REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 93 OF 2013

NEETA GOHIL.....APPELLANT

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....RESPONDENT

JUDGMENT

A. Introduction

1. This is an appeal against the ruling of Senior Principal Magistrate Milimani CMCC No. 867 of 2012 delivered on the 8th February 2013.

2. The appellant had filed an application seeking to set aside summary judgement entered against it on the 4/7/2012. The trial dismissed the application with costs.

3. The respondent's application dated 12th January 2012 sought for orders that judgment be entered in his favour in a liquidated claim. The monies were incurred by the appellant in use of a credit card issued to him by the respondent that accrued a debt that he failed to pay.

4. The appellant relied on two grounds as follows: -

> ***a) That the learned magistrate erred in law and in fact by dismissing the defendant's application for the enlargement of time within which to file his defence and allow him to defend his suit.***
>
> ***b) That the learned magistrate erred in law and in fact by failing to consider the evidence and submissions filed by the appellant.***

5. The parties disposed of the matter by way of written submissions.

B. Appellant's Submissions

6. The appellant submitted that despite service of the application for summary judgment, the clerk of his advocate had failed to diarize the matter leading to it proceeding e-parte and orders being issued to their detriment. The appellant further submitted that the mistake of an advocate should not be visited on a client and consequently that he should be granted an opportunity to be heard. The appellant cited a number of authorities as follows; **Murai & Others v Wainaina (1978) LLR 2782 (CA), Richard Leiyagu v IEBC & Others (2013) eKLR** and **Julie Migare v Co-operative Bank of Kenya (2009) eKLR.**

7. The appellant further submitted that the trial court erred and infringed on the appellant's right to a fair hearing as enumerated under Article 47 of the Constitution by dismissing his application and denying him a chance to put in his defence.

8. It was submitted that the summary judgement was entered on wrong facts as the amount claimed by the respondent was in dispute and could only be ascertained by formal proof hearing.

C. Respondent's Submissions

9. The respondent submitted that the appellant had not satisfied the conditions for grant of stay of execution pending appeal.

10. It is further submitted that there was no reason why they should suffer for the mistake of the appellant's counsel and further argued that the defence filed raised no triable issue. The respondent relied on the cases of **Hasmani v Banque Du Congo [1938] EACA 88,** and

Twentsche Overseas Trading Company Ltd v Bombay Garage Ltd [1958] EA 741.

11. It was also submitted that the appellant had not justified why the court should exercise their jurisdiction in setting aside the judgement and further that both the advocate and client ought to be vigilant in their cases especially given the huge delay in filing a reply, or showing up in court. The respondent relied on the case of **Samwel Kipsang Kitur & Anor v Eunice Kitur & 2 Others [2005] eKLR** in support of the submission that acts or omissions of agents with actual or ostensible authority are not without consequences on their principals.

12. The respondent further submits that the discretion of the court to set aside the judgement should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

D. Analysis & Determination

13. The duty of a first appellate Court as was held in the cases of **Mwana Sokoni v Kenya Bus Service Ltd (1985) KLR 931** and **Selle v Associated Motor Boat company ltd (1968) EA 123** is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

14. The discretionary power of the court to set aside interlocutory judgment was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (1982-88) KAR 1036** where the Court of Appeal in adopting principles set out in the English case of **Evans – Vs – Barltam [193]AC 473] at pg 480**, **Lord Atkin** stated thus: -

> ***"The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning, that the applicant must produce to the court evidence that he has a prima facie defence. The reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

15. The main principle espoused in the above passage is that the setting aside of an interlocutory judgment entered because of default in answering to a claim is governed essentially at the discretion of the court.

16. From the court record it is not denied that the appellant's counsel was served with the application for summary judgment dated 12/06/2012.The same was admitted in the supporting affidavitof the appellant's advocate Mr. Bosek. The appellant's counsel lays the fault for their failure to respond to this application on his clerk and urges the court to not hold the mistake against his client.

17. It is correct to state that where the circumstances of the case merit, mistakes of an advocate should not be visited on the clients when the situation can be remedied by costs. In the Case of **Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 Others (2013) eKLR, Odunga J held as follows: -**

> ***"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.***

18. However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J** expressed himself as follows: -

> **"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, *it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.* *(emphasis added)***

19. I hold similar view that it is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter. It is evident from the court record that the application to set aside the interlocutory judgement was brought 5 months after judgement had been given which is in my view an inordinate delay.

20. This court must take into account the principle of proportionality and weigh where the scales of justice lie. The core business of the court is to administer justice to the parties and not to render nugatory that ultimate end of justice. The court in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman -vs- Ambose Resort Limited [2004] 2 KLR 589.**

21. It was emphasised in the case of **Phillip Kiptoo Chemwolo (supra)** that where a defendant raises a reasonable defence to the plaintiffs claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant, even where the judgment entered is regular. Consequently, the applicant must produce evidence that he has a prima facie

defence before the court's discretion can be invoked or exercised in his favour. In the case of **Patel – Vs – East Africa Cargo Handling Services Ltd (1974) EA. 75**, it was held that a regular judgment will not normally be set aside unless the court is satisfied that there is a defence on its merits.

22. Courts have often held that a good or arguable defence should not be one that must succeed. It merely needs to satisfy the concept of a prima facie defence per **Hon. Ogola J** in **Shailesh Patel t/a Energy Co. of Africa – Vs – Kessels Engineering Works Prt Ltd & 2 Others [2014] eKLR,** where the learned Judge, despite finding that there was regular judgment entered against the defendants and despite finding the proposed defence not to appear to address the issues in the claim, nonetheless allowed the application for setting aside interlocutory judgement while acknowledging the defendant's right under Article 50 of the Constitution to a fair hearing.

23. Nonetheless, as was held in the case of **Mbogo & Another – Vs – Shah, EALR [1968] P. 13** that a court's discretion to set aside an exparte judgment or order for that matter is intended to avoid injustices or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

24. The appellant in his draft defence admits owing the amount claimed to the respondent. He pleads that the parties entered into an agreement on how the amount was to be cleared by the appellant. He accuses the respondent of breaching his part of the agreement of waiving interest on the sum owned.

25. The appellant did not attach any evidence of settlement to his defence. What he annexed was his own proposal for payment addressed to the respondent. There is no evidence to show that the respondent received or responded to the said proposal. In the absence of an agreement between the parties, the appellant cannot accuse the respondent of breach. A breach arises from failure to comply with terms or conditions of an agreement. What remains as a matter of fact is that the appellant admitted the debt but no agreement was mad on the alleged settlement.

26. It is therefore correct to say that, the draft defence is nothing but a sham. It does not specifically deny the issues raised in the plaint and as such remains a mere denial. In my view the defence does not raise any triable issues. Even if the court was to exercise its discretion on the ground that the appellant's advocate's mistake is excusable, it would not make any sense to set aside the judgment in a case pegged on a hopeless defence.

27. The appellant is an indolent litigant having brought this application five (5) months after the summary judgment was entered. I am in agreement with the respondent's advocate that it is the threat of attachment that moved the appellant to come to court.

28. Although the magistrate dealt with the main prayer very briefly in his brief ruling, he acknowledged the fact that the application for summary judgment was duly served. Service was not denied by the appellant as borne by the record. The court correctly rejected the reason given by the appellant for failure to attend court due to misdiarising the matter by the advocate.

29. It is my considered opinion that the magistrate did not err in dismissing the appellant's application dated 8/02/2013. The ruling was based on sound analysis of the material presented before the court. The ruling as brief as it is addressed the main issue raised in the application.

30. I find no merit in this appeal and I hereby dismiss it with costs to the respondent.

31. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF FEBRUARY, 2019.

F. MUCHEMI

JUDGE