



REPUBLIC OF KENYA

CORAM: R.E. OUGO J

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 85 OF 2018

NATHAN QADAFI KENGWARA.....APPELLANT/APPLICANT

VERSUS

HENRY KISSINGER KIMONGE.....1ST RESPONDENT

NAVANA TOURS AND TRAVEL LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon. P. Wamucii RM dated 7th September 2018 in Kisii CMC Case No. 317 of 2016)

JUDGMENT

1. The 1st Respondent in this appeal was sued by the Appellant in Kisii CMCC No. 317 of 2016. He was the 1st defendant and the 2nd Respondent was the 2nd Respondent. The matter as per the record of appeal was set down for hearing on the 15.3.2018 before Court no. 5 by Hon. N.S. Lutta on the 21.2.2018. The record of 21.2.2018 shows that Mr. Moguche was present for the plaintiff, Mr. Owiti was holding brief for Mr. Onsongo for the 1st defendant and Mr. Omollo was for the 2nd defendant. On the 15.3.2018 the matter was heard by Hon. Wamucii. The defendants were absent. The court noted that the date was taken by consent and that the defendant and their counsel were absent. The 1st Respondent was heard and the matter was fixed mention to fix a date for judgment on the 22.3.2018. On the 22.3.2018 Mr. Nduhukire who was holding brief for Mr. Onsongo informed the court that the instructions they had was that the matter has never proceeded and that the 1st defendant/appellant had just received a notice for the said date that the matter was being mentioned for submissions. He sought directions. The court observed that the matter was heard and directions for filing submissions made. A date for judgment was set for the 11.5.2018. The judgment was delivered on the 11.5.2018. On the 12.6.2018 the 1st respondent filed an application dated 6.6.2018. The application was heard and the court delivered its ruling on the 7.9.2018. The ruling dated 7/9/2018 is the subject of this appeal.

2. Parties canvassed the appeal by way of written submissions. I have read the submissions together with the record of appeal. The grounds of appeal can be condensed to one, whether learned the learned trial magistrate properly and judiciously exercise her discretion regarding settling aside an exparte judgment. The appellant in his application dated the 6/6/2018 sought to have the judgment dated the 11.5.2018 set aside and the suit be set down for hearing. Hon Wamucii in her ruling after perusing the court record of 21.2 2018 before Hon. Lutta noted that the appellant's averments made in the appellant's affidavit at paragraph 6 were not in the proceedings and that there was nothing to show that the proceedings were taken in the absence of Mr. Owiti or that the date of 15.3.2018 was fixed in his absence. That there was nothing on record on record to show that Counsel Ojwang Pheobe was in court on the said date and that she held anyone's brief . The trial court stated that the allegation that the hearing date was taken in the absence of Mr. Owiti did not find favour with her. The learned trial magistrate also noted that on the 15.3.2018 both defendants were absent and that the case proceeded as scheduled because the date had been fixed by consent of the parties. That the allegation that Mr. Ochwangi held brief for Mr. Onsongo and proceeded with the matter is false. She found that there was no sufficient reason why the judgment should be set aside and proceeded to dismiss the application.

3. As the first appeal court it's my duty to reconsider the evidence, evaluate it and reach my own conclusion (see Selle vs. Associated Motor Boat co. [1968] EA 123.

4. The principles of setting aside an exparte judgment are now well settled in case law. Order 12 Rule & of the Civil Procedure Rules gives a court powers and authority to set aside a judgment on such terms as may be just. In considering such an application a court will exercise its discretion after considering whether the applicant has demonstrated that there is sufficient cause to grant the orders sought. In this matter the proceedings before Hon. Lutta indicate that the hearing was set for the 15.3.2018. Mr. Owiti was holding brief for Mr. Onsongo for the 1st defendant, Ms Moguche was for the plaintiff. Mr. Omollo was for the 2nd defendant. An adjournment was granted on the basis that counsel for the 2nd defendant was bereaved. The handwritten proceedings appear to have another date before the date 15.3.2018. Hon. Wamucii proceeded to hear the plaintiff on the 15.3.2018, on the basis that the date was taken by consent. The appellant argues that the date that was

given first was the date Counsel holding brief indicated. What he states happened that another counsel held his brief when his client complained that they had been given a far off date is not on record, nor is there an indication that Mr. Ochwangi held his brief on the said date. The learned trial magistrate did not err in holding that the record did not bear what was deposed by the appellant.

5. In CMC **Holdings vs. Nzioki [2004] eKLR the Court of Appeal** held as follows;

“the law is now well settled that in application for settling aside an exparte judgment, the Court must consider not only the reasons why the defence was not filed or for the matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence is filed already or if a draft defence is annexed to the application raises triable issues”. [Emphasis mine]

6. However having noted what was deposed by the appellant the trial court should have gone further to consider whether the appellant had a defence with triable issues. The defence filed by the Appellant dated the 13/7/2017 raises several issues on; the nature of the business, its management, whether there was payment and the issue of the accounts. The appellant deserves a chance to defend the claim against him. In addition the appellant filed his application within a reasonable time, this demonstrates that he desires to be heard and in my view it would be a miscarriage of justice to deny him a chance to be heard. The appellant has demonstrated that his appeal has merit, the ruling dated 7/9/2018 is set aside, and the judgment delivered on the 11/5/2018 is also set aside. The matter is remitted back for hearing before Hon. Wamucii on a date to be taken before the learned trial magistrate. Each party to bear its own costs.

Dated signed and delivered at Kisii this 4th day of April 2019

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyagwencha h/b Mr. Onsongo For the Appellant

Respondent Absent

Respondent Absent

Mr. Omwoyo Court clerk