



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 218 OF 2014

WANANCHI GROUP (K) LIMITED.....APPELLANT/APPLICANT

VERSUS

MOSES MUHATIA MUKURU.....RESPONDENT/RESPONDENT

(An appeal from the Ruling and Order of Hon. Teresiah Ngugi (Mrs) SRM

delivered on 16th May, 2014 in Nairobi CMCC No. 3754 of 2013)

BETWEEN

MOSES MUHATIA MUKURU..... PLAINTIFF

AND

WANANCHI GROUP (K) LIMITED.....DEFENDANT

JUDGMENT

The plaintiff in the lower court filed a case against the defendant who however failed to enter appearance or file any defence. There followed an application for interlocutory judgment which was allowed. Subsequently, the defendant now appellant moved the court to set aside the ex parte judgment and stay of execution. That application was heard and dismissed in a ruling delivered on 16th May, 2014. This is an appeal from the said ruling.

In the memorandum of appeal dated 29th May and filed on 30th May, 2014 the lower is faulted for failing to appreciate that the appellant gave a reasonable and justifiable reason why there was failure to enter an appearance within the time allowed and that the appellant had a good defence which raised serious triable issues. The exercise of discretion was therefore not properly done and the court did not determine matters on merit but instead applied procedural technicalities.

Parties have filed submissions in the argument of the appeal. The appellate court will rarely interfere with the discretion of the trial court except in very deserving circumstances. Order 10 Rule 11 of the Civil Procedure Rules is instructive. The court may set aside an ex parte Judgment or vary the same on such terms as are just.

It is true that the respondent has a judgment in his favour but that judgment was rendered without the benefit of hearing the appellant. Where sufficient cause is shown and the court is persuaded that the party did not act in a negligent manner, then there should be no hesitation in giving an opportunity to such a party being heard. After all, the court's main concern is do justice to the parties who come before it.

There are several tests that come into play in the circumstances as those present in this case. Is there defence on merit? Will any prejudice be visited upon either of the parties and has the delay been sufficiently explained?. – see **Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited (2014) eKLR, Shanzu Investment Limited vs. Commissioner of Lands 1993] eKLR, Shah vs. Mbogo (1967) EA 166 and Patel Vs. EA Cargo Handling Services Limited (1974) EA 75.**

The discretion of the court in such cases “is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice” (Shah vs. Mbogo)

Going by the record before me, there is a clear demonstration by the appellant that it did not intend to evade or obstruct justice. The fact that they moved the lower court to set aside the exparte judgment for reasons that were recorded then, was a clear indicator for the desire to be heard. I am inclined to allow this appeal knowing well that the decretal sum has already been secured by an order of the court to deposit the same, which has been complied with. Further, I have seen the draft defence and believe it has displayed raised issues that should be subjected to trial.

In the end, this appeal is allowed with each party bearing their own costs. The lower court file shall now be remitted for the appellant to file a defence within 14 days from the date of this ruling so that the process of hearing may be completed in the lower court.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE