



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 12 OF 2014

ANNE WANJA MWANGI.....APPELLANT

VERSUS

SAMSON MURIITHI MURIUKI.....RESPONDENT

(An appeal from the ruling and order of the Hon. H. Onkwani (SRM) dated 26th February, 2014 in Karatina Principal Magistrates Court Civil Suit No. 43 of 2013)

JUDGMENT

On the 3rd day of July, 2013, the respondent in this appeal obtained judgment against the appellant in default of appearance in the magistrates' court. The judgment was for a liquidated sum of Kshs. 36,000/= together with interest calculated at 80% per month from 11 August, 2012 till payment in full; he was also awarded the costs of the suit.

By a motion filed on 23 December, 2013, the appellant sought to stay execution of the decree obtained against her and in the same breath asked this court to set aside the ex parte judgment, the subsequent decree and all the ensuing orders subsequent to the decree. She also sought for leave to file her defence out of time. The respondent opposed the motion.

In her ruling delivered on 26 February, 2014, the learned magistrate dismissed the motion and held that the reasons given by the appellant for failure to enter appearance and file defence were not sufficient. It is against this ruling and the resultant order that the appellant has appealed citing the following as her grounds of appeal:

1. The learned magistrate erred in law and fact in her finding that the appellant did not adduce sufficient reasons why she had not filed her defence within the time.
2. The learned magistrate erred in law and fact in her finding that the appellant had not disputed the agreement dated 11 July 2012 for a loan of Kshs. 36,000/= advanced to the appellant by the respondent; this contradicted her finding that the appellant disputed the amount advanced.
3. The learned magistrate erred in law in failing to exercise her unfettered discretion judiciously and set aside the ex parte judgment and the decree in accordance with Order 10 Rule 11 of the Civil Procedure Rules, 2010.
4. The learned magistrate erred in law in disregarding the appellant's draft defence which raised serious issues on the rate of interest that was usurious and unconscionable.
5. The learned magistrate erred in law in disregarding the authority of ***Mohamed s/o Mohamed –vs- Athmani Shante [1960] EA 1063*** and, in doing so, disregarded the doctrine of stare decisis.
6. The learned magistrate erred in law and misdirected herself in applying the principles set out in the case of ***Giella –vs- Cassman Brown [1970] EA 308*** on injunctions which was not relevant in matters concerning setting aside a judgment under Order 10 Rule 11 of the Civil Procedure Rules, 2010.

The motion out of which the impugned ruling arose was made under Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules. It was supported by the appellant's own affidavit in which she admitted that she was served with summons to enter appearance "early" in June 2013; however, she was attacked by a bout of malaria as a result of which she was admitted in hospital on 9 June 2013. She exhibited on her affidavit a copy of a discharge summary showing that she was admitted at Kimbimbi sub-district hospital on this particular date and was discharged on 27 June 2013.

The appellant also deposed that due to the illness, she forgot about the case in court; even then, she continued repaying the respondent's debt

and as at November, 2013, she had already paid him the sum of Kshs. 27,000/=. On 11 December, 2013, she was arrested on the strength of warrants of arrest obtained in execution of the decree and was only released after her son paid the sum of Kshs. 30,000/=.

It is upon her release, so she deposed, that she learned from the court registry that a decree had been obtained against her on 16 August, 2013 for payment of the principal sum of Kshs. 36,000/= and Kshs. 345,600/= being the accrued interest. She was also to pay the sum of Kshs. 13,330 as the costs of the suit. She swore that the rate of interest claimed by the respondent was “unconscionable, usurious, irregular, above all prevailing bank rates.”

The respondent opposed the motion and filed a replying affidavit in which he deposed that the appellant had not demonstrated why she could neither enter appearance nor file defence soon after she was discharged from hospital. He deposed that the appellant had admitted the debt and had even made payments after the suit had been filed and therefore, as I understand him, the appellant has never had any defence to the respondent’s claim.

Order 10 Rule 11 under which the motion was filed provides as follows:

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Order 51 rule of the rules which the appellant also invoked has more to do with the form which the application takes; no issue arose in that particular regard and therefore nothing turns on this particular rule.

The gist of Order 10 rule 11 is that it gives the court of first instance the unfettered discretion to set aside or vary judgment entered in default of appearance “upon such terms as are just”. As an appellate court, this honourable court will not interfere with such exercise of discretion by a subordinate court unless it is demonstrated its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See **Mbogo versus Shah (1968) E.A. 93** at **page 94**, per Sir Clement De Lestang).

It follows that the primary question to consider in this appeal is whether the learned magistrate properly exercised her discretion in dismissing the appellant’s application.

In exercising her discretion against the appellant, the learned magistrate, to a greater degree delved into the merits of the respondent’s case and by the same token, the implausibility of the appellant’s draft defence exhibited as a draft to her affidavit. To cap it all, she interrogated the contract between the appellant and the respondent which, for all intents and purposes, formed the basis upon which the respondent’s suit rested and concluded that the appellant was bound by that contract. As far as the reasons given for the delay in filing the defence are concerned, the learned magistrate acquitted herself as follows:

I have also considered the reasons why the defendant did not file her defence. I find the reasons not sufficient, having been discharged from hospital on 27th June 2013.

In **James Kanyिता Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR** the Court of Appeal explained circumstances which the court is bound to take into account in determining whether or not to set aside a default judgment; the Court said:

The court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

The list of factors which the court will consider is certainly not, exhaustive and the court of Appeal did not in any way suggest that it so exhaustive; rather I think each case will depend on its peculiar circumstances and as long as it is demonstrated that the discretion, though unfettered, was exercised judiciously and not capriciously, there would be no reason to interfere with the decision of the court of the first instance.

In **Gardner versus Jay (1937) 2 ALL ER 646** at 655 Bowen LJ, in discussing the discretion of the judge as regards mode of trial said:

That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage of justice in the exercise of it it will be reviewed.

For instance, the exercise of the discretion must be justified by facts and if not, it is subject to review by the appellate court. In **Maxwell v Keun (1928) 1KB 645 at 653**, Atkin LJ emphasised that while the Court of Appeal must be cautious not to interfere with the discretion of the trial judge, it must step in if it appears that the effect of the order arising from the exercise of discretion is to defeat the rights of the parties. In his own words the learned judge said:

I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such questions as an adjournment of a trial and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties all together and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.

Reference to the two cases, that is, **Gardner versus Jay (supra)** and

Maxwell v Keun (supra) was made in **Evans versus Bartlam (1937) ALL ER 646** where the House of Lords was called upon to determine the question of the power of the Court of Appeal to interfere with the discretion exercised by a judge in chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court of the United Kingdom.

Like our own Order 10 rule 11 of our Civil Procedure Rules, Order 13 rule 10 of the Supreme Court Rules provides:

Where a judgment is entered pursuant to any of the preceding rules of this order, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just.

Order 27 rule 15 of the Supreme Court Rules, on the other hand, provides:

Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit.

There does not appear to be a similar provision in our own rules although Order 12 rule 7 also clothes the court with the discretion to set aside a judgment entered, not in default, but for want of attendance by either of the parties on a date fixed for the hearing of a suit. The underlying rationale in all these provisions is, however, common; that the court has the discretion to set aside a judgment entered either in default of appearance or for want of attendance. Irrespective of the nature of the judgment, the common thread in whether these judgments ought to be set aside is the, exercise of discretion, one way or the other.

In discussing how and when this discretion can be exercised, the House of Lords in **Evans versus Bartlam (supra)** (per Atkin, LJ) noted that as much as the discretion is unfettered, the courts have laid for themselves rules to guide them in the normal exercise of their discretion and that one of these rules 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’*. It was also noted that in exercise of its discretion, the court will, among other things, consider why the judgment in default was entered. The court, however, cautioned that there can never be any rigid rule as when a default judgment can be set aside for if that were the case the civil procedural rules from which the court derives its power to exercise discretion would be deprived of most of their efficacy. The principle behind this unfettered discretion of the court, according to the House of Lords, is that *‘unless and until the court has pronounced a judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by failure to follow the rules of procedure’*. (Per Atkin LJ at page 5).

In the learned judge’s opinion, in exercising its discretion, the court does not, and will not, lay down rigid rules which deprive it of jurisdiction. Where necessary, even the rule concerning affidavit of merits could be departed from and the discretion may be exercised on any appropriate material though in practice, an affidavit is generally required. Going back to **Gardner versus Jay (supra)**, Bowen LJ at page 58 said:

When a tribunal is invested by an Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grounds in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the court do so?

Does it therefore follow that a recalcitrant defendant will, more often than not, have his way and have a judgment in default set aside whenever he fails to file his defence, in time or as prescribed by the rules? Of course not, first, because neither these decisions nor the rules say so. Speaking of the rules, if it was the intention of the Rules Committee that a default judgment or a judgment obtained upon ex parte hearing would always be set aside, as a matter of course, it would have expressly stated so; in which event, the question whether a court has the discretion to set the judgment aside or not would not arise. Secondly, Order 10 rules 4 to 8 which provide for judgment in default of appearance and Order 12 rules 1 to 5 under which the court is entitled to hear and determine suits ex parte in the absence of either of the parties would be rendered inconsequential.

The point is, all that an applicant is required to do is to present the court with sufficient material upon which it can exercise its discretion in his favour; what is or is not sufficient material is not anything subject to particular rule or rules; it will always depend on the particular circumstances of each case, the wisdom of the judge or magistrate (or what Bowen LJ referred to as ‘common sense’) and, of course, the justice of the case.

So, an applicant may have what may be deemed to be the best of defences to a particular claim but if he does not proffer any reason why he could not enter appearance and file such a defence within the prescribed timelines, or in any event, before entry of a default judgment, there is simply no material upon which the court can exercise its discretion to his advantage.

Turning back to the appellant’s case, and in light of the decisions I have discussed some of which, I admit, are only of persuasive value, I would conclude that the learned magistrate duly considered all those factors that one would regard as material to the appellant’s application before she exercised her discretion against her; notably, she considered the reasons for the delay and the appellant’s potential defence. I call it ‘potential’ defence because, the learned magistrate did not find that the appellant had any plausible defence to the respondent’s claim. In particular, she held that the appellant did not deny the existence of a contract between herself and the respondent and that being the case, she was certainly bound by the terms of that contract. It is worth remembering that this contract was the basis of the respondent’s suit against the appellant.

On this latter issue of the appellant’s defence, it is important to bear in mind that in an application to set aside a default judgment, the court is not thereby called upon to determine the substantive suit on merits; it follows that in considering the defendant’s defence, the court must resist the temptation of determining the substantive suit on the basis of untested affidavit evidence. Where the defence is taken as one of the

relevant factors for consideration in such an application, the court must limit itself to the aspect of whether there is a prima facie defence. The reason is simply to avoid any prejudice to the defendant in the event the order rejecting his application is overturned and the suit has to be heard on merits.

On the question of delay and subsequent failure to enter appearance and file defence, it is instructive that the appellant did not deny having been served with summons to enter appearance on 8 June 2013; she swore that she was immediately admitted in hospital on 9 June, 2013. She was discharged on 27 June, 2013 by which time the period within which she ought to have entered appearance had lapsed. However, it was not until 2 July, 2013 that judgment was entered against her meaning that the appellant could have entered appearance had she made any attempts to do so soon after she was discharged. It turned out that she not only failed to make any efforts to enter appearance before the default judgment was entered, but she also never made any efforts to set aside the judgment until 23 December, 2013 almost two weeks after she had been arrested on warrants obtained in execution of the decree against her.

The reason given why the appellant did not take any action is that she was depressed and even forgot about the matter. The learned magistrate dismissed this reason and I am inclined to agree with her because even in her alleged state of depression, the appellant admitted that she continued repaying the respondent what she thought was the rightful sum due to him and that as at November, 2013 she had paid Kshs. 27,000/= over and above what her son had paid to secure her release from civil jail. It certainly cannot be that the appellant was depressed and forgotten about the suit against her and at the same time she was repaying the loan which is the very subject that the suit was all about.

My assessment of the appellant is that she ignored the suit and only moved the court when she realised that she would eventually land into jail if the decree obtained against was not settled; by this time it was obviously too late to dispute the respondent's claim and she had to come up with some reason why she couldn't enter appearance in time and file her defence. Unfortunately, the reasons she came up with were more of a lame excuse than an explanation that would convince an objective mind to exercise discretion in her favour and set aside the default judgment.

In the ultimate, I find that the learned magistrate properly exercised her discretion and came to the right decision. Accordingly, the appellant's appeal is dismissed with costs.

Signed, dated and delivered in open court this 16th day of May, 2019

Ngaah Judge

JUDGE