



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 10 OF 2019**

**BETWEEN**

**KENYAN ALLIANCE INSURANCE LIMITED.....APPELLANT**

**AND**

**VINCENT NYAMONGO OMARI.....RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon.S. N. Lutta, SPM**

**dated 23<sup>rd</sup> January 2019 at the Magistrates Court**

**in Kisii in Civil Case No. 301 of 2016)**

**JUDGMENT**

1. This is an appeal against a ruling and order of the subordinate court dismissing the appellant's application dated 8<sup>th</sup> October 2018 in which the appellant sought, inter alia, the following orders:

[4] This honourable court be pleased to set aside, quash and/or nullify the entire ex-parte proceedings subsequent to the court's ruling of 29/9/2016 which ruling referred the matter to arbitration.

[5] The honourable court be pleased to make a declaration that this court is functus officio having referred the matter to arbitration vide its ruling dated 29/9/2016 and pursuant to the provision in Order 46 Rule 3(2) of the Civil Procedure Rules 2010

2. The grounds upon which the application was founded were on the face of the application and the deposition of Anthony Kariuki sworn on 8<sup>th</sup> October 2018. They were that the suit proceeded for hearing ex-parte on 7<sup>th</sup> March 2018 yet the matter had been referred for arbitration under **Order 46 Rule 3(2)** of the **Civil Procedure Rules, 2010**. It therefore urged that the matter could not proceed for hearing in view of the reference to arbitration. The appellant also claimed that it was not served with a hearing notice and after judgment was entered, it was not served with a *Notice of Entry of Judgment* contrary to **Order 22 rule 6** the **Civil Procedure Rules**. For the reasons advanced, the appellant contended that the court had unfettered jurisdiction to make a declaration that the trial court was *functus officio* having referred the matter to arbitration and that judgment ought to be set aside.

3. The respondent opposed the application through his affidavit sworn and filed on 23<sup>rd</sup> October 2018. He stated that the issues raised by the appellant were determined by the court which determined his application dated 20<sup>th</sup> December 2016 in which he sought to set the suit down for hearing. That the application was heard *ex-parte* after the appellant was served and failed to attend court for the hearing of the application. The respondent submitted that the application is now barred from complaining about the matter as it proceeded in his absence and that no reason was given by the appellant for failing to attend court. The respondent also deposed that the appellant had refused to cooperate in the appointment of an arbitrator hence it was necessary to move the court to proceed with the matter. The respondent contended that allowing the application would defeat the overriding objective to facilitate the just, expeditious, proportionate and affordable disposition of the suit.

4. After hearing the matter, the trial magistrate dismissed the appellant's application on two grounds. First, that the court was not *functus officio* as the arbitration did not materialize and since no award had been made, the court could proceed to determine the matter. Second, that the issues raised by the appellant were the same issues raised in the Notice of Preliminary Objection dated 23<sup>rd</sup> January 2017 to the

application dated 20<sup>th</sup> December 2016 which application was determined *ex-parte* after the appellant failed to attend court.

5. The thrust of the appellant's case in the memorandum of appeal dated 1<sup>st</sup> February 2019 is that the court had already referred the matter to arbitration by a ruling and order dated 29<sup>th</sup> September 2016 and that order was never reviewed, appealed against or set aside. It contended that the trial magistrate failed to consider the effect of **Order 46 Rule 3(2)** of the **Civil Procedure Rules** and therefore failed to find that the court had no jurisdiction to entertain the *ex-parte* hearing on 7<sup>th</sup> March 2018 which proceeded subsequent to the order of 29<sup>th</sup> September 2016 referring the dispute to arbitration. The appellant further contended that the trial magistrate erred by failing to consider the respondent's conduct in determining whether the proceedings were a gross abuse of the court process. At the hearing Mr Geno, counsel for the appellant, emphasized that the matter had already been referred to arbitration and all the subsequent proceedings after that reference were null and void hence the court erred in failing to set aside all the proceedings.

6. Mr Ombachi, counsel for the respondent, supported the decision of the trial magistrate. He submitted that although the matter had been referred to arbitration, the respondent applied for and the court allowed him to proceed with the hearing of the matter hence he was entitled to set down the matter for hearing. He contended that the appellant did not appeal or set aside that decision hence the appellant could not apply to set aside proceedings which were founded on a court order that had not been set aside.

7. The facts upon which this appeal is founded are not in dispute. After the respondent filed its claim, the appellant filed a Notice of Motion dated 22<sup>nd</sup> June 2016 seeking to refer the matter to arbitration pursuant to **Order 46 rule 1** of the **Civil Procedure Rules** and **section 6 (1)(a)** of the **Arbitration Act**. By a ruling dated 25<sup>th</sup> June 2016, the court allowed the application and referred the matter to arbitration.

8. It appears thereafter that no progress was made in moving the arbitration forward hence the respondent filed the Notice of Motion dated 20<sup>th</sup> December 2016 seeking an order that, "[T]his Honourable Court be pleased to set this suit down for hearing and determination." To that application, the appellant filed a Notice of Preliminary Objection dated 23<sup>rd</sup> January 2017 in which it submitted that the matter had already been referred to arbitration hence the application was not merited. When the that application came up for hearing on 6<sup>th</sup> December 2017, the trial magistrate allowed it noting that the appellant had been served but had failed to attend court. The court then fixed the suit for hearing on 7<sup>th</sup> March 2018.

9. On 7<sup>th</sup> March 2018, the matter came up for hearing and once again the matter proceeded in the absence of the appellant who had been served. The matter was mentioned for submissions on 4<sup>th</sup> March 2018 and reserved for judgment on 29<sup>th</sup> May 2018. It is the execution of the judgment and decree that precipitated the application that is now subject of this appeal.

10. While I agree with the appellant that the court had stayed the proceedings pending arbitration, the appellant's application before the trial court glossed over the order made on 6<sup>th</sup> December 2017 following the respondent Notice of Motion dated 20<sup>th</sup> December 2016. That order had not been appeal against or set aside and remained a lawful order for all intents and purposes. The appellant's application glossed over the judgment rendered on 29<sup>th</sup> May 2018 which determined the matter. The appellant has also not applied to set aside that judgment.

11. As I understand, the appellant's application before the trial court was an omnibus application to set aside all the proceedings subsequent to the order referring the matter to arbitration. The proceedings were brought back to court by an order of 6<sup>th</sup> December 2017 and whether that order is right or wrong, it remains valid as the appellant has not appealed against it or applied to set it aside.

12. I am aware that I am requested by the appellant to interfere with the discretion of the trial magistrate refusing to set aside proceedings and in doing so I am alive that all discretion must be exercised judiciously. In order to intervene in that discretion, I am guided by the decision in **Mbogo and Another v Shah [1968] EA 15** where it was stated that:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

13. The trial magistrate held that the issue whether the matter ought to have proceeded to hearing was determined by the order made in respect of the application dated 20<sup>th</sup> December 2017 which the appellant had opposed by way of the preliminary objection but failed to attend court to agitate its position. That order remains alive and as such the trial magistrate came to the correct conclusion in dismissing the application.

15. Finally, I wish to point out that the appellant wishes the court to shut its eyes to the fact that it failed to attend court two times; the first time when the arbitration order was set aside and he second time when the suit proceeded for hearing. The **Civil Procedure Rules** has very clear rules that provide an opportunity for an aggrieved party to set aside an order made in his absence. The appellant did not take advantage of those provisions. This court cannot shut its eyes to those orders which, as I have said, are still valid.

15. It must now be clear that this appeal is for dismissal. It is dismissed with costs to the respondent which I assess at Kshs. 30,000 exclusive of court fees.

**DATED and DELIVERED at KISII this 20<sup>th</sup> day of MAY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Geno instructed by Murimi, Ndumia, Mbago and Muchela Advocates for the appellant.

Mr Ombachi instructed by Ombachi and Company Advocates for the respondent.