



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 139 OF 2018**

**MASH EAST AFRICA LIMITED.....APPELLANT**

**-VERSUS-**

**JULIUS KAZUNGU.....RESPONDENT**

**(Being an appeal from the ruling delivered by Honourable D.O. Mbeja (Mr.) (SPM) on 2<sup>nd</sup> March, 2018 in CMCC NO. 4307 OF 2014)**

**JUDGMENT**

1. The respondent filed an action against the appellant before the Chief Magistrate's Court seeking the following reliefs for negligence occasioned by the appellant as follows:

- a. Payment of the cost of the TV set at Kshs.51,995/=**
- b. Loss of business earnings estimated at Kshs.2,000/= from 3<sup>rd</sup> March, 2014.**
- c. A refund of Kshs.2,000/= for the courier services.**
- d. Costs of the suit.**
- e. Interest on a) and b) above.**

2. In brief, the respondent pleaded in his plaint that on or about the 4<sup>th</sup> of March, 2014, he had deposited his TV set consignment with the appellant for transportation from Nairobi to Mombasa at a fee of Kshs.2,000/=.

3. The respondent further pleaded that the said consignment was intended to be used in airing football games via DSTV at Kilifi with an expected daily profit of Kshs.2,000/=.

4. It was also pleaded by the respondent that soon thereafter, he received a call from one of the appellant's employees, inquiring on whether he had sent someone to collect his TV set, to which he responded in the negative.

5. That when he visited the appellant's Head Office, he was interrogated by the appellant's Parcels Manager and taken to Industrial Police Station where he was booked on suspicions of colluding with another person to defraud the appellant.

6. The respondent added that he was thereafter released on cash bail of Kshs.20,000/= and eventually absolved of any liability following police investigations. That since then, the appellant has failed and/or neglected to indemnify him for the loss of his TV set.

7. The appellant subsequently entered appearance and filed its statement of defence.

8. However, when the suit came up for hearing on 5<sup>th</sup> July, 2017 neither the appellant nor its legal representative was in court. Consequently, the hearing proceeded ex parte and the trial court entered its judgment on 28<sup>th</sup> September, 2017 in favour of the respondent as prayed in the plaint together with costs of the suit and interest thereon.

9. Following the above, the appellant filed an application dated 4<sup>th</sup> October, 2017 seeking for inter alia, the setting aside of the ex parte hearing and consequent orders made.

10. In resistance to the said application, the respondent filed Grounds of Opposition on 16<sup>th</sup> October, 2017.

11. The application was canvassed by written submissions which both parties filed. In its ruling of 2<sup>nd</sup> March, 2018 the trial court held that the appellant has not been keen in defending its case and that it was served with the hearing notice for the scheduled hearing date but it neglected to attend court. The trial court therefore declined to grant the orders sought and moved to dismiss the application with costs.

12. The appellant being aggrieved preferred this appeal and put forward the following grounds:

**i. THAT the learned trial magistrate erred in law and in fact by failing to take into consideration the grounds cited in the notice of motion dated 4<sup>th</sup> October, 2017, the depositions made in the supporting affidavit and the appellant's written submissions dated 2<sup>nd</sup> December, 2017 in dismissing the said Motion.**

**ii. THAT the learned trial magistrate erred in fact in making the finding that the appellant had not been keen and willing to have the suit heard and disposed of expeditiously, and that it had been sluggish in defending the same.**

**iii. THAT the learned trial magistrate erred in law and in fact by not making a finding that the appellant's failure to attend court during the hearing of the suit on 5<sup>th</sup> July, 2017 was a consequence of an accident, inadvertence, excusable mistake or error.**

**iv. THAT the learned trial magistrate erred in law and in fact by not taking into account the appellant's defence filed in the suit in reaching his decision to dismiss the appellant's application.**

**v. THAT the learned trial magistrate erred in law and in fact by relying on the wrong principles of law in dismissing the appellant's application dated 4<sup>th</sup> October, 2017.**

**vi. THAT the learned trial magistrate erred in law and in fact by not applying the relevant principles of law applicable when exercising judicial discretion on applications for setting aside ex parte judgments.**

**vii. THAT the learned trial magistrate erred in law and in fact in dismissing the appellant's application.**

13. The parties recorded a consent order to have this appeal disposed of by written submissions. I have re-evaluated the arguments which were made before this trial court. I have further considered the rival written submissions together with the authorities cited. It would appear that the issues which commend themselves for determination are threefold:

14. In the first ground the appellant has submitted that the learned trial magistrate failed to consider its application as presented before him.

15. I have considered and re-evaluated the arguments presented before the trial court and it is clear that the trial magistrate stated that he considered the application and the arguments articulated by the parties and was convinced inter alia, that the appellant had been sluggish in defending its case. There is therefore nothing to indicate that the learned trial magistrate overlooked either the appellant's application or the submissions.

16. I am convinced that the trial magistrate duly analyzed the application and exercised his discretion in dismissing the same.

17. The second ground is a combination grounds (ii) and (iii) which relate to the circumstances leading to the *ex parte* judgment. On its part, the appellant explained its failure to attend court for the hearing of the suit on 5<sup>th</sup> July, 2017 by stating that whereas it was served with a hearing notice by the respondent, the date was not diarized due to inadvertence on the part of its clerk.

18. The appellant also argued that this was reaffirmed by the two (2) affidavits filed in support of its application, yet the learned trial magistrate failed to attach any weight to the explanation given and as a result, did not exercise his discretion in the proper manner.

19. The respondent supported the magistrate's finding by submitting that the said magistrate correctly exercised his discretion in refusing to set aside the *ex parte* judgment, since the appellant was at all material times aware of the hearing date but chose not to attend court on the required date.

20. I have perused the application filed by the appellant and the supporting affidavit of *David Masai Olinyo*. In his affidavit, David Masai Olinyo deposed that the firm of advocates representing the appellant at the time filed an application seeking to withdraw from acting in the matter. He further averred that the said application was allowed but that the relevant order was never served upon the appellant, thereby leading to the belief that the said firm of advocates was still on record for the appellant. That it was not until sometime in the month of April, 2017 that the appellant came to the realization that the said advocates had ceased acting for them.

21. The deponent also averred that the appellant was thereafter served with a hearing notice by the respondent, following which he instructed the office clerk to diarize the matter but this was not done.
22. It was therefore the deponent's averment that as a result, the hearing proceeded *ex parte* and the appellant only later on came to learn of the existence of the judgment upon being served with a notice of entry of judgment dated 29<sup>th</sup> September, 2017.
23. In its ruling, the learned trial magistrate illustrated his satisfaction that the appellant had been duly served with a hearing notice but had instead chosen to ignore the same.
24. Having considered the above, it is clear that the appellant was served with a hearing notice. The explanation given for its non-attendance did not auger well with the learned trial magistrate. The question that remains, therefore, is whether such explanation was reasonable in view of the circumstances, keeping in mind the court's unfettered discretion in either agreeing or declining to set aside an *ex parte* judgment.
25. Firstly, it is clear that as at the time of the hearing, the appellant was not represented by counsel, despite its admission that it came to learn of the withdrawal of its erstwhile advocates. No explanation has been afforded for the inaction in appointing a fresh firm of advocates to handle the matter.
26. Secondly, the aforesaid deponent admitted to having been notified of the hearing notice served upon the appellant; the only mistake was in the inadvertence of the relevant party who failed diarize the date
27. From the foregoing, my view is that while there was a clear mistake on the part of the appellant's employee(s) in not diarizing the matter, a fair explanation was given for the same. It would appear the learned trial magistrate did not take this into account in arriving at his finding. I am satisfied that the appeal should succeed on the basis of grounds (ii) and (iii).
28. The third ground is a combination of grounds (iv), (v), (vi) and (vii) of the appeal. The appellant argued that the learned trial magistrate not only applied wrong principles in rendering his decision such as the principle of *res judicata*, but failed to consider the appellant's statement of defence and whether the same raises triable issues.
29. In his submissions, the respondent contended that the learned trial magistrate exercised his discretion properly and in line with the relevant principles.
30. In his ruling, the learned trial magistrate made reference to the principles on the setting aside of *ex parte* judgment
31. The said magistrate also made reference to the overriding objective as espoused in the Civil Procedure Act.
32. It is however glaring that the learned trial magistrate did not take any irrelevant factors into account but he did not make any reference to the statement of defence filed by the appellant to establish whether the same raises triable issues. This was important in the circumstances of the matter.
33. I have perused the statement of defence filed by the appellant on 12<sup>th</sup> September, 2014. In my view, the same raises triable issues including whether or not there was a consignment arrangement/agreement between the parties and whether or not there was contributory negligence on the part of the respondent.
34. The above constitute issues which would have required the trial court's consideration and deliberation to enable it arrive at an objective finding.
35. The learned trial magistrate evidently overlooked the defence already on record in rendering his decision, thereby leading to a wrong finding. It is in broad interest of justice to grant the appellant his day in court.
36. In the end, the appeal is allowed. Consequently, the order dismissing the motion dated 4/10/2016 issued by Hon. D. O. Mbeja on 2/3/2018 in Nairobi C.M.C.C. 4307 of 2014 is set aside and is substituted with an order allowing the aforesaid motion in terms of prayers 3 and 4. For the avoidance of doubt the *ex parte* judgment entered in Nairobi C.M.C.C. no. 4307 of 2014 is hereby set aside. The suit is to be heard afresh on its merits by another magistrate other than Hon.D. O. Mbeja on priority basis. In the circumstances of this case a fair order to make on costs is to order that each party bears its own costs.

**Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of May, 2019.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent