



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 34 OF 2018

CECILIA WAIRIMU KAMAU.....APPELLANT

VERSUS

SAMUEL MAINA.....RESPONDENT

JUDGMENT

FACTS

1. A brief overview of the case is as follows; in 2017 the respondent instituted legal proceedings against the appellant to recover a total sum of Kshs.1,725,000/-; the appellant is alleged to have refused/failed to honour the terms of an agreement and was therefore in breach; an ex-parte judgment was entered against the appellant which she had unsuccessfully applied to have set aside in the subordinate court;

2. The Appellant herein being dissatisfied with the trial court's decision delivered on the 17/07/2018 by the Hon. P.Mutua Senior Principal Magistrate in Nyeri CMCC No.401 of 2017 sought redress by filing the Memorandum of Appeal on the 19/07/2018 and listed six (6) grounds of appeal; which grounds are as summarized hereunder;

(i) The trial court erred in dismissing the application dated 29/05/2018 in Nyeri CMCC No.401 of 2017;

(ii) The appellant was denied an opportunity to ventilate her defence; the respondent did not demonstrate the prejudice likely to be suffered which could not be compensated with costs;

(iii) The trial court ignored the triable issues raised in the appellant's draft Defence; the Summons to Enter Appearance was faulty; the process-server effected improper service;

(iv) The trial court erred in summarily determining the suit without considering the gravity of the triable and arguable issues raised and arrived at an erroneous decision.

(v) The appellant prayed that the appeal be allowed and the ruling delivered on the 17/07/2018 and any subsequent orders be set aside;

3. At the hearing hereof the Appellant was represented by learned counsel Mr. Mshila whereas the respondent was represented by learned counsel Mr. Wamahiu; both counsel made oral presentations hereunder in a summary of their rival submissions;

APPELLANTS CASE

4. The Summons to Enter Appearance was improper as the suit was instituted on the 23/11/2017 but it indicated the matter was set for hearing on 13/03/2017; the Appellant also contends that she was misled by the process-server into believing that she had a year in which to enter appearance;

5. The appellant was not served with the Notice of Entry Judgment before the execution process was initiated; that the appellant only made aware of the judgment when served with the Notice to Show Cause dated 2/05/2018;

6. The appellant annexed a Draft Defence in which she submitted that it was meritorious as it raises triable issues; one being that there are no contractual duties owed to the respondent; that the sum advanced on the 21/11/2013 which was secured by motor vehicle registration No.KAR 220E was in the sum of Kshs.225,000/- which sum had been fully paid and the security duly released to the appellant; that the Deed of Acknowledgment dated the 8/09/2014 that was the basis of the respondents claim was a forgery as the amount and interest rate has been altered and meant to have misled the trial court into believing that the debt against the appellant was still in existence.

7. That there were glaring triable issues that could be gleaned from the documents; that the duty of the court was not to mete out punishment but to balance the rights of the parties; case law relied on **Philip Keipto Chemwolo & Anor vs Augustine Kubende [1986] eKLR** and **Interglobe Services Ltd vs Hama Ware Housing Ltd (2014) eKLR**.

RESPONDENTS CASE

8. In response the respondent opposed the application and relied on a Replying Affidavit made on the 12/06/2018; the respondent raised a preliminary point that the appellant had not given any security for costs and that she was in contempt of court for defying court directions; that the timelines in the Summons to Enter Appearance were clear and that the appellant was indolent and did not take any action upon service of the summons;

9. The respondent stated that the application to set aside the ex-parte judgment was an afterthought; the draft defence was a sham and was also a mere denial as it did not raise any triable issues; the issue of the Acknowledgment Deed dated 8/09/2014 being a forgery or fraudulent was not raised or particularized in the defence; there was still a debt owing to the respondent and no document any deed of discharge;

10. That the lower court's ruling dismissing the appellant's application was well reasoned; the case cited and relied upon was that of **Mbogo vs Shah (1968) EA 93** where it was held that the appellate court should not interfere with the discretion of the lower court unless it is satisfied that it misdirected itself and as a result arrived at a wrong decision; or that it was manifestly clear that it wrongly exercise of its discretion and as a result there was miscarriage of justice;

11. The appellate court was urged to reach a conclusion that the appellant was underserving of exercise of the court's discretion to set aside the impugned ex-parte judgment.

ISSUES FOR DETERMINATION

12. After taking into consideration the presentations made by both parties this court finds the following issues for determination;

- (i) Whether to set aside the ruling delivered on 17/07/2018;

ANALYSIS

13. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence placed before it and arrive at its own independent conclusion; case reference is the case of **Selle vs Associated Motor Boat Co. Ltd (1968) EA 23; where it was held;**

“In particular this court is not bound ...

14. The appellant herein had applied to the lower court to have the ex-parte judgment entered against her on the 21/01/2015, set aside; this first application was dismissed on the 17/07/2018 because the trial court found that it was lacking in merit; the appellant then proceeded to file this instant appeal against that ruling;

15. The appellant had attached to her initial application a draft of the defence she had to the respondent's claim to support the contention that she had a good defence to the respondents claim; it was to the effect that the sums claimed had been fully paid and the security had been released and that there was no sum owed to the respondent; her contention was that there was also an alteration of the loan documents;

16. The reason the appellant gave for her omission to filing her defence within the timelines was that she had been misled by the process server who had served her with the Summons to Enter Appearance; the appellant submitted that all these triable issues were raised before the trial court and it had erred in ignoring and/or failing to take them into consideration when arriving at its decision; therefore it had denied her an opportunity to ventilate her defence; so she was still seeking for her right to justice which she contends can only be achieved by the setting aside of the ex-parte judgment;

17. The appeal was opposed the grounds that the defence was a sham and afterthought as appellant had conceded that money was advanced to her; that if the monies had been repaid no discharge was annexed to show satisfaction of the debt; secondly the appellant had raised the issue of fraud and forgery of the documents but had failed to place any material before the trial court to support these allegations nor were these allegations particularized in her defence as required by law;

18. The respondent submitted that even though the appellate court had unfettered discretion this should be exercised judicially and that it should not interfere with the trial court's decision unless it had satisfied itself that the trial court had misdirected itself and as a result arrived at a wrong decision; or unless it was manifestly clear that the trial court wrongly exercised its discretion and as a result there was a miscarriage of justice;

19. The respondent urged this court to dismiss the appeal as the appellant was undeserving of the courts discretion to set aside the impugned ex-parte judgment;

20. This court concurs that it has been given wide and unfettered discretion to make such orders as may be necessary for the ends of justice; but this has to be exercised judicially; in this instance this court has had occasion to peruse the detailed and well-reasoned decision of the trial court;

21. Starting with the issue of service of the Summons to Enter Appearance the trial court found that the issue of the appellant being misled

was unfounded; and stated that;

“The summons to enter appearance are very clear that she was to enter appearance within fifteen (15) days after service The issue of being misled therefore does not arise.”

22. This court has had occasion to peruse the court record in particular the Affidavit of Service dated the 22/01/2018 made by the process server who effected service upon the appellant; at paragraph 5 it makes reference to the mention date and it reads as follows;

“5. THAT the Notice of summons set out clearly the mention date as 13th March, 2018.”

23. Service was effected on the 6/01/2018 and this is not in dispute; this court sees no reason why the process server placed more emphasis on the mention date than on the time-line of 15 days; the contents of the affidavit are supportive of the appellants explanation of being misled by the process server; had the trial court addressed the issue of service closely it would have found that such an explanation constituted a good and sufficient cause for the appellants failure to file the defence within the required timelines;

24. On the issue of the defence the trial court had this to state in its ruling;

“The only thing which can save the defendant is if she has a defence to the claim.

10. I have considered the draft defence.....But she provides no particulars of fraud as required under Order2 rule 4 of the Civil Procedure Rules, 2010. A court cannot make a finding of fraud when the particulars of fraud are not set out in the pleadings (Wamukota vs Donati [1987] KLR 280). There is therefore no valid defence of fraud before the court. The upshot is that the defendant as matters stand, has no valid defence to the plaintiff’s claim.”

25. The trial court proceeded to dismiss the application with costs to the respondent; it is trite law that the court only has to consider whether on the face of it the defence discloses an arguable or triable issue; the appellant raised the issue of alteration of the loan documents on the issue of interest rate; this line of defence appears to contain considerable merit and ought not to have been disregarded by the trial court; in this instance the defence filed was also a draft defence and the failure to include the particulars of fraud is not fatal as the defence can be subjected to amendment to include the particulars;

26. This court is satisfied that on the face of the draft defence the appellant has put forward a reasonable defence to the claim made against her by the respondent; the appellant has also sufficiently demonstrated the cause that led to failure to file her defence within the timelines; and as there has been no proper adjudication of the case the appellant ought not to be shut out of a trial and a verdict be rendered on merit; from the material place before it this is found to be a suitable case in which the court can invoke its discretionary powers and to set aside the ex-parte judgment and the appellant given an opportunity to defend her case;

FINDINGS & DETERMINATION

27. In the light of the forgoing this court makes the following findings and determinations;

(i) The appeal is found to have merit and it is hereby allowed.

(ii) The trial court’s ruling dated the 17/07/2018 dismissing the appellant’s application is hereby set aside; and substituted with an order setting aside the ex-parte judgment entered on the 25/01/2018;

(iii) The appellant shall file a defence within 30 days from the date hereof;

(iv) The respondent shall have thrown-away costs assessed at Kshs. 7,500/- and costs on the application: whereas the appellant shall have costs on the appeal;

(v) File to revert to lower court for hearing and determination.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 13th day of June, 2019.

HON. A. MSHILA

JUDGE