



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 663 OF 2017

EUNICE M'MBOGA.....APPELLANT

-VERSUS-

ERIC ASIBA.....RESPONDENT

(Being an appeal from the ruling and order delivered by Honourable D.W. Mburu (Mr.) Principal Magistrate on 17th November, 2017 in CMCC No. 3436 OF 2016)

JUDGEMENT

1. The Respondent in this instance, instituted a suit against the appellant by way of the plaint dated 26th May, 2016 and sought the sum of KShs.153,500/= plus costs and interest thereon for an outstanding friendly loan advanced to the appellant.
2. The Respondent then served copies of the summons to enter appearance and the plaint upon the appellant, who failed to enter appearance and/or file a statement of defence within the stipulated statutory timelines. The Respondent applied for the entry of an interlocutory judgment and the same was entered on 15th July, 2016.
3. Thereafter, the appellant filed an application seeking to have the aforementioned interlocutory judgment set aside and for leave to put in her statement of defence. The application was dismissed by the trial court vide her ruling of 17th February, 2017 for failure on the part of the appellant to explain the delay in entering appearance in time and/or filing her defence, as well as the failure to annex a draft defence to the application.
4. The appellant then filed a Notice of Motion dated 28th February, 2017 and amended on 20th March, 2017 seeking among other orders, that the trial court reviews and/or sets aside its ruling of 17th February, 2017 and that the said appellant be granted leave of court to file her defence out of time.
5. The abovementioned application was later dismissed for non-attendance on 10th April, 2017, thereby prompting the appellant to again file an application dated 5th July, 2017 seeking to set aside the dismissal order.
6. Upon hearing the application, the trial court found that no valid reasons had been offered to have its earlier orders set aside. Consequently, the application of 5th July, 2017 was dismissed vide the ruling delivered on 17th November, 2017.
7. The aforementioned ruling provoked the filing of this appeal.

The grounds of appeal as set out in the memorandum of appeal are:

- i. THAT the learned trial magistrate erred in both law and fact by failing to appreciate the common law principle that the errors of counsel should not be visited on the client.***
- ii. THAT the learned trial magistrate erred in law and in fact by failing to consider the evidence on record demonstrating that the appellant had paid to the Respondent the contested sum of KShs.133,500/=.***
- iii. THAT the learned trial magistrate misguided himself by focusing all his attention to counsel who has since ceased from conducting the matter instead of establishing that the appellant has a triable defence with high chances of success.***
- iv. THAT the learned trial magistrate failed to appreciate that his action of dismissing the appellant's application had the implication of the Respondent attaching her property, thereby essentially punishing the appellant over a debt that has already***

been paid.

v. THAT the learned trial magistrate failed to consider the written submissions of the appellant.

8. Parties were directed to dispose of the appeal through written submissions. I have considered the rival submissions and the respective cited authorities. I have also re-evaluated the arguments and the submissions presented before the trial court.

9. In the *first* ground of appeal, the appellant contends that the learned trial magistrate failed to consider that the appellant had given proper instructions to her erstwhile counsel and that the failure of the said counsel to attend court cannot and should not be attributed to the appellant. She further contended that the inadvertence of an advocate ought not to be visited upon his or her client, citing various authorities. Consequently, it is the appellant's submission that the trial court exercised its discretion in an improper manner.

10. On his part, the Respondent submits that the appeal is simply an afterthought and is intended to delay the enjoyment of the fruits of his judgment. Adding that the appellant disregarded the legal procedures.

11. I have examined the application dated 5th July, 2017 filed before the trial court in which the appellant sought for inter alia to reinstate the appellant's amended application of 20th March, 2017 which had been dismissed for non-attendance. The appellant explained that on the material day, her counsel was involved in a minor traffic accident and had to wait for the arrival of the traffic police.

12. The appellant added in her application that her said counsel called a colleague to hold his brief in the matter. The appellant said she was later informed that the amended application had been listed for hearing on 10th July, 2017.

13. In his ruling, the learned trial magistrate stated that if at all a police officer visited the scene, it follows that the accident would have been recorded in an Occurrence Book yet no documentary evidence was adduced to verify the account given. Furthermore, the learned Principal Magistrate found that the identity of the advocate who had been requested to hold brief was not disclosed to the court and that the court record revealed the non-attendance on the part of the appellant.

14. Upon perusal of the trial court's typed proceedings it is apparent that the appellant did not avail any iota of evidence to show that her advocate was involved in an accident. The alleged advocate did not swear an affidavit to explain what made him/ her fail to attend court.

15. It is clear that nothing was presented before the learned trial magistrate to support the account of events deponed by the appellant's advocate. The learned Principle Magistrate correctly came to the conclusion that the appellant had failed to support her application.

16. In the *second* and *fourth* grounds, the appellant submits that she tendered evidence before the trial court demonstrating that she has already settled the entire disputed amount and that the Respondent, while being fully aware of this fact, still chose to proceed with the execution of the decree. The appellant urged this court to find that it is unfair and against the interest of justice to have the interlocutory judgment remain in place.

17. On the other hand, the Respondent argued that the question of payments is not in issue since the appellant began making the said payments without involving the court or the Respondent, despite there being an interlocutory judgment in place. The respondent seem to suggest that the decretal sum has not been fully settled by the appellant.

18. The subject of payments was mentioned in the appellant's amended application of 20th March, 2017 which application was dismissed for non-attendance. I have perused the copies of the deposit receipts constituting the record of appeal and it is apparent that there it is difficult to ascertain whether the receipts relate to the matter at hand or whether all the payments were made by the appellant. Therefore, nothing turns out on the two grounds of appeal.

19. In the *third* ground of appeal, the appellant submits that the trial court attention on the non-attendance of her counsel rather than taking time to consider her interests as a litigant and that she has a defence with triable issues.

20. In response,, the Respondent submitted that it is the appellant who failed to file her defence within the statutory limits.

21. I have perused the record and it is clear that when the appellant first filed the Chamber Summons dated 6th October, 2016 seeking for leave to file her statement of defence, the trial court ruled that she had not annexed a draft defence nor explained her failure to file the same in good time.

22. The appellant subsequently, the appellant filed the amended application dated 20th March, 2017 which was eventually dismissed for want of prosecution, thus prompting the filing of the application on which the impugned ruling is premised.

23. After having considered the arguments presented before it, the trial court found no sufficient reason to grant the orders sought. I am satisfied that the trial court took into account all relevant factors in arriving at its decision.

24. It is evident that applicant filed numerous applications following each other. Such conduct justify a court that the appellant was abusing the process of court. I find no merit in the third ground of appeal.

25. In the end this appeal is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 5th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent