REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 32 OF 2018

JACKSON KIPNGETICH TUITOEK……. APPELLANT

VERSUS

OSMAN HASSAN GOLE……. RESPONDENT

(Being an appeal from the ruling in Kericho Chief Magistrate's Court Civil Case

No. 369 of 2012 (Hon. B. R. Kipyegon (SRM) dated 24th October 2018)

JUDGMENT

1. This appeal arises from the ruling and order of the Senior Resident Magistrate Hon. B.R. Kipyegon given on 24th October 2018 in Kericho CMCC No. 369 of 2012. The appellant was the defendant in the suit, while the respondent was the plaintiff. The ruling was in respect of an application dated 2nd October 2018 seeking to set aside orders of the trial court made on 19th September 2018 directing the filing of written submissions following the closure of the defence case. The case had been closed by the defence Counsel, Mr. Nyadimo, after the court declined to grant an adjournment sought by the appellant and directed the parties to proceed with the matter.

2. The application to set aside the orders was made by the firm of M/S Orina & Co Advocates who sought to act alongside the firm of Ms. E.K Korir & Co. Advocates. The basis of the application was that Mr. Nyadimo, the Advocate on record for the defendant who had closed the defence case, was not informed of the serious sickness of the appellant and of his inability to prosecute his case. It was the appellant's case that the orders of the court were therefore irregular and the appellant had a right to be heard. The plaintiff/ respondent opposed the application before the trial court, terming it mischievous and intended to cause him prejudice.

3. The court declined to set aside the orders of 19th September 2018 noting that the case was initially filed in the High Court in November 2011, and the trial did not take off for over 6 years. The plaintiff was heard on 25th April 2018 in the absence of the appellant who had been served but did not appear in court. That thereafter, judgment had been entered in favour of the plaintiff and was read in open court on 30th May 2018. However, following an application by the appellant dated 19th July 2018, the judgment was set aside by a consent order entered into between the parties on 8th August 2018 which was adopted as an order of the court. The matter was then scheduled for hearing on 19th September 2018.

4. The record indicates that on that date, on an application for adjournment by the appellant's Counsel, the trial court observed that there was indolence and lack of keenness on the part of the appellant to proceed with the case. It directed the parties to proceed with the case failing which the judgment on record would revert. The plaintiff and two witnesses then testified after which the defence closed its case without calling any witnesses.

5. In his Memorandum of Appeal dated 6th November 2018, the appellant appeals against the said ruling on the following grounds:

> ***1. The learned magistrate erred both in law and fact by denying the Appellant a chance to give evidence and locking out evidence of the Appellant.***
>
> ***2. The learned trial magistrate erred both in law and fact by denying the Appellant his rights to a fair hearing.***
>
> ***3. The trial magistrate erred both in law and fact by failing to consider the strong defence filed by the Appellant.***
>
> ***4. The learned trial magistrate erred in both law and fact by failing to consider the fact that the cheque of Kshs. 3,000,000 issued did not emanate from the Defendant.***

5. The learned trial magistrate erred both in law and fact by failing to take judicial notice of the fact that cheques over 1,000,000 cannot be issued.

6. The learned trial magistrate erred both in law and fact by disregarding the defendant's applicant's statement of defence which raises triable issues.

7. The learned trial magistrate erred both in law and fact by disregarding the evidence of the Appellant and that of his witnesses.

8. ***The learned trial magistrate erred both in law and fact in denying the Appellant a hearing hence denying his constitution right to access to justice as provided in the constitution.***

6. The parties filed written submissions in support and opposition to the appeal, which I have read and considered. In his submissions, the appellant argues that he was not given an opportunity to be heard, which was in contravention of Article 50 of the Constitution. He relies on the decision in **Onyango v A.G (1986-1989) E. A 456** in which Nyarangi JA held that:

> ***"I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly."***

7. In the same case, the Learned Judge went on to observe that :

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

8. The appellant has also cited the case of **Mbaki & Others v Macharia & Another (2005) 2EA 206** at page 210 in which the court observed that:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the right rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

9. The decision of the Supreme Court of India in **Sangram Singh v Election Tribunal Kotech AIR 1955 SC 664 at 711** was also cited in support of the appellant\s case. The court in that decision stated that:

> ***"There must be ever present in the mind the fact that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

10. The appellant submitted that a decision to deny a party an opportunity to be heard should be the last resort of a court as no prejudice would be occasioned to the respondent should this court order a retrial. Reliance was placed on **Sebei District Administration v Gasyali & Others (1968) EA 300** where Sheridan J held:

> ***"…the nature of the action should be considered. The defence if one has been brought to the notice of the court however irregular, should be considered. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court."***

11. It was his case that where a defendant raises a reasonable defence, the court should exercise its discretion in his favour even where a judgment entered in favour of the plaintiff is regular.

12. The appellant urged the court, in the interests of justice and in line with the *audi alteram patern* principle, to set aside the judgement, the decree and any consequential orders issued by the trial court in this matter and allow him to defend the suit. He asked the court to be guided by the words of the court in **Patel v E.A Cargo Handling Services Limited (1974) E.A 75** in which it was held that:

> ***"The main concern of a court is to do justice to the parties and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will usually not set aside the judgment unless it satisfied that there is a defence on merits. In this respect, defence on merit does not mean, in my views a defence that must succeed, it means as Sheridan J put it " triable issue " that is an issue which raises a defence and which should go on trial for adjudication."***

13. In his submissions, the respondent argues that this court cannot re-open a case that the parties freely closed. He submits that the appellant has no defence at all in this case, and that he had proved his case on a balance of probabilities. It was his submission that the grounds of appeal raised by the appellant had no merit. While the appellant alleged that the trial court had erred in law and fact in not considering his defence or affording him a chance to be heard, he did not have a good defence as his statement of defence denied that he owed the respondent the amount claimed. Further, that the record showed that he had been given a chance to he heard, but had closed his case and called no witnesses.

14. With regard to the appellant's third ground of appeal in which he argues that the trial court erred in not considering his strong defence, the respondent submits that other than denying the plaintiff's allegations, the defendant had alleged fraud on the part of the respondent, but had not called any evidence to controvert the respondent's evidence before the trial court.

15. As for the appellant's argument that the trial court erred in not taking judicial notice of the fact that a cheque for Kshs 3,000,000.00 cannot be issued, the respondent submitted that this ground was not available to the appellant as it was not raised anywhere in the defence. The respondent relied on **Daniel Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** for the proposition that parties are bound by their pleadings and any evidence that is at variance with the pleadings is for rejection. He also cited the case of **Raila Amolo Odinga & Another v IEBC & 2 Others [2017]** eKLR in which the Supreme Court held that:

> ***" In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."***

16. I have considered the record of appeal and the submissions of the parties. I have also set out above the factual situation leading to the present appeal, which I have duly considered in accordance with my duty as the first appellate court- see **Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123.**

17. What emerges from the trial court record is that a judgment had been entered in favour of the respondent when he was heard *ex parte* on 25th April 2018 upon failure by the appellant to appear in court, despite service**. This judgment, read in open court on 30th May 2018, was set aside by consent on 8th August 2018, and the matter was then fixed for hearing. On 19th September 2018, the matter was scheduled for hearing, but it appears that the appellant was again not ready with his witnesses. The respondent and two witnesses testified, while the appellant, through his Learned Counsel, Mr. Nyadimo, called no witnesses but proceeded to close his case.**

18. The appellant now wants the court to re-open the case in the lower court. He contends that the ruling of the trial court dismissing his application of 2nd October 2018 seeking to set aside the orders of 19th September 2018 was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard.

19. I have not heard the respondent to dispute the importance of the right to a hearing for all parties. I do not, further, believe that one can argue with the principles with regard to the right to a fair hearing, and the duty of the court to accord all parties a hearing, enunciated by the courts in the cases cited before me. What I do need to consider, however, is whether the facts of this case justify an interference with the decision of the lower court on the basis that the appellant was denied an opportunity to be heard. In making this determination, I bear in mind the words of the Court of Appeal in **Njagi Kanyunguti Alias Karingi Kanyunguti & 4 Others vs David Njeru Njogu [1997] eKLR** in which it stated:

> ***"In an application brought either under O.IX A rule 10 or O. IX B rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (See, Pithon Waweru Maina v. Thuku Mugiria, (Civil Appeal No. 27 of 1982) (unreported), Patel v. E.A Cargo Handling Services Ltd 1974 EA 75). The court is, also, enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment."***

20. Later in its judgment, after considering the facts of the case, the Court of Appeal expressed the following view:

> ***"However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, and will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. (See Shah v. Mbogo & Another, 1967 EA 116 at p.123). The appellants' conduct and that of their advocate when viewed objectively clearly shows that they were bent on delaying the course of justice."***

21. I begin by observing that this is a 2011 matter. It had not been beard for a period of 6 years. It relates to a loan of Kshs 3,000,000 which the appellant had borrowed from the respondent, but had failed to repay. In his plaint dated 3rd November 2011, the respondent sought recovery of the principal sum, interest at commercial rates, and costs. The appellant filed a defence in which he denied the claim by the respondent. The matter, which had initially been filed at the High Court in Kericho as High Court Civil Case No. 91 of 2011 was later transferred to the Chief Magistrate's Court as CMCC No. 369 of 2012.

22. In a judgment dated 30th May 2018, the trial court, which had heard the plaintiff *ex parte*, entered judgment in his favour. The appellant, however, sought to set aside the *ex parte* judgment by his application dated 19th July 2018. As noted earlier, a consent order was entered into under which the judgment of 30th May 2018 was set aside and the matter re-opened.

23. On 19th September 2018 when the matter was scheduled for hearing afresh, both parties indicated to the court that they were ready to proceed with the matter at the initial call over of the matter, and they were allocated time for the hearing. However, when called upon to proceed, the appellant applied, through his Counsel, for an adjournment. The application was opposed, and the court directed that the parties proceed.

24. The plaintiff testified and called two witnesses, while the defendant, who appears to have been absent, closed his case through his Learned Counsel, Mr. Nyadimo. Mr. Nyadimo indicated that the defendant/appellant would rely on the statement of defence dated 14th November 2011. The court then gave directions for filing of submissions, and fixed the matter for directions to confirm filing of submissions. The appellant alleges that the counsel who closed his case was not informed of his sickness and of his inability to prosecute his case. I note that the documents said to show his illness date between 2016 and January 2018. The hearing was in September, 2018. It was the appellant's duty to inform his advocate about his illness. He cannot blame anyone on this score but himself.

25. From the material before me, I am not persuaded by the arguments of the appellant that the trial court erred in any way in the manner in which it dealt with the matter. The appellant had every opportunity to present his case. The judgment that was entered following the hearing in his absence on 25th April 2018 was set aside by consent. He was not present at the second hearing of the matter on 19th September 2018, but he was represented by Counsel. His Advocate elected to close his case and rely on the defence on record. This was after an attempt to adjourn the matter, ostensibly on the basis that the defendant needed to file a defence and witness statements, had failed. There was already a defence statement on record, which his advocate said he would rely on, and nothing was presented before the court with regard to the appellant's state of health.

26. Taking all matters into consideration, I am unable to find that any of the appellant's grounds of appeal has any merit. Revolving as they all do around the alleged failure by the trial court to consider his defence, and accusing the trial court of failure to accord him a hearing, I find that all of them are untenable. He raises the issue of whether or not a cheque for Kshs 3,000,000 can be issued in light of Central Bank regulations, but it is evident from his defence that this was an issue that arises only in this appeal, and did not form part of his defence.

27. In the result, I find that the appellant was afforded an opportunity to be heard. He elected not to take it, and this appeal, in my view, is yet another attempt to delay this matter, now in its eight year, further. The appeal is accordingly dismissed with costs to the respondent.

Dated and Signed at Nairobi this 26th day of June 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 17th day of July, 2019

GEORGE DULU

JUDGE