REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 147 OF 2015

JANET KALEKYE MUTUTO.....APPELLANT

VERSUS

BENDETA KIAYUA KITUKU

DANIEL MWENDWA KITUKU (Legal Representatives of

FRANCIS KITUKU (Deceased).....RESPONDENTS

J U D G M E N T

1. The Respondent, a Personal representative of the Estate of **Francis Kituku** (Deceased) by way of Plaint dated **8th** day of **July, 2009** sued the Appellant claiming for general and special damages under the **Fatal Accidents** and **Law Reform Act.** The Appellant failed and/or neglected to file a defence. An interlocutory Judgment was entered against her on the **10th August, 2009.** The matter proceeded to formal proof whereafter by a Judgment dated **11th** day of **August, 2009** an award of **Kshs. 580,000/=** was made.

2. The Appellant instructed the firm of **J. K. Mwalimu & Co. Advocates** who filed a Notice of Appointment on **11th August, 2010.** It was however dated the **28th** day of **July, 2010.**

3. On the **7th October, 2010** the firm of **Mbigi Njuguna & Co. Advocates** filed a Notice of Change of Advocates also dated the **28th** day of **July, 2010.**

4. On **19th December, 2012,** despite change of the firm of advocates, the firm of **J. K. Mwalimu & Co. Advocates** filed a Notice of Motion dated **14th December, 2012** where the Appellant sought an order setting aside the Judgment entered and all consequential orders to enable her defend the suit. The trial Court heard, and dismissed the Application.

5. Aggrieved, the Appellant appeals on the grounds that:

· That the Learned Resident Magistrate erred and misdirected himself on the law and the fact when he failed to find that the Appellant had not been properly served, and that the correspondences exchanged between the Respondent's Counsel and the Appellant's Insurer's Counsel had not been initiated by the Appellant.

· That the learned Resident Magistrate erred and misdirected himself on the law and the fact when he failed to consider the draft defence tendered by the Appellant which had raised weighty triable issues that warranted the learned Magistrate setting aside the ex-parte Judgement.

· The learned Resident Magistrate erred and misdirected himself on the law and the fact when he vetoed his discretion without a proper basis for so doing.

6. It was urged for the Appellant that service was not proper. The Court failed to interrogate the question of legal representation after the Appellant denied knowing the Advocates who came on record who may have been retained by the Insurance Company after it was served.

7. Further, it was argued that judicial discretion was not exercised properly as the draft statement of defence raised triable issues. Regarding failure to annex the Court order, it was argued that justice should be administered without technicalities.

8. It was urged on the part of the Respondent that the Appeal was incurably defective for lack of a certified decree or order. That the Appellant failed to give the Court a tenable reason as to why she did not file her defence within the prescribed period of time. That the statement of defence had mere, general denial which did not raise any triable issues therefore should not be interfered with. In this regard, the case of **Isaac Moracha Ongwacho vs. Dennis Willy Michuki & Another (2005) eKLR** was cited where it was stated that:

> ***"… But the Court went on to explain (on page 76), that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular Judgment had been entered, the Court would not usually set aside the Judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go to trial."***

9. The Court was urged not to set aside the Judgment as it would cause the Respondent prejudice as it will be setting back her effort and progress in prosecuting the case as stated in the case of **Francis Gichuki vs. Martin Leposo Tamoo (2004) eKLR Civil Appeal No. 530 of 2002** that:

> ***"… The reason for this is that the discretion under the Rule is to be employed to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error … However, did the facts in the case before this Court giving rise to the default Judgment arise from "accident, inadvertence, or excusable mistake or error"?***
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> ***I think not. The Appellant here was tardy and disinterested in the outcome of his case. Default Judgment was entered herein because of the failure of his advocate to attend Court on several occasions. Even then he did nothing to set aside that Judgment. He fully participated in the hearing for formal proof, and then waited for a full two years after Judgment was passed, to make an application for setting aside.***
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> ***This is definitely not the kind of litigant who deserves the discretion of this Court. In fact, this is the kind of litigant envisaged in Shah vs Mbogo (supra) as "a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."***
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> ***It is a cardinal principle of justice that there must be an end to litigation. The Plaintiff's conduct in this case is an affront to that principle. He cannot be allowed to drag the litigation forever. If that is caused by his Advocate, it may achieve more justice if he were to have recourse against the Advocate than to vex the Defendant with this suit indefinitely."***

10. I have considered rival submissions of both Counsels vis-à-vis the duty bestowed upon me to reconsider what transpired in the Lower Court afresh.

11. Principles governing setting aside exparte Judgment obtained in the absence of an appearance or defence or the Defendant's failure to attend Court was enunciated in the case of **Pithon Waweru Maina vs. Thuku Mugira (1983) KLR** where the Court stated that:

> ***"… the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in the case of Shah vs. Mbogo (1967) EA 116 at 123 and Shabir Din vs. Ram Parkash Anand (1955) 22 EA CA 48 … the Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that as a result there has been an injustice …"***

12. An affidavit was deposed by the Process Server, **Joseph N. David** that service was personal. It was averred that on the **11th July, 2009** at **12.00 p.m.** he served the Appellant outside the Kitui Law Courts registry. The Appellant denied having been represented by the firms of **Mbingi Njuguna and Company Advocates and Wagaki Murage** and **Company Advocates** who may have been retained by the insurance company, but she does not deny having instructed the firm of **J. K. Mwalimu and Company Advocates** who filed a Notice of Appointment on **11th August, 2010** and waited until **129** days later to file the impugned Application. It was averred by the Respondent in the reply to the affidavit and not denied that the Appellant's son **Mutinda** and his brother engaged her with a view of settling the matter. As correctly observed by the trial Magistrate, if the Process Server lied he should have been subjected to cross examination. Events that unfolded were evidence of proper service having been effected.

13. This is a clear case of the Appellant having not been inadvertent. What is demonstrated is evidence of a deliberate act of wanting to delay the course of justice.

14. As to whether the draft statement of defence raises triable issues, the occurrence of the accident is admitted. The argument raised is that the Deceased substantially contributed to the accident. The Respondent filed submissions seeking an award of **Kshs. 1,900,800/=** in general damages and **Kshs. 100,000/=** for loss of expectation of life **(Kshs. 2,000,800/=).** The learned Magistrate exercised wisdom and granted a total award off **Kshs. 580,000/=.** The conduct of the Appellant was not a demonstration of seriousness on his part to defend the suit.

15. It is also worth noting that filing of the order as required by the law is not a technicality as envisaged by **Article 159(1)(d)** of the **Constitution** but it concerns substantial justice as it is a requirement.

16. This is a case where justice demands an end to litigation as appreciated by the trial Court. Therefore, I decline to grant orders sought. The Appeal is dismissed with costs to the Respondent.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 3rd day of July, 2019.

L. N. MUTENDE

JUDGE