REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 186 OF 2018

JULIUS ODHIAMBO ODUOR.....APPEALLANT

VERSUS

THE CHAIRMAN, SECRETARY, AUDITOR &

ORGANISERS OF NYIKWA RAMOGI WELFARE.....RESPONDENT

J U D G M E N T

1. This determination concerns the ruling of the trial court given on the 13/7/2018 by which the court declined and dismissed an application by the appellant seeking orders of review of the earlier decision dated 6/10/2017 by which the plaintiff suit was struck out and a judgment entered for the Respondent in terms of the counter-claim in the sum of Kshs.126,050.00 plus costs and interests.

2. The Application whose ruling has given rise to this appeal was essentially an application to set aside the ruling of 6/10/2017. It was premised on the provisions of Section 3A & 63 (e) of the Civil Procedure Act as well as other rules under the Act and based on the facts that; the appellant was never informed by the counsel on the progress made in the case including the dates fixed for hearing and delivery of the decision of 6/10/2017 and therefore that the mistake of counsel ought not be visited upon the client.

3. That application was supported by the Affidavit of the Appellant whose thrust was that it was his current and not the erstwhile advocate who informed him of the delivery of the ruling and the fact that the Respondent's counsel had written demanding payment of the judgment sum, costs and interest. He however added that his erstwhile advocate gave the letter by the respondent dated 9/10/2017 for his comment. No dates are however given when he received the information.

4. When served, the respondent filed a Replying Affidavit sworn by the counsel in which it was averred and contended that the application was misconceived and abuse of the court process as the court made a proper finding in entering judgment for the respondent.

5. It was additionally contended that the Appellant had misused money entrusted to his custody and could not be allowed to blame counsel as he had a duty as the litigant to be responsible for his litigation by seeking to be abreast at all times.

6. The application went before the trial court who upon hearing the parties delivered the ruling now appealed against in which the court rendered itself in the following words:-

> **"The Plaintiff has averred that a mistake of his Advocate should not be revisited upon an innocent litigant and it is an interest of justice of this Court to determine this matter. This argument is not plausible enough to warrant setting aside and/or stay of execution. It is very clear on record that the Plaintiff was properly served with the application dated the 30/08/2016 but failed to respond and was squarely dismissed.**
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> **It is noted that the Plaintiff is the owner of his case and can therefore not blame his former Advocate for failure to inform him of the progress of the case. The Court cannot exercise jurisdiction over a party who wants to obstruct or delay justice. He is also not denying that he had misappropriated money belonging to the welfare group and therefore this instant application is without merit and it is dismissed with costs to the Defendants"**

7. This being a first appeal, this court's mandate and duty is to re-examine, re-appraise and re-evaluate the entire record of proceeding before trial court with a view to coming to own conclusions[1] .

8. I appreciate the application dated 01/11/2017 to have strictly sought an order for setting aside the orders 6/10/2019 and any other order like review. To this court setting aside arises where there is a default leading to an order being made ex-parte or on account of that default.

9. The jurisdiction of the court in setting aside is granted to avoid injustice and to correct errors arising out of accidents, inadvertence or

excusable mistake but not towards assisting a litigant who has sought to defeat the course of justice by way of evasion or such other ignoble conduct[2].

10. The order sought to be set aside was one made after the two sides to the litigation addressed the court and was not a resultant of any default. It was thus not an order due for correction by setting aside but maybe by an appeal which the Appellant did not opt for. The applicant just took a wholly defective vehicle that was from the onset incapable of delivering him to his destination. I am unable to find any error on the trial court as to entitle this court to interfere with the decision of the lower court. An error of counsel must not always be seen as incapable of being left to rest on the shoulder of his client. There are situations that asking a litigant to bear the brunt of his counsel's mistake may be the just way to proceed. I have in mind the law that advocates are by law mandated to take out professional indemnity covers. That to me is an appreciation that advocates do make mistake and that when such does happen, the client should not be left remediless. Others court have had the chance to consider this point and it is acceptable that at times blunders by counsel must rest on the client. In **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 Kimaru, J** expressed himself as follows: -

> **"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, *it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.***

11. The trial court in dismissing the appellant's application was evidently abreast of this position of the law hence I am thus unable to allow the appeal but instead find that it is indeed a befitting candidate for dismissal.

12. I may only add that the alleged mistake by the advocate in not informing the Appellant of the outcome, even if it were to be true, would not have been a basis to set aside. It would present no basis to set aside because there was no explanation of what had been lost due to failure to advise him on the proceedings and ruling of the 6/10/2017.

13. However it is telling that the Appellant became aware of the ruling through the letter of 9/10/2017, a letter done just three days after the ruling but there is no indication by way of date when he came by that letter.

14. It is a case of total lack of candour which is never the reason for a court of law to exercise its discretion even in appropriate cases for setting aside.

15. I order and direct the appeal be dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 20th day of September 2019.

P.J.O. OTIENO

JUDGE

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[1] *Selle V Associated Motor Boat Company Ltd., [1968] EA 123 At P. 126*

[2] Mbogo & Another – Vs – Shah, EALR [1968] P. 13