



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.43 OF 2015

GEORGE MATHANGANI KAGIRI.....APPELLANT

VERSUS.

EVANS WAFULA WANJALA.....RESPONDENT

[An appeal from the ruling in original Bungoma CMCC NO 278 /2008 delivered on by Hon P.N. ARERI Senior Resident Magistrate]

JUDGMENT

This is an appeal arises from the ruling of Honourable P.N. Areri Senior Resident Magistrate in Bungoma CMCC No. 278 of 2008. The appellant had filed an application dated 5th March, 2015 seeking to set aside ex-parte judgment entered in default of defence against him. The trial dismissed thereafter the application with costs.

Background information.

By way of amended plaint dated 5th August 2008 the plaintiff, Respondent herein sued the appellant for compensation for injuries sustained following a road accident sustained on or about 10th April 2007 along Bungoma-Webuye Road. Upon full hearing of Plaintiff/Respondent case that proceeded undefended the court entered ex-parte judgement against the appellant.

The appellant contends that he was not served with summons to enter appearance and therefore he did not file a defence or any document to advance his case and this led to an interlocutory judgement entered against him. The Appellant then filed an application dated 5th March 2015 to set aside the ex-parte judgement but the honourable court dismissed the application.

The appellant being aggrieved by the ruling appealed on the same under the following grounds: -

- i. That the learned magistrate erred in law and in fact when he failed to appreciate that the interlocutory judgement upon which final judgment against the appellant was anchored was irregularly and unprocedurally entered.***
- ii. The Learned trial magistrate erred in law and fact when he failed to find that the appellant was never served with summons to enter appearance.***
- iii. The Learned trial magistrate erred in law and fact when he failed to give the appellant's application the correct approach resulting in an erroneous ruling.***
- iv. The Learned trial magistrate erred in law and fact when he gave a ruling that was against the weight of the evidence on record.***

By way of consent the parties disposed of the appeal by way of written submissions.

The appellant submitted through advocate on record Mr. Kamau that the court dismissed appellant's application without considering threshold requirement set out in law relying on the caselaw in ***PITHON WAWERU MAINA V THUKA MUGIRIA[1983]E KLR***

He submitted that to disallow the appellant to file his defence was injustice and urged this court to interfere with court's discretion in order to allow the matter in issue to be heard on its merits.

The appellant further submitted that the trial court infringed on the appellant's right to a fair hearing as enumerated under Article 47 of the Constitution, 2010 by dismissing his application and denying him a chance to put in his defence.

The respondent submitted through his counsel on record Mr. Makali that the court made a finding that the appellant was duly served and dismissed his application. He submitted that the appeal as filed is incompetent as the appeal arises from ruling under order 11 of the Civil Procedure Rules, 2010 and that no leave having been sought in the instant case to lodge the appeal renders this appeal incompetent and should be struck out relying on case law in **EDITH WAIRIMU NJOROGE V BROOKS HOLDINGS COMPANY LTD & ANOTHER (2018)eKLR**

The respondent further submits that in the instant case the trial court did not commit any error of principle of law in arriving at the finding and the appellant was avoiding due process and prayed that the appeal be dismissed.

The duty of a first appellate Court as was held in the cases of **Mwana Sokoni v Kenya Bus Service Ltd (1985) KLR 931** and **Selle v Associated Motor Boat company ltd (1968) EA 123** is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

The discretionary power of the court to set aside interlocutory judgment was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (1982-88) KAR 1036** where the Court of Appeal in adopting principles set out in the English case of **Evans – Vs – Bartlam [193]AC 473** at pg 480, Lord Atkin stated thus: -

“The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning, that the applicant must produce to the court evidence that he has a prima facie defence. The reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

The main principle espoused in the above passage is that the setting aside of an interlocutory judgment entered because of default in answering to a claim is governed essentially at the discretion of the court.

From the court records it is respondent contention that that the appellant was served with summons to enter appearance through a process server and this is supported by affidavit of service sworn by Robert Wamalwa on 21st August 2018.

The Appellant on the other hand contention is that he was never served and therefore he was not able to file his defence to advance his case which led an interlocutory judgement been entered against him.

In the instant case this court must take into account the principle of proportionality and weigh where the scales of justice lie. The core business of the court is to administer justice to the parties and not to render nugatory that ultimate end of justice. The court in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman -vs- Ambose Resort Limited [2004] 2 KLR 589**.

This court has taken into consideration the application dated 5th March 2015 and grounds raised in the application and I have also analysed the evidence on record before the trial court.

From evidence on record the 1st and 2nd Defendants were duly served but failed to enter appearance and file defence and matter proceeded ex parte and plaintiff filed a request for judgement and interlocutory judgement was entered against the defendants.

The main issue raised by the appellant is that he was not the owner of the subject motor vehicle. when the appellant appeared in court on 27/2/2015 on notice to show cause he stated;

“I am not aware of this matter. This matter does not concern me. I have never owned a matatu. I have nothing to say concerning the amount”.

Even if we were to accept the issue on ownership of the subject motor vehicle. The finding of the trial court was that appellant was the owner and/or beneficial owner of the motor vehicle.

The trial magistrate stated; -

“A search on ownership conducted at the registry of motor vehicle revealed that the 2nd Defendant and 3rd Defendant were the registered owners of the offending motor vehicle. The certificate of search exhibit 5. The plaintiff produced before court the P3 as exhibit 4 and police abstract as exhibit 5”.

I have analyzed the annexed draft statement of defence by the appellant. It was emphasized in the case of **Phillip Kiptoo Chemwolo (supra)** that where a defendant raises a reasonable defence to the plaintiff’s claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant, even where the judgment entered is regular. Consequently, the applicant must produce evidence that he has a prima facie defence before the court’s discretion can be invoked or exercised in his favour. In the case of **Patel – Vs – East Africa Cargo Handling Services Ltd (1974) EA. 75**, it was held that a regular judgment will not normally be set aside unless the court is satisfied that there is a defence on its merits.

It is important to note that courts have often held that a good or arguable defence should not be one that must succeed. It merely needs to

satisfy the concept of a prima facie defence.

It was held in the case of *Mbogo & Another – Vs – Shah, EALR [1968] P. 13* that a court's discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustices or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

Having analyzed the draft defence in the instant case, it is correct to say that, the draft defence is nothing but a sham. It does not specifically deny the issues raised in the plaint and as such remains a general and mere denial. In my view the defence does not raise any triable issues it would not make any sense to set aside the interlocutory judgment.

It is my finding that the magistrate did not error in dismissing the appellant's application dated 5th March 2015. The ruling was based on sound analysis of the material presented before the court. I find no merit in this appeal and I hereby dismiss it.

No order as to costs.

It is so decided.

Dated and Delivered at BUNGOMA this 8th day of Oct, 2019.

S.N.RIECHI

JUDGE