



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 112 OF 2017

VALENTINE EDU LTD.....APPELLANT

AND

MATHIAS OWILI OBIERORESPONDENT

RULING

1. The Respondent instituted a suit against the Appellant claiming general and special damages together with interest vide a plaint dated 4th August, 2016 in Mombasa SRMCC No. 1444 of 2016.
2. The appellant filed a memorandum of appeal to the said suit on the 18th August, 2016 but filed no defence. There being no defence file, by the appellant, an interlocutory judgment was entered in favour of the Respondent on 2nd September, 2016.
3. A defence was subsequently filed by the Appellant on 4th November, 2016 and on 16th February, 2016, it also filed a notice of motion application dated 16th February, 2017 seeking to set aside the interlocutory judgment which was entered in favour of the Appellant on 2nd September, 2016. The application was dismissed on 2nd September, 2017.
4. Dissatisfied with the said decision the Respondent lodged the instant appeal and set out the following grounds;
 - (a) The learned magistrate erred in law and in fact in dismissing the Appellants' notice of motion application dated 16th February, 2017, without any cogent reason.
 - (b) The learned magistrate erred in law and in fact in failing to evaluate the appellants draft statement of defence and appreciate that it raises triable issues.
 - (c) The learned magistrate erred in law and in fact in failing to apply several decided case laws that were cited and submitted in support of the appellant's application, thus this arriving at an erroneous decision.
5. The Appeal was admitted for hearing on 19th September, 2018 and on the same date, the parties agreed to dispense with the appeal via written submissions. It is only the appellant's written submission that are on record having been filed on 15th October, 2018.

APPELLANT'S SUBMISSIONS

6. The appellants counsel submitted that he was relying on the grounds set fourth in the memorandum of appeal and its written submission. He submitted that any judgment passed against a defendant in default of appearance or defence can be set aside whether such judgment is regular or irregular. And the court, should in granting or refusal to grant the orders of setting aside of such judgment consider whether the defendant has a good and reasonable defence.
7. Lastly, the appellant's counsel submitted that the trial court failed to exercise its discretion in determining the application and urged this Honourable court to allow the appeal.
8. The Respondent did not file any submissions and neither did he proceed by viva voce evidence.
9. In an appeal, the role of this court as provided for under section 78 of the Civil Procedure Act is to exercise the same powers and

perform nearly as may be the same action as are conferred and imposed on courts of original jurisdiction in respect of suits instituted therein. In this appeal, the court, duty, as is expected, is to evaluate the evidence that was adduced at trial, while being careful to note that it did not have the benefit of hearing and observing the witnesses as the lower court did.

10. I have read through the memorandum of appeal, record of appeal, submission by the appellant and considered the applicable law. I find that the issue for determination is whether the appellant met the threshold of setting aside an interlocutory judgment

11. From the proceedings in the record of appeal, it is a fact that the suit was instituted on the 4th August, 2016 by the Respondent and the Appellant filed a memorandum of appearance within 14 days on 18th August, 2016. From foregoing, it is clear that the appellant was well aware of the proceedings in the lower court and consequences of which they filed a memorandum of appearance.

12. On the 2nd September, 2016, an interlocutory judgment was entered against the Appellant after the Respondent applied for and same following failure by appellant to file a defence. From the proceedings and a reading through the Appellants' supporting affidavit dated 16th February, 2017, the Appellant does not explain why the defence filed on the 4th November, 2016 was filed two months after lapse of time.

13. Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back the plaintiff's progress in prosecuting its case, hence causing it to suffer prejudice. The court must therefore be satisfied that the defendant has offered a very plausible explanation as why he failed to file his memorandum of appearance and defence within the prescribed period under the Civil Procedure Rules, 2010, before such judgment can be set aside and / or varied.

14. It is my finding that the appellant, even after filing a defence statement two months after the lapse of time, they never bothered to request for court's leave to have the defence admitted out of time by the trial court. And not having given an explanation whatsoever as to why the defence was not filed on time, the appellant is guilty of laches.

15. The Appellant only moved this Honourable court to set aside the interlocutory judgment on the 16th February, 2017, approximately 3 months after filing this defence and this is only after being served with a notification of entering of judgment on the 9th February, 2017, hence the application by the Appellant to set aside the interlocutory was an afterthought.

16. The court of appeal in the case of WAWERU VRS NDIGA (1983) KLR 236, reviewed and upheld its previous decisions on the application under Order 10 Rule 11 of the Civil Procedure Rule and held that a court has unfettered discretion to do justice between the parties. It further held that it may be just and on the facts of a particular case to set aside and exparte judgment to avoid hardship or injustice arising from inadvertence or mistaken even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice, as delay defaults equity.

17. It is worth noting that the right to a fair trial as enshrined in Article 50 (1) of the Constitution is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under Article 48 of the Constitution. It is the duty of this court therefore, to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

18. Ogolla, J in SHAILESH PATEL T/A ENERGY CO. OF AFRICA VRS KESSELS ENGINEERING WORKS PRT LTD & 2 OTHERS (2014) e KLR despite finding that there was a regular judgment entered against the defendants and despite finding the proposed defence not to appear to address the issues in the claim, nonetheless allowed the application for setting aside interlocutory judgment while acknowledging the defendant's right under Article 50 of the Constitution to a fair hearing.

19. Be that as it may, the power to set aside an interlocutory judgment is discretionary that should be exercised with a lot of caution, to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the cause of justice. Delay defaults equity. The power of the court to set aside interlocutory judgment was considered in the case of PHILLIP KIPTOO CHEPWOLO & MUMIAS SUGAR CO. LTD VRS AUGUSTINE KUBENDE (1982-88) KAR 1036, where the court of appeal in adopting principles set out in the English case of EVANS VRS BARLTAM (193) Ac 473 at page 480, Lord Atkin stated this;

“ The discretion is in terms unconditional. The court's however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that the nature of the action should be considered. The defence, if one has been brought to the notice of the court, however irregularly 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 thought it should always be remembered that to deny the subject a hearing should be the last resort of the court”

20. This court therefore finds that it is in the interest of justice that the Appellant be given a fair and reasonable opportunity to present his case to enable the court consider the same on merit and make a determination thereof.

21. In arriving at the said conclusion, the court has had due regard to the case of CIVIL CASE NO. 3399 OF 1992, FREDRICK CHEGE KAMENWA VRS ARON K KANDE where the court of appeal held that;

“...notwithstanding the regularly of and exparte judgment, a court may set aside the same if he has reasonable defence on the merit.”

And CIVIL CASE NO. 222 OF 2010, NINNIE WAMBUI KIBINGE & 2 OTHERS VRS MATCH ELECTRICALS LIMITED, the court held that;

“it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit..”

22. Therefore, the upshot of this judgment is that court has found that the appellant’s appeal succeeds with the following orders;

(a) The notice of motion application dated 16th February, 2017 and filed on even date, being merited, be and is hereby allowed in terms of prayers No 3 and 4 therein;

(b) Consequently, the judgment delivered on the 9th July, 2017 and consequential orders therefor hereby conditionally set aside;

(c) The defendant is hereby directed to file and serve its pleadings in response to the plaintiff’s claim within 14 days from today;

(d) The plaintiff will be at liberty to respond to the defendant’s defence within fourteen (14) days from the date of service. The timeline for filing subsequent pleading shall be as set out in the Civil Procedure Rules, 2010;

(e) To avoid confusion in the file, the Defendant memorandum of appearance and defence filed on 18th August ,2016 and 4th November, 2016 respectively be and are hereby expunged from the court record;

(f) The defendant to pay to the plaintiff throw away costs in the sum of Ksh 20,000 within the next fourteen (14) days from the date hereof;

(g) Failure to comply with the above orders, the plaintiff will be at liberty to apply for appropriate orders.

Orders accordingly.

Ruling delivered, dated and signed this 11th day of October, 2019.

D. O. CHEPKWONY

JUDGE