REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 48 OF 2018

(CORAM: F. GIKONYO J.)

MONARCH INSURANCE CO LTD.....APPELLANT

Versus

TIBA TRANSPORTERS LIMITED.....RESPONDENT

[An appeal from the ruling of Hon. E. Wanjala (SRM) delivered on 24. 1.2018 in NBI CMCCC No. 1112 of 2017]

JUDGMENT

Introduction

1. The appellant herein was the defendant in the trial court; the respondent was the plaintiff. The respondent instituted proceedings in the trial court vide plaint dated 20/2/2017 in which they sought judgment for a mandated mediation settlement of Kshs. 1,772,727.27/=, advocate fees of Kshs 2,196,725.47/=, Transport and accommodation fees of Kshs. 624,351.56/=, interest at courts rates and costs of the suit.

2. The facts of the case were that the respondent was the insured and the appellant was the insurer under the policy No. 2009.080.008993 for the motor vehicle Registration Number KAY 574E/2C6090. On 29/12/2009 during the insured motor vehicle was involved in an accident in Uganda which led to the death of Weketa James, the driver of the other vehicle involved in the accident. The respondent through the insurance agent reported the accident giving all the relevant details to the appellant. The appellant then assured the respondent that they would take over the matter and handle it to its conclusion.

3. However, a warrant of attachment and sale of movable property was issued on 14/9/2011 against the Respondent by the High Court of Uganda at Lira Civil Suit No. 4 of 2010. The respondent notified the appellant of the matter but the appellants claimed they were never served with any summons despite taking over the matter. The appellant on 24/10/2014 through its claims and legal services manager declined to pay the plaintiff on allegation of the respondent's failure to report to the national bureau in Uganda. The respondent was forced to pay and paid the claim to avoid future court cases. Consequently the respondents filed a civil suit to recover monies paid in the claim and other costs.

4. The Appellants were served with summons and plaint but only entered appearance. The trial court on 25/8/2017 entered judgment against the appellant for failing to file a defence for the total sum of Kshs 4,772,924.30/=. The appellant thereafter filed a notice of motion dated 3/11/2017 seeking a stay of execution, setting aside of the judgment dated 3/8/2017 and the trial court to refer the dispute to arbitration in accordance with the terms of the building Contract between the parties. The application was heard and the trial court in its ruling dated 24/1/2018 found the application lacked merit and dismissed it with costs to the Respondent.

Appeal

5. Having been aggrieved by the trial Magistrates ruling the respondents filed the appeal herein for orders that the appeal be allowed, ruling of the subordinate court be set aside, interlocutory Judgment be set aside and that the dispute be referred to Arbitration. The appeal was based on the following grounds in brief;

a. The learned magistrate erred in law and in fact by dismissing the appellant application dated 3/11/2017 to set aside the interlocutory Judgement and refer the dispute to Arbitration.

b. The learned magistrate erred in law and in fact in failing to consider the reasons advanced by the appellants advocate explaining the delay in filing the application dated 3/11/2017.

c. The learned magistrate erred in law and in fact in failing to appreciate that the appellant had a tenable defence thus warranting the need to be allowed to defend the claim against it

d. The learned magistrate erred in law and facts in disregarding the principles setting aside interlocutory judgment and thus exercised her discretion wrongly.

6. The appeal was opposed by the replying affidavit of Nur Shillow Hassan dated 19/2/2018 who averred that he is the director of the respondent and that the allegation that the learned magistrate erred in refusing to set aside the interlocutory judgment and refer this matter to arbitration is a waste of the courts time as the suit filed against the appellant was for a refund of the money that the respondent paid on the promises of the appellant. The appellant filed a response to the plaint more than six months after being served with the suit and after the magistrate had granted interlocutory order to attach its property in execution.

7. He was categorical that the appellant had no tenable defense since they did not in their defense deny engaging a lawyer in the primary suit in Uganda in which the respondent settled the amount now sought to be refunded. The appellants despite having been served with the interlocutory judgment still waited for two months to file an application to set aside the judgment. The appellants counsel based their delay on the fact that it was a mistake of counsel but it was the duty of the appellant to follow up on the matter. Consequently, he stated that the application dated 3/11/2017 lacked merit and was only intended to delay the respondent's access to justice.

ANALYSIS AND DETERMINATION

8. I have carefully perused through the application, affidavits, submissions and the record in its entirety and the issues to be determined are;

a. Whether the learned magistrate erred in law and in fact in dismissing the appellant's application dated 3/11/2017?

b. Whether the orders that the appellants are seeking are deserved?

9. The trial court in dismissing the Notice of Motion dated 3/11/2017 observed in her ruling that the appellant entered appearance after service but never filed a defence and as a consequence judgment in default was entered. The trial court also observed that the appellants were only awakened by the execution proceedings and rushed to court with the application for stay of execution on account of mistake of counsel. The learned magistrate was not convinced that she should exercise her discretion in favour of setting aside the ex parte judgment for she found the motive of the appellant was to delay the matter which would cause an injustice to the respondent.

10. Whereas the court has unfettered discretion to set aside default judgment, in accordance with **SHAH v MGOGO & ANOTHER (1976) EA**, in the words of Harris J., the discretion of the Court is only:-

"Exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".

Mistake of counsel

11. The question here is whether in the circumstances of this case the Appellants deserve the favour of court's discretion. As the trial magistrate put it, the yardstick for matters complained of is as was stated in the case of **Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38**; the opinion of Lord Griffith that

"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."

12. Further insights on the subject should be found in the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR that:-**

"While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

13. From the record, the appellants were aware of the proceedings in Uganda and did not deny they engaged counsel in the matter. They were also aware of the judgment in the said suit. In addition, the appellant filed a response to the plaint more than six months after being served with the suit and after the magistrate had granted interlocutory order and execution thereof.

14. I note also that despite having been notified of the interlocutory judgment, the appellant waited for two months to file an application to set aside the judgment. The claim by the appellants that their counsel misplaced the file does not hold sway given the nature of the case they faced of which they were already aware and the time taken to act. The attitude of the appellant as an insurance company of good repute negates diligence in pursuit of justice. The alleged mistake of counsel does not offer sufficient explanation as to the delay herein in approaching the court. Needless to state that it was the duty of the appellant to follow up the matter with its legal counsel. In the circumstances I cannot help but to agree with the Respondent that the appellant is simply using the court process to delay the respondent's enjoyment of the fruits of its judgment. Such actions militate against favourable exercise of discretion.

Referral to arbitration

15. On the issue of referral to arbitration, the trial magistrate referred to the case of **Blue shield Insurance Co. Ltd v Raymond Buuri M'rimberia [1998] eKLR** that there can be triable issue where a policy of insurance has been proved and the insurer had not obtained a decree entitling it to avoid liability under the policy. Additionally, the trial court observed that the appellants could not over 7 years after the accident turn around and say that the respondents breached the terms of the insurance policy.

16. Here section 6 of the Arbitration Act becomes instrumental. The section provides;

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—**
>
> **(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
>
> **(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."**

17. Courts have given sufficient and apt exposition of the purport and application of section 6 of the Arbitration Act. I do not wish to multiply those decision except to cite the case of **LOFTY v BEDOUIN ENTERPRISES LTD – EALR (2005) 2 EA** where the Court of Appeal categorically stated that:

> **"We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]**

18. The rationale of the decision in the Lofty case was as expressed in the statement by Githinji J. (as he then was) in HCCC 1756 of 2000, and which the learned judges of Appeal cited with approved, that;

> **"In my view, section 6(1) of the Arbitration Act of 1995 which the court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of Section 6(1) of the Arbitration Act of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest state of the proceedings. Section 6(1) of the Arbitration Act, Chapter 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act of 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance."**

19. In light of the foregoing, referral of the matter to arbitration and other orders of stay should be made without any delay and in accordance with the law. I do not understand how a party who claims to be diligent would file an appearance and then remain mum for over two months before applying for referral of dispute to arbitration. The delay and laxity by the Appellants is inordinate and inexcusable. The application for referral to arbitration together with other orders for stay of execution offends the law and it fails. I reject the application on this ground.

Triable issue

20. I note that the trial magistrate also found that there was no dispute to be referred to arbitration since the claim was for a refund. She also found that the appellant herein was indolent. In accordance with what I may call the *Sheridan J.* test there must be a bona fide triable issue worth a trial for the court to allow a person to defend a suit. Triable issue need not be one which will succeed but one which raises *a prima facie* defence which should go to trial for adjudication. The request to refer matter to arbitration was not potent in view of the law and the circumstances of this case. Any hope of any triable issue in light of what I have stated is not bona fide expectation. Again, in law where a third party has obtained judgment against the insured pursuant to a policy of insurance, the insurer will only avoid liability if it obtains a declaration that it is entitled to avoid liability thereof. See section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya. This matter stemmed from an accident that occurred in 2009, the respondent was insured by the appellant and judgment was entered against them. The Appellant was aware of the proceedings and judgment but for reasons known only to them they failed to pay the decree whereof the Respondent was forced to pay eventually. The Respondent instituted a civil suit for the recovery of the said sum. One doubts whether the Appellant considered the matter to be important for it appears their inaction was merely an act of temporizing the case. They did not take care in handling the matter. Therefore, in the absence of such interventions as provided in section 10 of Cap 405, and in the circumstances of this case, it is doubtful any bona fide triable issue could legitimately be claimed by the insurer.

21. In conclusion, I note the appellants attributed the delay herein to mistake of their advocate. Although the advocate admitted having misplaced the file and termed it an honest mistake on her part, the attitude and inaction by the Appellant negate any bona fides on the appellant. Furthermore, whereas this appeal is hinged on right to be heard, the omissions by the Appellant and their counsel have not been explained to the satisfaction of the court. The Appellant may be using the court process to delay this case; something that justice abhors. Therefore, setting aside of the judgment herein will cause extreme injustice and prejudice to the Respondent. Accordingly, the trial court exercised her discretion properly in dismissing the application herein.

22. In the upshot, I find the appeal herein to be without merit and is dismissed.

23. Each party to bear its own costs.

Dated and signed at Meru this 7th day of November, 2019

F.M GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 14th day of November 2019

L. NJUGUNA

JUDGE