REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 60 OF 2016

TITO MMBWANGA MAMBO.....APPELANT

VERSUS

FLORENCE MUNZE SHILISIA.....RESPONDENT

(Appeal from judgement of Hon.Oruo Resident Magistrate in Webuye PM

Civil Case No.54 of 2012 dated on 9/8/2016)

JUDGMENT

In this appeal, the appellant (formerly defendant) has appealed to this court against the Ruling of the Hon. Nancy Baraza in Senior Principal Magistrate Court Webuye civil case number 192 of 2017 in her ruling delivered on 12/02/2019 the learned trial magistrate dismissed the appellant's application to set aside an ex- parte judgment in which he had made an order of payment of Kshs.250,000/= in favour of the Respondent (formerly plaintiff).

The claim by plaintiff/Respondent set in the plaint dated 26/9/2017 the respondent sued the appellant in which he pleaded refund of Kshs.250,000/= together with the accrued interest thereon arising from and friendly loan. The appellant filed defence dated 3/11/2017 denying the claim and stated the money was deposited in his account and it was a refund of money he had advanced the plaintiff/Respondent for purposes of facilitating a bribe for recruitment of plaintiff's son to the military.

During hearing on the 3/7/2018 application for adjournment was made by Respondent but the same was declined and the respondent proceeded with the matter he testified but called no witness and thereafter and the trial magistrate entered exparte judgement on the 18/9/2018 against the defendant for Kshs.250,000/=.

Subsequently the defendant/Appellant herein proceeded to file an application dated 3rd October 2018 to set aside exparte judgment but the same was dismissed by Hon. Baraza Nancy by ruling delivered on 12/2/2019 in Webuye SRMC no.92 of 2017.

The appellant herein being dissatisfied with the ruling and orders appealed to this court on the following grounds;

> ***i. That the Learned Magistrate erred in law and fact in not properly evaluating principles governing setting aside of exparte judgement***
>
> ***ii. That the Learned Magistrate erred in law and fact in stating that the orders subject to the application were issued on 3/7/2018 hence took 3 months to file the application yet judgement was actually delivered on 18/9/2018 and application was filed on 3/10/2018.***
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> ***iii. That the learned magistrate erred in law and fact in introducing speculative evidence in her ruling and her decision was flawed, erroneous and infeasible and has resulted in miscarriage of justice.***
>
> ***iv. That the learned magistrate erred in law and fact by failing to exercise her discretion judicially.***

By consent of the parties the appeal was canvassed by way of written submission. Advocate Shitsama for the appellant submitted that the discretion to enter ex parte judgement should be exercised judicially relying on case of ***Smith Vs Middletone (1972) SC 30.*** Mr. Shitsama submitted that trial magistrate relied on speculative evidence to dismiss the application which was an error in law.

He submitted that when that when the matter came up for hearing the appellant sought adjournment on grounds raised on record and it was 1st time the matter was coming up for hearing and therefore the mistake of advocate should not be visited on his client. He submitted that the defence raised triable issues which can only be proved if the matter proceed to full hearing relying on case of ***Tree Shade Motor Limited***

He submitted that the appellant offered a candid and frank explanation as to why he was not present I court and the appellant gave sufficient reasons to have allowed the application to set aside the exparte judgement. He urged this court to proceed and allow the appeal. The respondent submitted through his advocate Mr.Juma, he submitted that in applying the principles to set aside exparte judgment in the instant appeal this court should consider why the appellant and his advocate failed to attend court on material day of hearing.

He submitted that he who alleges must prove and that counsel on record for the appellant being held up in another matter was never proved as no cause list was produced nor annexed to the application.

He submitted that the issue of appellant advocate was sick on hearing date was not proved too as the sick sheet showed appellant advocate had been sick on the previous date.

He submitted that there is no sufficient cause as to why appellant failed to attend hearing on due date and this court should find that the appellant has failed to substantiate the ground of appeal. I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issue for determination in this appeal is whether this court should set aside the exparte judgement entered on the 18/09/2018.

The principles of setting aside ex-parte judgments have been enunciated in several leading authorities. In the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Sir Duffus stated as follows:

> ***"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it "a triable issue" that is, an issue which raises a prima facie defence and which should go to trial for adjudication"***

Applying the above principles to the instant appeal, it is necessary to find out whether there are valid reasons for the appellant's failure to attend court on the hearing date. In his application to set aside the ex-parte judgment the appellant stated that on material date for hearing he sought an adjournment on ground that the Advocate on record was sick and secondly the advocate was engaged in another matter in **HCC. No 128 of 2013** but the adjournment was declined and the matter proceeded to hearing and on close of respondent's case exparte judgment was entered. He also states that he has a good defence with triable issues that can only be determined after full hearing.

Courts involved in adjudication processes should be slow to visit the mistake of the advocate on his client. I have looked at the Defence and I note that the appellant raises fundamental issues that can only be determined during full hearing that is whether the money received was a debt or refund. The right to a fair hearing is one of the fundamental rights enshrined in Article 50 of the Constitution of Kenya. This right should be available to everyone who seeks to have their disputes resolved within the justice system, and where the defendant has demonstrated that he needs to defend, he should be allowed, within the set procedures to do so.

My analysis of the facts and the law lead me to the conclusion that the trial magistrate did not exercise his discretion judicially. I therefore allow the appeal and set aside the judgment entered in favour of the respondent together with all consequential orders thereto. I substitute it with an order that the suit be set down for hearing within sixty days from date herein and the appellant to pay the respondent throw away costs that is to be agreed between the parties and if they fail to agree on the costs payable the same to be determined by trial court.

I so order.

Dated and **Delivered** at **BUNGOMA** this 6th **day of** November, **2019.**

S.N. RIECHI

JUDGE.