



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 534 OF 2018

(CORAM: F. GIKONYO J.)

ALLAN MUSEVE.....APPELLANT

VERSUS

ALFRED MUEMA MWANZIA.....RESPONDENT

(An Appeal from the judgment of the Hon. M. Chesang, RM, delivered on 12th May 2015 in Milimani CMCCC NO. 6076 of 2013)

JUDGMENT

1. This appeal raises quite interesting arguments as it shall emerge later. The primary suit is NBI CMCCC No. 6076 of 2013 filed by the respondent against the appellants for general damages, future medical expenses, costs of the suit and interest. On 12th May 2015 interlocutory judgment was entered against the Appellant. Subsequently, final judgment was entered against the Appellant and in favour of the respondent as follows:-

a. Liability.....100%

b. Special damages.....Kshs. 114,747

c. General Damages.....Kshs. 1,000,000

d. Interest at 12% p.a from 30/9/13- 31/8/15.....Kshs. 254,345

TOTAL.....Kshs. 1,369,092

e. Cost plus interest at court rates

2. The appellant being aggrieved by the decision filed this appeal and raised nine grounds of appeal which challenge the entire judgment of the trial magistrate. The memorandum of appeal as filed has however elicited stiff objection from the Respondent. The objection shall be discussed fully and determined as such.

Some important facts

3. After judgment was entered, the appellants filed a notice of Motion dated 5th October 2017 seeking a stay of execution and leave to file defence out of time. The application was allowed by the trial court in a Ruling dated 21st February 2018 on condition that the Appellant deposits the decretal sum in court within 30 days. The appellant did not comply with the Orders but instead filed Miscellaneous Application No. 259 of 2018 dated 11th April 2018 seeking interim stay of execution of the lower courts, Orders given on 21st February 2018 and leave to file an appeal out of time against the said orders.

4. In a Ruling dated 6th November 2018 made in the miscellaneous application, this Court granted the appellant the Orders sought in his application dated 11th April 2018. In more specific terms, the Court ordered as follows;

Stay of execution of the lower Court decree and Order of 21st February 2018 be and is hereby granted on condition that the appellant deposits a sum of Kshs. 50,000/= as security for costs only within 30 days from this Ruling.

Memorandum of appeal be deemed as filed provided that he pays the filing fees from 6th November 2018.

5. The appellant filed its memorandum of appeal on 9th November 2018 setting out the specific grounds of appeal in respect of the judgment and decree of the trial Court dated 12th May 2015 and as well as the subsequent Orders dated 12th February 2018.

Respondent's quarrel

6. The Respondent has fastened a quarrel with the manner the memorandum of appeal was couched. According to the Respondent, the appeal as filed goes against the directions and Orders issued by the Court in miscellaneous application No. 259 of 2018. The Respondent stated that the prayers sought by the appellant were specific; leave to file appeal against the trial Court's Ruling dated 21st February 2018. But, the appeal herein is against the judgment of the trial court dated 12th May 2015 of which leave has not been granted.

Appellant: appeal is proper

7. The appellant defended the memorandum of appeal filed herein. It was argued that the memorandum was filed pursuant to the Ruling dated 11th April 2018 in which this court admitted the memorandum of appeal as duly filed. According to the appellant, the order of the High Court allowed the appellant to contest the entire judgment and decree delivered on 12th May 2015.

Command to serve substantive justice

8. The arguments by the Respondent attempting to limit this Court to considering only the appeal against the Order of the trial Court dated 21st February 2018 sound to be quite attractive. I fathom the basis for their argument is that the Miscellaneous Application No.259 of 2018 only sought leave to file appeal against the orders dated 21st February 2018. However, upon consideration of all factors, the court deemed the memorandum of appeal thereto as duly filed subject only to payment of court fees. The memorandum of appeal was accordingly filed on 9th November 2018. Therefore, the ruling of 6th November 2018 on the application dated 11th April 2018 left a lot of room for the appellant. That notwithstanding, the question is whether the restriction such as the one being proposed by the Respondent abides by the court's constitutional calling to serve substantive justice in article 159 of the Constitution.

9. In the realm of substantive justice, the approach being proposed by the Respondent is like serving meager pinches of bird seed instead of a substantial meal. The constitutional command is to serve substantive justice. When this constitutional reality is coupled with the order by the court in which the memorandum of appeal was deemed to be duly filed subject to payment of court fee, it becomes clear that it will not profit administration of justice to restrict the appeal to the order of 21st February 2018. The proper approach is to consider the entire record of the trial court; the interlocutory and final judgment as well as the order of 21st February 2018.

10. Be that as it may, the cardinal point in the appeal is right to be heard. The court has unfettered discretion to set aside default judgment. Except, in the words of Harris J., in the case of **SHAH v MGOGO & ANOTHER (1976) EA**, 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”.

11. See also the Court of Appeal in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** that:

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

12. I will apply the test of the law to the facts of the case. The trial court allowed the Appellant to defend the suit but on condition which was onerous in the circumstances of the case. The requirement that the Appellant deposits the decretal sum in court as a condition for leave to file a defence was inimical to clogging and denial of the right to fair hearing and access to justice. If such was to be the policy of court, it would only help to stifle litigation. The Appellant has raised triable issues worth trial. I therefore, set aside the entire judgment of the trial court as well as the orders of 21st February 2018. I allow the Appellant to file a defence within 14 days of today and serve it in accordance with the laid down procedure. In the circumstances of this case, I do not see any prejudice to the Respondent.

13. But, given the conduct of the Appellant, I order that the Appellant will bear costs of this appeal as well as thrown away costs incurred in the proceedings in the trial court. It is so ordered.

Dated and signed at Meru on the 7th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 5th day of December 2019

L. NJUGUNA

JUDGE