



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 68 OF 2014**

**UAP PROVINCIAL INSURANCE COMPANY .....APPELLANT**

**VERSUS**

**ROA (Suing for and on behalf of RAA, a minor) ....RESPONDENT**

**(Being an appeal from the ruling and order of the Chief Magistrate's Court at Milimani by Hon. T.S Nchoe (Mr) SRM delivered on 20<sup>th</sup> February, 2014 in CMCC No. 1174 of 2013**

**JUDGMENT**

The respondent herein filed a suit against the appellant in the lower court claiming special damages of Ksh. 219,674/= being medical expenses incurred for the treatment of the minor named herein. The appellant was served with summons to enter appearance which was filed late but no defence was filed. An application to have the memorandum of appearance deemed as filed and leave to file a statement of defence was not allowed by the lower court.

Subsequently, the respondent applied and obtained interlocutory judgment against the appellant. The appellant applied to set aside the interlocutory judgment, which application was argued and dismissed by the lower court.

In a brief ruling dated 20<sup>th</sup> February, 2014 the lower court observed that, the main ground for failing to file the statement of defence within the prescribed time was that the appellant was unable to trace the file. Guided by the authorities submitted, the application was deemed to be an abuse of the court process and dismissed with costs. It is that ruling that prompted this appeal.

The Memorandum of Appeal filed on 7<sup>th</sup> March, 2014 faulted the lower court for determining that, the appellant failed to advance reasons to warrant the court exercise its discretion to set aside the interlocutory judgment. The lower court was also faulted for failing to find the draft defence raised triable issues, and that the court failed to apply its mind judiciously to uphold the overriding objective, to facilitate the just and proportionate determination of the application.

Further, the lower court was criticised for failing to consider that any prejudice suffered by the respondent could be compensated by an award of costs, and that it failed to uphold the constitutional prescription that justice shall be administered without undue regard to procedural technicalities.

I am supposed to reconsider and evaluate the lower court record with a view to arriving at independent conclusions. In addressing the application to set aside the interlocutory judgment, the lower court was being asked to exercise its discretion, which has to be exercised considering the interests of all the parties to the dispute.

An appellate court should not interfere with the exercise of the discretion of the lower court, unless it is satisfied that the said interference is prompted by misdirection in some matter leading to a wrong decision. Other considerations are that, the exercise of that discretion resulted to injustice to the other party and that it is manifestly clear from the case as a whole, that the trial court was clearly wrong. – **Mbogo & Another Vs. Shah (1968) EA 93.**

The appellant admitted receipt of summons to enter appearance. This has not been contested by the respondent. The delay in lodging the memorandum of appearance was caused by non-availability of the court file. A letter written to the executive officer vindicates the appellant. It is common knowledge that, files are sometimes misplaced and documents may not be filed in time or at all. That is a systemic shortcoming that is beyond the parties that come before our courts. The admission by the appellant that indeed summons was acknowledged, enhances its credibility. It is also common knowledge that mistakes of this nature do occur.

I have asked myself, what prejudice if any shall be visited upon the respondent if the appellant is allowed to defend this claim. The decretal

sum has already been deposited in an internet earning account by an order of this court.

Whereas it is true that the judgment obtained by the respondent is valid, in the circumstances of this case, the draft defence to which the lower court's attention was drawn, raises triable issues which should be subjected to trial. A party who advances a defence, however weak, should be allowed its day in court. I agree that the omission on the part of the appellant could easily have been ameliorated by an award of costs.

I see no prejudice that shall befall the respondent if this appeal is allowed.

Accordingly this appeal is allowed. The lower court file shall be remitted for the validation of the Memorandum of Appearance and the filing of the appellant's defence to facilitate a hearing on merit. The respondent shall however have the costs occasioned by the inaction of the appellant.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> Day of December, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**