



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 286 OF 2009**

**MEENYE AND KIRIMA ADVOCATES..... APPELLANT**

**- V E R S U S -**

**CHRISTOPHER NDUNG’U.....RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate’s Court, Nairobi Milimani Commercial Courts, E. N. Maina (Miss) SPM dated 15<sup>th</sup> May, 2009 in CMCC No. 5281 of 2007.)*

**JUDGEMENT**

1) Christopher Ndung’u the respondent herein, filed a claim against Meenye & Kirima Advocates, the appellant herein, for a sum of kshs.115,000/= on account of a cheque which was issued by the appellant that was dishonoured upon presentation at the bank. The case was heard, but the appellant did not attend the hearing. In the end, Hon. Maina, the learned Senior Principal Magistrate, entered judgement in favour of the respondent for the claimed sums. The appellant thereafter filed the chamber summons dated 17/03/2009 in which it sought to set aside the trial magistrate’s judgment. The gist of the appellant’s application was that the case was heard in its absence because he had not been informed of the hearing date by his advocates. That it only became aware of the judgment and decree when auctioneers moved in to execute. The application was dismissed on 14/05/2009.

2) Aggrieved by the dismissal order, the appellant preferred this appeal and raised the following grounds of appeal in its memorandum:

***1. The learned magistrate erred in law and in fact in dismissing the appellant’s application 17<sup>th</sup> March 2009 with costs.***

***2. The trial magistrate erred in failing to appreciate that the appellant failure to attend court for the hearing of the suit was not deliberate but was solely caused by the appellant’s then advocates on record who failed to inform the appellant the date when the case was due for hearing and further refused and or failed to attend court on the date of the hearing.***

***3. The learned magistrate erred in law and in fact by failing to exercise her discretion judiciously and in the interest of justice and fairness.***

***4. The learned magistrate erred in law and in fact by failing to appreciate that the appellant had an arguable defence on record and that he was entitled to an opportunity to raise his defence in a full hearing of the suit.***

***5. The learned magistrate erred in law in failing to appreciate that no prejudice would have been***

*occasioned to the respondent if the appellant's application had been allowed and the judgment in consequence of non-attendance set aside.*

3) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and also considered the rival written submissions.

4. The appellant submits that there are set guidelines which the courts consider in applications to set aside an ex-parte judgment. First, whether the trial magistrate considered all the facts, circumstances of the matters and the merits of the parties in dismissing the application to set aside. Secondly, whether the learned magistrate considered the defence on record. Thirdly, whether the plaintiff can be compensated with costs for the delay occasioned. Fourthly, was it reasonable and just in the circumstances to allow the application to set aside the ex-parte judgment! The appellant cited the case of **Pithon Waweru Maina – vs- Thuka Mugiria (1983) eKLR**, which restated the factors to be considered in determining an application for setting aside an ex parte judgement.

5) The appellant submits that the learned trial magistrate failed to consider all the factors that ought to have been taken in account in exercise of her discretion.

6) The respondent on the other hand submits that the trial magistrate exercised her discretion judiciously in dismissing the appellant's application to set aside the exparte judgement. The respondent cited the case of **Mbogo & Another –vs- Shah (1968) EA 93** where the court held inter alia that:

**“a court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in exercise of his discretion.”**

It is the respondent's submission that the appeal lacks merit.

7) The appellant during trial stated that they have an arguable defence on record which raises triable issues and they should be given an opportunity to defend the suit, which is in the interest of justice. It also stated that they are innocent victims of the omission or negligence of their former advocates. The respondent during trial stated that without hearing the appellants former advocates on the allegations made against them, the allegations remain unsafe to be relied upon by the court to grant the dismissal orders sought.

8) The trial magistrate ruling read in part as follow:

**“I have considered the application and submissions of counsel. I also appreciate that this court has unfettered discretion to set aside an exparte application. I am not satisfied that the defendant/applicant has satisfied the condition for exercise of this courts discretion in his favour. It is no longer an excuse to heap blame one one's advocate. The applicant is a firm of advocates which ought to have known better than to sit back without bothering to find out how their case against it was entered on 2/9/2008 and it was not until 17/3/2009 about 5 months later that this application was filed. Equity does not aid the indolent and clearly this application has no merit. Accordingly I dismiss it with costs to the plaintiff/respondent.”**

9) I have re-evaluated the arguments made before the trial court. It was submitted by the appellant that it was not notified by its advocate of the hearing date and that is why it failed to attend court. In response to this argument the respondent stated that there was need to interrogate the firm of Mwiti & Co. Advocates which represented the appellant to determine the veracity of the assertion. The trial magistrate formed the opinion that the client (appellant) should be left to suffer for the mistakes of its advocate. I think the learned senior principal magistrate fell into error. In the circumstances of this case the appellant gave, plausible explanation for its failure to attend court therefore it should not have been allowed to suffer for the mistakes of its advocate.

10) In the end, I find merit in this appeal. It is allowed.

Consequently the order dismissing the summons dated 17.3.2009 is set aside and is substituted with an order allowing the summons in terms of prayer 3. In the circumstances of this case it is only fair that costs of the appeal assessed at ksh.20,000/= and for the summons before the trial court assessed at 10,000/= be paid to the respondents.

11) The suit to be heard afresh by another magistrate of competent jurisdiction other than Hon. E. Maina on priority basis and within a period of 90 days from the date hereof

Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of February, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent