



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 80 OF 2017

MAERSK (K) LIMITED.....1ST APPELLANT

MAERSK LOGISTICS LIMITED.....2ND APPELLANT

VERSUS

PRAFULA ENTERPRISES LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC NO.316 of 2008

delivered by Hon. J.Ngarngar (MR.) (CM) on 15.11.17)

JUDGEMENT

1. PRAFULA ENTERPRISES LIMITED (*hereinafter referred to as respondent*) sued MAERSK (K) LIMITED and MAERSK LOGISTICS LIMITED (*hereinafter referred to as appellants*) in the lower court, claiming USD 18,452.29 equivalent to Kshs. 354,680/- for services rendered during the years 2004-2005.

2. The defendants/appellants filed a statement of Defence and denied the claim and urged the court to dismiss it with costs

PLAINTIFF/RESPONDENT'S CASE

3. The first witness for the plaintiff/respondent testified on 9.2.10 and was cross-examined by the defendants'/appellants' counsel. The 2nd witness for the plaintiff/respondent testified on 7.10.14 in the absence of defendants'/appellants' counsel.

4. By a judgment dated 31.5.17, judgment was entered for the plaintiff/respondent as against the defendants/appellants as was prayed in the plaint.

5. By a Notice of Motion dated 2.10.17, the defendants/respondents sought orders to set aside the judgment and they be allowed to tender their defence.

6. By a Ruling dated **15.11.17**, the Notice of Motion dated 2.10.17 was dismissed with costs to the plaintiff/respondent.

The Appeal

7. The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 24.11.17 which set out 5 grounds of appeal which I have summarized into 3 grounds to wit:

1. The learned trial magistrate erred in law and fact by failing to find that the Notice of Motion application dated 24.7.13 by the firm of M/s Auta Nyakundi & Company Advocates to cease acting for the defendants/appellants was not served upon the defendants/appellants

2. The learned trial magistrate erred in law and fact by denying the defendants/appellants a hearing

3. The learned trial magistrate erred in law and fact by failing to consider the defendants/appellants defence

SUBMISSIONS BY THE PARTIES

8. On 10th April, 2018, the court directed that the appeal be canvassed by way of written submission which the parties dutifully filed.

Appellant's submissions

9. It is the Appellants' case that they were not served with the Notice of Motion application dated 24.7.13 by the firm of M/s Auta Nyakundi & Company Advocates seeking leave to cease acting for them. It was also submitted that the mistake of their advocate ought not to have been visited on them by denying them a chance to present their defence. Appellants placed reliance on the following authorities:-

- i. Order 9 Rule 13 of the Civil Procedure Rules**
- ii. Eunice Wairimu Muturi & another v Ruth Nyambura Chuchu & 2 others [2013] eKLR**
- iii. Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd [2005] eKLR**
- iv. Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR**
- v. Gold Lida Limited v NIC Bank Limited & 2 others [2018] eKLR**
- vi. Belinda Murai & Others Vs Amoi Wainaina (1978),**
- vii. Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR**
- viii. Patel v Nalemu (HCT-04-CV-CA-0066-2012) [2015] UGHCCD 57**
- ix. Mary Kyamulabi versus Ahamad Zirondomu 1980 HCB 11**
- x. Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193**

Respondent's submissions

10. Respondent holds the view that the trial court was satisfied that the appellants had been served with the Notice of Motion application dated 24.7.13 by the firm of M/s Auta Nyakundi & Company Advocates seeking to cease acting for the appellants and further that appellants were subsequently served with notices to attend the hearing which they failed to honour. The respondent urged the court to find that the defence did not sufficiently answer to the plaintiff's case which was not controverted. Respondent placed reliance on the following authorities:-

- i. David Kahuruka Gitau & Another v Nancy Ann Wathithi Gitau & Another [2016] eKLR**
- ii. Eunice Wairimu Muturi & another v Ruth Nyambura Chuchu & 2 others (Supra)**
- iii. ERF Kenya Limited v Bustrack Limited & Another [2005] eKLR**
- iv. Equitorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 others [2014] eKLR**
- v. CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978]eKLR**
- vi. Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007 Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**
- vii. Interchemie E. A. Limited v Nakuru Veterinary Centre Limited[2001] eKLR**
- viii. Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR**

Analysis and Determination

11. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See ***David Kahuruka Gitau & Another v Nancy Ann Wathithi Gitau & Another (Supra)***). It then behooves this court to summarize the evidence that was tendered before the trial court.

12. In determining this appeal, I will consider two main issues.

- a. Evidence relating to service of the Notice of Motion application dated 24.7.13 by the firm of M/s Auta Nyakundi &**

Company Advocates to cease acting for the appellants

b. Service of the hearing notice for 7.10.14 when the respondent's case was heard in the absence of appellants' representative

13. As regards notice of application by an advocate to cease action for a party, Order 9 of the Civil Procedure Rules provides as follows:-

13. (1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has —

(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order;

and

(b) procured the order to be entered in the appropriate court; and

(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal

14. The Notice of Motion application dated 24.7.13 by the firm of M/s Auta Nyakundi & Company Advocates to cease acting for the appellants was allowed on 10.9.13. The proceedings of that day read as follows:

- Mr. Mungai holding brief for Mr. Otieno for the plaintiff

- Nyakundi & Co. Advocates for the defendant absent

Ms. Mungai:- There is an application by the firm of Nyakundi to cease acting. We have no objection.

ORDER: - The application dated 24/7/13 is allowed as prayed.

15. It is apparent from the proceedings of 10.9.13 that the firm of M/s Auta Nyakundi & Company Advocates was not represented in court when their application dated 24.7.13 to cease acting for the appellants was allowed. The record shows that the application was prosecuted by the respondent's counsel. The court file does not contain evidence in the form of an affidavit of service, or otherwise, to the effect that the application had been duly served.

16. The only requirement for an Advocate wishing to withdraw from acting in the provisions is to give notice to all affected parties. (See *Eunice Wairimu Muturi & another v Ruth Nyambura Chuchu & 2 others (Supra)*). The court trial court's record shows that the court did not make an inquiry concerning the service on the appellants of the application by their advocate to cease acting for them. In the absence of evidence that the appellants had been with that the application, the order by the trial court that the firm of M/s Auta Nyakundi & Company Advocates had ceased acting for the appellants was of no consequence. Consequently, the firm of M/s Auta Nyakundi & Company Advocates was considered the advocate of the appellant in this matter until when the firm of Meritad Law Africa LLP came on record on 3.10.17.

17. With reference to service of the hearing notice for 7.10.14 when the respondent's case was heard in the absence of appellants' representative, the respondent placed reliance on a replying affidavit of Mitchell J.B.Menezes dated 6.10.17 which is at page 72 to 77 of the record of appeal. The affidavit gives the chronology of events from the filing and conclusion of this case.

18. Paragraph 17 of that affidavit which is relevant to the hearing of 17.10.14 states as follows:

“THAT I prepared a hearing notice dated 12.9.14 fixing the matter for hearing on 7.10.14 and served the same upon the advocates for the defendants. (Annexed hereto and marked MJNM-11 is a copy of the affidavit of service).”

19. The affidavit of service marked *MJNM-11* at paragraph 3 refers to copies of Registered Post Receipts and Covering Letter by which the hearing notice dated 12.9.14 was allegedly served on the first appellant.

20. I have perused both the lower court file and this appeal file and I did not see any Registered Post Receipts and Covering Letter addressed to the first appellant. The respondent has therefore not demonstrated the existence of a hearing notice dated 12.9.14 fixing the matter for hearing on 7.10.14 nor service of the same. And even if the hearing notice had been served on the 1st appellant, it should be noted, as stated hereinabove, that the firm of M/s Auta Nyakundi & Company Advocates was still the advocate on record for the appellants and the respondent's advocate's firm had an obligation to serve the said firm of M/s Auta Nyakundi & Company Advocates which it failed to do. And even if the appellant's advocate had been served with a hearing notice, the advocate's failure to appear should not have been visited on the appellants by closing the door of justice to their face. (See **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd; Philip Keipto Chemwolo & another v Augustine Kubende; Gold Lida Limited v Nic Bank Limited & 2 others; Patel v**

Nalemu; Mary Kyamulabi versus Ahamad Zirondomu and Belinda Murai & Others v Amoi Wainaina (Supra).

21. *The decisions in ERF Kenya Limited v Bustrack Limited & Another; Equitorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 others; CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd); Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No. 68 of 2007 Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No. 68 of 2007 and Interchemie E. A. Limited v Nakuru Veterinary Centre Limited (Supra) are distinguishable from this case. The appellants did not get a chance to defend themselves and their defence cannot be said to be a sham until it has been tested by the trial court.*

22. I have considered the case of ***Simon Thuo Mwangi v Unga Feeds Limited (Supra)*** and I am satisfied that the appellants had made out a good case for setting aside of the judgment entered on 31.5.17. The trial court, on the good grounds and reasons advanced, ought to have exercised a judicial discretion to set aside the judgment for the sake of justice and fairness in the case.

23. Having said that, I am satisfied that the proceedings of 7.10.14 and subsequent proceedings were irregular for want of service of a hearing notice on the appellants' advocate on record or even on the appellants.

Disposition

24. In view of the findings I have made, the appeal succeeds. The Order **made on 15.11.17 is set aside and substituted with an order allowing the application dated 2nd October, 2017 in terms of prayers number (3) and (4).**

25. **This matter shall be mentioned before Chief Magistrate's Court in Kisumu on 24th October, 2018 for directions as to hearing.**

26. **Each part shall bear its own costs. It is so ordered.**

DATED AND SIGNED AT KISUMU THIS 4th DAY OF *October*, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellants -Mr. Okeyo h/b for Mr. Wanda instructed by M/s. Meritad Law Africa LLP

For Respondent - N/A