



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.385 OF 2013

GOVINDA & SONS (K) LIMITED.....APPELLANT

-VERSUS-

PETER MALUKI KIEMA.....RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court

at Milimani Commercial Courts, Nairobi delivered on the 4th July 2013

by the Honourable Senior Principal Magistrate W.F. (Mr. Andayi)

JUDGMENT

The Respondent who was the plaintiff in the matter before the trial court filed a plaint dated the 28th day of January, 2010 in which he sought damages against the Appellant, following an accident that occurred on the 14th day of July 2008 while the Respondent was in the course of his employment at the Appellant's place of work.

The matter proceeded ex parte, interlocutory judgment having been entered against the Appellant for failure to file appearance and defence to the claim within the stipulated time and a judgment was delivered on the 21st February, 2013, in which the Appellant was found 100% liable for the accident and a sum of Kshs.203,000 was awarded to the Respondent plus the costs of the suit.

On 18th April, 2013, the Appellant received a letter dated the 21st March 2013 from the Respondent's Advocate informing it of the said judgment following which, it quickly filed the Notice of Motion dated the 24th day of April, 2013, seeking an order for stay of execution of the judgment entered on the 21st February, 2013, an order setting aside the said judgment and leave to defend the suit.

The Application was made on the grounds that; the Appellant had instructed its insurers to take over the conduct of the matter and file an appearance and a defence but that was not done, that; the Appellant acted diligently in the circumstances as it was never notified that no appearance or defence was filed, that it has a good defence to the claim which raises triable issues and sought to be given a chance to be heard on merits.

In the affidavit in support of the said Notice of Motion sworn by Rame Shcndaria Govind Gorasia, on the 24th April, 2013 he depones that prior to receiving the letter dated the 21st March, 2013, the Appellant had forwarded the summons to enter appearance to its insurers – UAP Insurance company Limited to take over the conduct of the matter. That all along, the Appellant was not aware that its insurers had not entered appearance and defence otherwise, the Appellant would have instructed another counsel.

He averred that the Appellant acted diligently in the circumstances, as it was never notified that no action was taken by the Insurance company aforesaid. He prays that the inadvertence omission by the insurance company should not be meted out on it. He contends that the Appellant has a good defence to the claim that raises triable issues and ought to be given a chance to ventilate its case on merits.

The Respondent opposed the application by way of a Replying affidavit sworn by Peter Maluki Kiema, the Respondent herein, on 8th May, 2013, in which, it was averred that the application was fatally defective as the Respondent's advocates in the lower court were not properly on record as they did not seek the leave of the court to come on record after judgment had been delivered.

He deponed that since the Appellant was served with the summons, it was fully aware of the suit, yet it chose to take no action in the matter. He contended that the Appellant is guilty of laches by not responding to the claim which was served on it way back in February, 2010. That, it cannot purport to have served the Insurance with the suit papers without a follow up yet the insurance is not a party to the suit.

He averred that he should not be denied the fruits of his judgment as a result of omissions of the Appellant and a party who is not privy to the suit. He contends that the application is made to delay the conclusion of the suit which has already been finalized and that the court should not aid a litigant who deliberately seeks to delay the course of justice. He contends that the Appellant does not have a good defence to the Respondent's claim.

After hearing the application, the trial magistrate dismissed the same in a ruling delivered on the 4th day of July, 2013 and found that the Application was intended to delay the course of justice and that the Appellant has no good defence to the claim. He found no merits in the application.

The Appellant appealed against the said ruling and has listed five grounds of Appeal in its memorandum of appeal dated the 9th day of July, 2013 as follows:-

1. *That the learned trial Magistrate erred in law and in fact in failing to appreciate the triable issues raised in the Appellant's draft Defence and in allowing the Respondent's claim.*
2. *That the learned trial Magistrate erred in law and in fact in failing to appreciate the contention that the Defendant had diligently instructed its insurers to take over the conduct of the matter and file defence.*
3. *That the learned trial Magistrate erred in law and in fact in failing to appreciate the fact that the failure to enter appearance or file defence should not be visited upon the Defendant*
4. *That the learned trial Magistrate erred in law and in fact in finding that the Respondent was entitled to judgment in the sums entered against the Appellant as claimed in the Plaintiff.*
5. *That the learned trial Magistrate erred in law and in fact in holding that the Respondent was entitled to the costs of the suit payable by the Appellant.*

The Appeal proceeded by way of written submissions which the court has duly considered together with the grounds of Appeal.

After analyzing the evidence as above, I am of the view that the grounds of appeal can be collapsed into three main grounds listed as grounds 1 – 3 in the memorandum of Appeal.

On the first ground, Order 10 Rule 11 of the Civil Procedure Rules 2010 allows a court to set aside judgment which has been entered under that order, upon such terms as are just. An *ex parte* judgment can be irregular or regular, depending on whether summons to enter appearance were served upon the defendant. But even where summons were served, the court can still set aside the *ex parte* judgment if the defendant has a defence on merits. This was the holding of the court in the case of **Kanwal Sarjit Singh Dhirman Vs. Keshavji Jivraj Shah Civil Appal No. 33 of 2007** where the court of Appeal summarized the law on setting aside of interlocutory judgment as follows;

“where it is a regular judgment 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 merits does not mean a defence that must succeed, it means as SHERIDAN J. put it “triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication”

The Appellant submitted that there was a defence on merit which raises triable issues that ought to have been allowed to go to trial which included; whether a casual worker is a permanent employee within the meaning of the laws at the time and whether the Respondent was also to blame for the accident.

In his submissions, the Respondent contended that the draft defence annexed to the application to set aside the interlocutory judgment was a sham and composed of mere denials and in part, an admission. That, the Appellant did not take all precautionary measures to ensure that no negligence would occur on its part.

It was submitted that, the Appellant did not deny having been properly served with summons to enter appearance and that there is no evidence adduced to support the allegation that it instructed its insurer to take over the conduct of the matter. It was contended that the faults of the Appellant cannot be visited upon the Respondent and that in any event, it is the duty of the Appellant to file defence and not its insurer. That the Appellant neglected and slept on its right to defend itself in the claim against the Respondent.

It was further submitted that they failed to demonstrate that they were not liable for the injury sustained by the Respondent by failing to adduce any evidence to show that the Appellant had provided safety gears such as safety belts to its employees, and that is why, the learned magistrate found it 100% liable. That the Appeal is ill advised, bad in law, a delaying tactic that has succeeded in delaying the Respondent from enjoying the fruits of his judgment.

The court has looked at the draft defence. The Appellant has admitted that the Respondent was retained as a casual worker, on a day to day basis, but avers that he was not its employee. It has also been denied that an accident occurred on the 14th July 2008 and that the Respondent suffered injuries as alleged in the plaintiff. Further, in the alternative and without prejudice, the Appellant pleaded that if at all an accident occurred but which is denied, the same was a direct result of the negligence on the part of the Respondent and has set out the particulars of such negligence in paragraphs 7(a) – 7(d) of the draft defence.

In his ruling, the learned magistrate argued that the Appellant approbated and reprobated at the same time by admitting that the Respondent was not their employee and further by pleading that it was not aware of the accident leading to the suit and then stated that if the accident

occurred, the plaintiff was to blame. In the learned magistrate's view, the Respondent answered the question that the accident occurred and that he was not to blame for the accident and that he had proven his case on a balance of probability. The learned magistrate also found that the Appellant did not answer to the issue of providing the Respondent with a safe system of work.

In paragraph 3 of the defence, the Appellant admitted that the Respondent was a casual worker on a day to day basis. In paragraph 6, it has, on a without prejudice basis, pleaded contributory negligence on the part of the Respondent. What we have on record is the evidence of the Respondent which was not tested on cross-examination. In my view, the draft defence raises triable issues and especially because the Appellant pleaded contributory negligence on the part of the Respondent. It is only by taking the evidence of the Appellant that the court can be in a position to determine who was liable for the accident and if both parties were to blame, to what extent.

On why the Appellant failed to file appearance and defence within the time stipulated by the law, a letter dated the 23rd February, 2010 has been annexed to the affidavit in support of the application to set aside the interlocutory judgment. The Appellant admitted that it was served with summons to enter appearance but since it was insured, it forwarded the same to the insurers requesting them to appoint an advocate to enter appearance and defence on their behalf but the insurance failed to act.

It is trite that an insurance company has a duty to defend a suit brought against their insured under the principle of subrogation. I concur with the Respondent's submission that the Appellant ought to have followed up with their insurers to ensure that they acted on time, which was not done, but for the reason that the Appellant has a defence that raises triable issues, the court will allow the Appeal in the interest of justice. The ruling and order of the Chief Magistrate's Court Nairobi delivered on the 4th July, 2013 in CMCC No. 394/2010 is hereby set aside and it is substituted with an order allowing the application. The Appellant is hereby granted leave to defend the suit and the draft defence annexed to the affidavit in support of the application dated 24th April 2013, is hereby deemed as duly filed upon payment of the requisite fees.

Each party to bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 5th day of **November, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Appellant**

.....**For the Respondents**