REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 38 OF 2017

WAWERU PETER..................................APPELLANT

VERSUS

ROBERT NJOROGE CHEGE...........RESPONDENT

JUDGMENT

1. By a Plaint dated 07/12/2012, the Respondent sued the Appellant in *Githunguri PMCC No. 75 of 2012* for general and special damages sounding in the tort of negligence arising from an accident which occurred on 30/03/2010 in which the Respondent claimed he sustained bodily injuries that required hospitalization. The accident involved Motor Vehicle Registration Number KAB 853F ("Suit Motor Vehicle"). The Respondent was a passenger in the Suit Motor Vehicle when it was involved in a road traffic accident.

2. The Respondent claimed to have served the Appellant with the Summons and Plaint but the latter did not enter appearance or file a defence. Consequently, the Respondent's advocates requested for an interlocutory judgment. The same was entered on 11/06/2013. The case was fixed for formal proof which proceeded on 14/10/2013. Judgment was delivered on 04/11/2013. The Court awarded the Respondent general damages of Kshs. 600,000/- and special damages of Kshs. 52,909/- plus costs and interests.

3. The Respondent proceeded to execute the judgment. This prompted the Appellant, through his lawyers, Mburu Machua & Co. Advocates, to move to Court *vide* an application dated 17/12/2013 to seek stay of execution. The Appellant also prayed for the *ex parte* judgment to be set aside and to be allowed to defend the suit.

4. The Appellant was successful. In a ruling dated 07/07/2014, the Learned Trial Magistrate agreed to set aside the *ex parte* judgment on two conditions: first, the Appellant was required to file his Statement of Defence within seven (7) days of that judgment; and second, the Appellant was ordered to pay throw away costs to the Respondent assessed by the Court at Kshs. 15,000/- before the suit could be set down for hearing.

5. The Appellant complied with neither orders. The Appellant did not pay the costs as ordered. He also only filed his Statement of Defence on 01/09/2014 – more than fourty-six (46) days after the expiry of the time stipulated by the Court and without seeking extension by the Court.

6. On 15/09/2014, the Respondent approached the Court for orders that the Statement of Defence filed out of time be struck out and the *Ex parte* judgment be reinstated.

7. The Respondent's Application to reinstate the *ex parte* judgment was scheduled for hearing on 22/09/2014. Neither the Appellant nor his advocate showed up for the hearing. It proceeded *ex parte*. On 06/10/2014, the Learned Trial Magistrate allowed the Application. The *ex parte* judgment delivered on 04/11/2012 was reinstated.

8. Naturally, the Respondent moved, again, to execute the judgment.

9. Again, that stirred the Appellant to action. Confusingly, the Appellant brought an Objection application dated 07/11/2014 seeking for stay of execution and sale of good proclaimed in execution of the judgment. The Application is styled as "Objection Proceedings" under Order 22 Rule 51 of the Civil Procedure Rule on the basis that the proclaimed goods do not belong to the Appellant. In that Application, the Applicant/Objector is named as "Peter Kimani Waweru." The Application is filed through Njau Ngigi & Co. Advocates, the current advocates for the Appellants. In that Application, the said Peter Kimani Waweru claims that the Appellant (Waweru Peter) has no legal or equitable interests in the proclaimed properties.

10. The Objection Application was heard *inter partes* before the Learned Wambo E.O. on 12/11/14. The Application was dismissed with costs in a ruling dated 18/11/2014. On 24/11/2014, the Appellant filed and Application dated 21/11/2014 in which he sought the following three substantive prayers:

i. *"That the firm of Njau Ngigi & Co. Advocates be deemed as formally on record as advocates for the Applicant/Defendant/Judgment-Debtor herein in place of Mburu Machua & Co. Advocates.*

ii. *That this Honourable Court do stay execution of warrants of attachment issued on 15th October, 2014 and sale of Defendant/Judgment-Debtor properties pending hearing and determination of this Application.*

iii. *That the orders issued against Defendant/Judgment-Debtor on 6th October, 2014 be set aside.*

iv. *That the Defendant/Judgment-Debtor be allowed to file his Replying Affidavit out of time*."

11. This Application was opposed by the Respondent who filed two Affidavits in opposition. The Application was heard inter partes on 18/12/2014. A ruling was delivered on 06/01/2015. Other than prayer 2 (for orders that the firm of Njau Ngigi & Co. Advocates come on record for the Appellant), the Application was dismissed in whole. It is that decision that has prompted the present appeal.

12. The Appellant has filed a Memorandum of Appeal detailing eleven grounds of Appeal. As revealed in their Written Submissions, the grounds really amount to one: that the Appellant was a victim of the mistakes of his former lawyer; and that those mistakes should not be visited on him. In expounding on this argument, the Appellant has explained the importance of seeing this argument in light of the constitutional right to a fair hearing. To this extent, he has cited Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] eKLR.

13. The Appellant also cited Belinda Murai & Others v Amos Wainaina [1978] KLR 2782 where the Court of Appeal stated that a mistake is a mistake regardless of who commits it; and explained that the door to justice is not closed because a mistake has been committed by a lawyer who ought to know better. The Appellant similarly cited Philip Chemowolo v Augustine Kubede and Ghehona v SDA Church of East Africa Union [2013] eKLR.

14. Naturally, the Respondent has taken the opposite view: that the case represents a case where the mistakes made by the Appellant should not be excused as they are not mere technical omissions but impact on the process of justice. The Respondent cited with approval Anthony Raymond Cordeiro & 2 Others v Adrian Noel Carvalho & 5 Others (Milimani High Court, Commercial Division Civil Suit No. 627 of 2012). That case decried the attempts by advocates and litigants to rely on Article 159(2)(d) of the Constitution to cure all their failures to comply with rules of procedures and court orders.

15. The real question presented on this appeal is whether the Learned Trial Magistrate erred in refusing to exercise her discretion to set aside the ruling dated 06/10/2014 and allowing the Appellant to defend the Application by the Respondent to reinstate the *ex parte* judgment.

16. Like in the Court below, the Appellant chokes it up to mistakes of counsel which, he says, should be excused. The main argument is that he should be given his day in Court. The Court below rejected his argument for two reasons:

i. First, the Learned Trial Magistrate was not persuaded that the Appellant did not know or should not reasonably have known the conditions upon which the *ex parte* judgment was initially set aside. Hence, the Court applied the maxim that equity does not aid the indolent and reasoned that the Appellant ought to have found out what had happened to his case for the four-month hiatus between the filing of his initial application and the attachment.

ii. Second, the Learned Trial Magistrate invoked another maxim of equity: that he who comes to equity must do so with clean hands. In doing so, the Learned Magistrate found as a fact that the Appellant had originally misrepresented to the Court that he was not the owner of the Suit Motor Vehicle when he originally got the orders to set aside the *ex parte* judgment but that his tune changed in the application under consideration.

17. I have now considered the entire record as I am required to do. I have considered that my task as a first appellate Court is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

18. I have rehashed the history and procedural posture of this case in detail in part to demonstrate the extent to which the Appellant and/or his lawyer failed to take action at various points in time in order to determine if he was entitled to the orders he sought from the Learned Trial Magistrate in the circumstances. The procedural history shows the following:

i. The Appellant failed to enter appearance to the suit. He claimed he was not served with summons and Plaint and was permitted to defend the suit.

ii. The Appellant was favoured by the Court ruling of xxxxx in which the Learned Magistrate set aside the *ex parte* judgment so that he could defend the suit.

iii. The Appellant failed to adhere by the conditions set by the Court to set aside the judgment. In particular, the Appellant was to file a defence within seven days and pay the costs of the application. He did neither.

iv. The Appellant was aware that an *ex parte* judgment had been entered against him hence his decision to instruct a lawyer to set aside. It must be assumed that in the ordinary, prudent conduct of his affairs he must have found out from his lawyers what the outcome of his application to set aside the *ex parte* judgment was.

v. When the Appellant first became aware of the reinstatement of the *ex parte* judgment, his reaction was not to set aside but to file Objection Proceedings with a claim that the proclaimed goods in readiness for execution were not his properties. In doing so, the Appellant assumed a somewhat different name "Peter Kimani Waweru". The substance of that application was that "Waweru Peter" is a different individual than "Peter Kimani Waweru". The Appellant seems to have entirely dropped this line of argument in the present appeal.

vi. There is no clear explanation from the Appellant why he chose to initially present himself as an "innocent" Objector while he, in fact, knew he was the Defendant/Judgment-debtor in the matter.

vii. In the subsequent applications, the Appellant radically changed the position he held when he first asked the Court to set aside the *ex parte* judgment. Initially, his position was that the Suit Motor Vehicle did not belong to him. In the latest application that prompted this appeal, his story changed: the Suit Motor Vehicle does, in fact, belong to him but was registered in his name by his father. This basically means that the Appellant misrepresented to the Court the factual position in order to obtain setting aside orders.

viii. The Appellant did file a Statement of Defence albeit 46 days after the expiry of the time extended by the Court. As the Learned Magistrate correctly pointed out, this is an indication that the Appellant was aware of the conditions upon which the *ex parte* judgment was set aside.

ix. The *ex parte* judgement was set aside on 07/07/2014 following the Appellants' application dated 17/12/2013. It is inconceivable that the Appellant went to sleep immediately after instructing his lawyers to file an application to set aside the *ex parte* judgment and only awoke upon yet another proclamation of his goods three months later.

19. The history of this case even upon re-evaluation reveals quite unmistakably that the Learned Trial Magistrate did not err at all in her analysis and conclusion that the Appellant was not entitled to the Court's discretion one more time to defend the suit. The Learned Trial Magistrate was correct that:

i. There were enough tell-tale signs that the Appellant knew or could have known with the exercise of ordinary prudence and diligence expected of any litigant he was expected to take some action after he initially applied to set aside the *ex parte* judgment entered into on 04/11/2013 at his instance;

ii. There was sufficient evidence to suggest that the Appellant had not acted in good faith in his approach to the litigation. In particular, his unexplained attempt to come into the litigation as an "Objector" in a bid to thwart the execution of a lawful decree coupled with his mutating position on whether he was the owner of the Suit Motor Vehicle or not disentitled him to equitable relief from the Court.

20. The upshot of this analysis is that the proffered appeal is unmeritorious and must be dismissed. I hereby do so with costs to the Respondent.

21. Orders accordingly.

Delivered at Kiambu this 22nd day of November, 2018.

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JOEL NGUGI

JUDGE