REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 31 OF 2017

DERBY REGISTRARS LIMITED.....APPELLANT

VERSUS

KENYA NATIONAL ASSURANCE CO. (2001) LTD.....RESPONDENT

JUDGMENT

This appeal arises from a ruling that was delivered by Hon. C. Obulutsa, Ag. Chief Magistrate on 22nd July, 2014 in Milimani Commercial Court, PMCC No. 5957 of 2008, Kenya National Assurance Co.(2001)Ltd. *v* Derby Registrars Limited in which he declined to set aside an *ex-parte* judgment that he had entered in favour of the respondent herein against the appellant on 25th October, 2012.

By a plaint dated 22nd September, 2008 that was amended on 15th July, 2011, the respondent had sued the appellant in the lower court for a sum of Kshs. 221,673.95 being the outstanding rent and service charge as at 31st October, 2007 in respect of the premises that had been let by the respondent to the appellant at Protection House, Nairobi.

The appellant entered appearance and filed a statement of defence on 4th November, 2008 in which it admitted the existence of a tenancy agreement between it and the respondent but denied owing the respondent any rent or service charge. The appellant averred that as at the time its tenancy with the respondent came to an end, it had paid all rent and service charge due to the respondent. The appellant averred that it had overpaid the respondent and had filed a suit against the respondent namely, PMCC No. 9644 of 2005 with regard to the overpaid amount.

On 25th January, 2012, the respondent fixed the lower court case for hearing on 27th September, 2012. From the evidence on record, the advocates who were acting for the appellant, Muoki & Co. Advocates were served with a hearing notice. When the lower court case came up for hearing on 27th September, 2012 neither the appellant nor its advocates attended court and the lower court having satisfied itself that the appellant's advocates had been served with a hearing notice allowed the respondent to proceed with the hearing of the case, the absence of the appellant notwithstanding. The respondent called one witness and closed its case. In a judgment that was delivered on 25th October, 2012, the lower court found that there was uncontroverted evidence that as at 31st October 2007, the appellant owed the respondent a sum of Kshs. 193,654.95 as rent arrears. Following that finding, the lower court entered judgment for the respondent against the appellant in the aforesaid sum together with costs and interest.

On 23rd November, 2012, the respondent's advocates on record prepared a draft decree and forwarded the same to the advocates then on record for the appellant for approval. From the evidence on record, the letter forwarding the draft decree was received by the appellant's then advocates on 26th November, 2012. On 10th December, 2012, the respondent's advocates wrote to the executive officer of the lower court informing him that the appellant's advocates had not responded to their letter requesting for comment on the draft decree. The decree of the lower court was signed and sealed on 4th January, 2013. There is no evidence from the record that the respondent took any action to execute the decree.

On 22nd May, 2014, the appellant filed a Notice of Motion application of the same date in the lower court seeking an order for the setting aside of the judgment of the lower court that was delivered on 25th October, 2012 and for the case to be heard a fresh on merit. The application was brought on the grounds that the appellant was never informed of the hearing date by its advocates then on record, Muoki & Company Advocates as a consequence of which the hearing of the suit proceeded ex-parte in its absence. The appellant contended further that it had a good defence on record and should be given a chance to be heard.

The respondent opposed the application through grounds of opposition dated 29th May, 2015 in which it stated that failure by the appellant and its advocates then on record to appear in court on the hearing date had not been sufficiently explained. The respondent contended further that the application was filed after inordinate delay which delay was not explained. The respondent contended further that litigation must

come to an end and that it should not be punished for diligently prosecuting the suit.

The appellant's application was argued by way of written submissions. By a ruling delivered on 22nd July, 2014, the court dismissed the application as lacking in merit. The lower court found that there was no reasonable explanation advanced by the appellant as to why neither the appellant nor its advocates attended court for the hearing after they were served with a hearing notice. The lower court observed also that the appellant's advocates had been notified of the judgment of the court when a draft decree was sent to them for approval and they took no action. The court also noted that it had taken the appellant about 1 year and 7 months to file the application for setting aside the said judgment. The court observed that the delay in bringing the application was not explained. On the appellant's contention that there was another case between the same parties which should have been heard together with the suit in which the judgment aforesaid was delivered, the court noted that there was no order for the consolidation of the two cases. Relying on the case of Thrift Homes Limited *v* Kays Investments Ltd., Nairobi HCCC No. 1512 of 1998, the court agreed with the respondent that there was no general rule that errors made by advocates will always be excused.

It is this decision that gave rise to this appeal. The appellant challenged the decision of the lower court on the following grounds:

1. That the learned trial Magistrate erred in law and fact in dismissing the defendant's application dated 22nd May, 2014 on the basis that the defendant was fully aware of the judgment dated 25th October, 2012 when he knew or ought to have known that the defendant as a party became aware of the said judgment on 9th May, 2014 when investigators went to the defendant's office.

2. That the learned trial Magistrate erred in law and fact in holding that the defendant was aware of the judgment when he knew or ought to have known that the plaintiff did not file a replying affidavit to rebut the facts contained in the defendant's supporting affidavit dated 22nd May, 2014 and hence he arrived at a wrong conclusion.

3. That the learned trial Magistrate erred in law and fact in that he declined to set aside the *ex-parte* judgment when he knew or ought to have known that the failure to attend court was a mistake of an advocate, and that it was not fair and just to visit the mistake of an advocate on the party, and hence arrived at a wrong decision.

4. That the learned trial Magistrate erred in law and fact in that he failed to consider all the evidence, documents produced and submissions by the defendant and thus arrived at a wrong conclusion.

5. That the learned trial Magistrate erred in law and fact in that by dismissing the defendant's application to set aside the ex-parte judgment, he condemned the defendant unheard contrary to the rules of natural justice.

6. That the said ruling is contrary to law and is not supported by evidence on record.

The appeal was argued by way of written submissions. The appellant filed its submissions on 13th December, 2017 while the respondent filed its submissions in reply on 18th April, 2018. The appellant submitted that contrary to the findings by the lower court, it gave detailed explanation for its failure to attend court on 27th September, 2012 for the hearing. The appellant submitted further that it filed the application to set aside the lower court judgment within 12 days from 9th May, 2014 when it became aware of the judgment through an investigator. The appellant argued that the court erred in its finding that there was inordinate delay in the filing of the application. The appellant cited the cases of Mwalia *v* Kenya Bureau of Standards (2001) 1 E.A 151, Jackson Biegon *v* Charles Too & 3 Others(2005)eKLR, Ceneast Airlines Limited *v* Kenya Shell Limited(200)2 E.A 362, Charles Chege Njoroge *v* Trans National Bank Ltd. (2006) eKLR, Githiaka *v* Nduriri(2004)2KLR 67 and Allen *v* Sir Alfred McAlpine & Sons Ltd (1968)1AllER 54 for the principles to be applied in applications for setting aside ex parte judgments. The appellant submitted that the court has unfettered discretion to set aside ex parte judgment and that the main concern of the court is to do justice to the parties. The appellant submitted that a mistake of an advocate should not be visited upon a litigant.

In its submissions in reply, the respondent submitted that an appellate court should only interfere with the exercise of discretion by the trial court in limited circumstances. In support of this submission, the respondent cited the case of Mbogo *v* Shah(1968)E.A 93. The respondent submitted that the appellant had not demonstrated that the lower court misdirected itself in any way or that it was wrong in exercising its discretion. The respondent submitted that the appellant had only raised factual issues that were considered by the lower court in arriving at its decision.

The respondent submitted that it was not in dispute that the appellant's advocates had been served with a hearing notice and that there was no affidavit from the appellant's previous advocates confirming the appellant's allegation that it was not informed of the hearing date. The respondent submitted that mere assertions as deposed in the supporting affidavit cannot suffice where the appellant was represented by an advocate who was duly served.

The respondent submitted that the appellant's advocates' absence was unexplained and the lower court could not just set aside a regular judgment. In support of this submission, the respondent relied on the case of J.G Builders *v* Plan International[2015]eKLR where the court stated that a case belongs to a litigant not to the advocate and that a litigant has a duty to pursue the prosecution of his case and to constantly check with his advocate on the progress of the case. The respondent argued that the appellant had lost interest in defending the suit as there was no evidence that it consulted its advocate on the progress of the matter. The respondent submitted that the appellant's lack of interest in the case explains the delay in the filing of the application which culminated in the decision the subject of this appeal. The respondent reiterated the holding in the case of Thrift Homes Ltd *v* Kays Investments Ltd Nairobi HCCC No. 1512 of 1998 where the court stated that there was no absolute principle that errors by advocates will always be excused and that in some cases, the litigant's remedy would be in pursuing damages for professional negligence against the advocate. The respondent submitted that it had not been shown that the lower court had exercised its discretion improperly and urged the court to dismiss the appeal.

Determination:

The only issue arising for determination in this appeal is whether the lower court exercised its discretion properly in refusing to set aside the *ex parte* judgment that was entered against the appellant on 25th October, 2012. I have carefully perused the record of appeal which contains the pleadings and the proceedings of the lower court. I have also considered the ruling the subject of the appeal and the grounds appeal put forward by the appellant. Finally, I have considered the submissions of counsel together with the authorities cited in support thereof. The appellant's application in the lower court should have been brought under Order 12 Rule 7 of the Civil Procedure Rules rather than Order 22 Rule 22 of the Civil Procedure Rules which was not relevant. Order 12 Rule 7 of the Civil Procedure Rules gives the court power to set aside judgment entered after a hearing in the absence of a party. The power is discretionary. Commenting on the exercise of that power the court in Patel *v* E. A. Cargo Handling Services Ltd. (1974) E. A. 75 stated that:

> **"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where there is a judgment……The court will not usually set aside judgment unless it is satisfied that there is a defence on merits. In this respect, the defence on the merits does not mean in my view, a defence that must succeed…… It's an issue which raises a prima facie defence and which should go to trial for adjudication."**

In the case of Mbogo *v* Shah (1968) E. A. 93, it was held that an appellate court would not interfere with the exercise of the trial court's discretion unless it is satisfied that the trial court misdirected itself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of its discretion and that as a result there has been a misjustice. See also, Patriotic Guards Ltd. *v* James Kipchirchir Sambu Nrb CA 20 of 2016 (2018) eKLR and Tana and Athi Rivers Development Authority *v* Jeremiah Kimigho Mwakio & 3 others Mbsa CA No. 41 of 2014 (2015) eKLR.

I am not persuaded that the lower court exercised its discretion wrongly. The lower court was called upon to set aside a regular judgment. The court considered the reasons why the appellant and its advocate failed to attend court for hearing. The court also considered why the application to set aside the judgment was brought after 1½ years from the date of judgment. Finally, the court considered whether in the circumstances, the alleged mistake of the appellant's previous advocates whom the appellant blamed for its failure to attend court could not be visited upon the appellant. After considering all these factors, the court was not satisfied that proper explanation had been given for the appellant's failure to attend court for the hearing and for the delay in filing the setting aside application. The appellant blamed its previous advocates for the judgement that was entered against it. I am of the view that parties cannot blame their advocates wholly for mistakes arising in the conduct of litigation. The litigants also have a responsibility to follow up their cases. In Donald O. Raballa *v* Judicial Service Commission & another (2018) eKLR, the Court of Appeal held that inaction by an advocate does not constitute excusable mistake. The court rendered itself as follows:

> **"But the circumstances disclosed in this case do not amount to a mistake of counsel but inaction after receiving instructions to act in the matter. In the case of Rajesh Rughani vs Fifty Investment Ltd. & Another (2005) eKLR this Court held:**
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> **"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".**
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> **Similarly in Bains Construction Co. Ltd. vs John Mzare Ogowe (2011) eKLR the court observed:**
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> **"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences".**

Due to the foregoing, I am satisfied that the lower court exercised its discretion properly in refusing to set aside the judgment that was entered against the appellant. The findings by the lower court that the appellant had not given reasonable explanation for its failure to attend court and for the delay in bringing the application to set aside the default judgment were not based on any misdirection and as such cannot be faulted.

In the final analysis and for the foregoing reasons, I find no merit in the appeal before the court. The appeal is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 24th day of January 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Obok h/b for Mr. Muriithi for the Appellant

N/A for the Respondent

Catherine-Court Assistant