REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 74 OF 2016

(FORMERLY CIVIL APPEAL NO. 480 OF 2014)

REAL MANAGEMENT SERVICES LIMITED.....1ST APPELLANT

AKSHRAP REAL ESTATE LIMITED.....2ND APPELLANT

=VERSUS=

INTERNATIONAL PARTNERSHIP SERVICES (E.A) LTD.....RESPONDENT

(being an Appeal from the Ruling of the Honourable S. Atambo (Ms)

delivered on 24th October 2014 in Nairobi CMCC No. 7241 of 2013

International Partnership Services (EA) Ltd vs Real management Services

Limited and Akshrap Real Estate Limited)

JUDGEMENT

1. The appellants, Real Management Services Limited and Akshrap Real Estate Limited (hereinafter referred to as **the "Appellants")** were aggrieved by the ruling and order of the Hon. S. Atambo (Ms) in Nairobi CMCC No. 724 of 2013. International Partnership Services (EA) Ltd vs Real Management Services and Akshrap Real Estate Limited. The said ruling was delivered on 24th October 2014.

2. The appellants have appealed against the said ruling on the following grounds:-

(1) That the learned Magistrate erred in law in failing to allow the appellants application by failing to consider that the appellant's defence raises triable issues which are apparent in the draft statement of defence and thereby breaching the principle of natural justice.

(2) That the learned magistrate erred in law and in fact in not considering whether the respondent was correct in serving orders of the court personally on the respondents while they had advocates on record.

(3) That the learned magistrate erred in law in finding that the appellant's advocates did not sufficiently explain the reason for the delay in filing their application despite the fact that the outcome of the application was served personally of the appellant's and not their advocates on record.

(4) That the learned magistrate erred in law and fact by visiting the mistake of the appellant's advocates on the appellants.

(5) That the learned magistrate erred in law and in fact in exercising her discretion by misdirecting herself and not considering the defence of the appellants and considering matters and/or facts which she should not have considered and/or by failing to take into consideration matters and/or which she should not have considered and/or failing to take into consideration matters and/or facts which she should have taken into consideration and in doing so arriving at a wrong decision.

(6) That the learned magistrate misdirected herself on issues of law and fact and therefore arriving at a wrong finding.

(7) That the decision of the learned magistrate erred by failing to evaluate the weight of evidence adduced before the court.

3. Together with the memorandum of appeal, the appellant filed a notice of motion dated 30th October 2014 seeking interim orders of stay of execution which were granted on 31st October 2014.

4. The brief facts are that by a plaint dated 18th November 2013, and filed in court on 19th November 2013, the respondent instituted a suit against the appellants in the Honourable subordinate court seeking the sum of Kshs.500,000, interest from May 2013 till payment in full and costs of the suit. The appellants filed their defence on 29th January 2014. By an application dated 6th May 2014 and filed in court on 7th May 2014, the respondent prayed for the Honourable subordinate court to enter judgment on admission against the appellants herein jointly and severally in the sum of Kshs.500,000/-. Subsequently on 11th June 2014 judgment was entered for the respondent by the honourable subordinate court against the appellants for the sum of Kshs.500,000 with costs and interest.

5. By an application dated and filed on 30th July 2014, the appellants prayed for stay of execution of the judgment and decree granted on 11th June 2014 and reinstatement of the application dated 6th May 2014 for hearing and determination on merit. By a ruling dated 24th October 2014 the learned magistrate dismissed the appellants' application dated 30th July 2014 with costs to the respondent.

6. On the 14th June 2018 the court directed that the appeal be canvassed by way of written submissions.

The appellants' submissions

7. The appellants were denied their inalienable right to be heard and therefore condemned unheard. They have a meritorious defence to the suit in Nairobi CMCC No. 7241 of 2013 and it is in their interest of justice that the appellants ought to be afforded an opportunity to defend the said claim and be heard on the merits. The honourable subordinate court failed to consider the fact that the appellants had a meritorious defence which raised triable issues and condemned them unheard by entering judgment on admission. They have put forward the cases of **Richard Nchapai Leiyangu vs IEBC & 2 others Nyeri Civil Appeal No. 18 of 2013; James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR; Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630**.

8. The honourable learned magistrate stated that the defence filed by the appellants raised no triable issues. The defence however raised triable issues which were not considered by the honourable subordinate court.

9. The respondent's application dated 6th May 2014 proceeded exparte on account of failure of the counsel appearing for the appellants to file the replying affidavit in time and to attend court on the date of the hearing. Counsel was able to demonstrate that it was due to failure to diarise the same which is an excusable mistake. The honourable learned magistrate failed to consider the explanation given by the appellants in their submissions which demonstrated the circumstances leading to the filing of the application. Her exercise of desertion was therefore not judicious and ought to be overturned by this honourable court. They have also put forward the cases of **Wachira Karani vs Bildad Wachira [2016] eKLR; Harrison Wanjohi Wambugu vs Felista Wairimu Chege; Sameer Africa Ltd vs Aggarawal & Sons Limited [2013] eKLR.**

10. They urge that the Appeal herein be found to be merited and be allowed with costs.

The Respondent's submissions

11. The burden of proving and or reasonably justifying to court why the appellants or their advocate did not attend court and did not file a replying affidavit by 11th June 2018 fell on the appellants. The trial court ought to consider the circumstances or alleged excuse for not attending court, evaluate the evidence presented before it to justify the non-attendance, exercise discretion judiciously based on the evidence before it and consider events prior to filing the application to set aside and the time taken before the appellants filed the application dated 30th July 2018 before rendering a ruling. They have put forward the case of **Chege Muraya vs Rehema Noor & Another Nakuru Civil Appeal No. 320 of 2010** which quoted with approval the case of **Belinda Mwai & Others vs Amos Wainaina [1979] Eklr**.

12. The appellant herein have failed to reasonably explain the reason for non attendance of court on the due date. No sufficient evidence was presented by the appellants to justify their application for non attendance of court. They have put forward the case of **The Hon. Attorney General vs the Law Society of Kenya Civil Appeal No. 133 of 2016**. This appeal is merely aimed at delaying the respondent from enjoying the fruits of its judgment.

13. The respondent has explained and justified why he served the orders issued by the subordinate court on the 11th June 2014 to the appellants personally. The appellants did not contest the issue of their receptionist declining to receive a court order by filing a further affidavit at the subordinate court to contest this issue. There was not irregularity or illegality in serving a court order to the appellants personally.

14. The appellants' defence does not rise triable issues. The defence consists of admissions. The respondent insisted that the appellants still owed them the balance of the contractual amount together with expenses arising from vacating from one godown to the other. The appellants admissions in paragraph 3 and 10 of the defence compelled the respondent to file the notice of motion dated 6th May 2014.

They pray that the appeal be dismissed with costs to the respondent.

15. I have considered the memorandum of appeal, the written submissions of counsel, the oral highlight and the authorities cited. The issues for determination are:-

(i) Whether in the application dated 30th July 2014 the appellants have reasonably justified their failure to attend court on 11th June 2014 and failure to file a replying affidavit thereto.

(ii) If so, whether the honourable learned magistrate exercised her discretion judiciously in declining to set aside the judgment and decree granted on 11th June 2014 for the suit to be heard interpartes on its merit.

(iii) Whether service of a court order issued on 27th June 2014 to the appellants personally on 30th June 2014 was regular and lawful.

(iv) Whether the honourable learned magistrate was justified in holding that the appellants statement of defence did not raise any triable issues worth going for trial.

(v) Who bears the costs of this appeal?

16. I have gone through the court record of the subordinate court. The respondent filed a notice of motion dated 6th May 2014 seeking against the defendant that judgment be entered in admission in the sum of Kshs.500,000/-. The same appears in pages 39 – 40 of the record of appeal). The said application came up on 11th June 2014. The same was allowed as it was unopposed. The record also shows that the appellants' advocates were not present despite being served. The said application was therefore allowed. Arising from the judgment and decree the appellants therefore filed the notice of motion dated 30th July 2018 (pages 52-54 of the record of appeal) seeking to set aside the judgment and decree granted on 11th June 2014 and to reinstate the notice of motion dated 6th May 2014 for hearing and determination interpartes. The same is supported by the affidavit of Sylvester Kibera Maina Advocate sworn on the 30th July 2014. He deposed in paragraph 4 thus:-

"That upon perusal of my office file I discovered that indeed the plaintiff's advocates had served my office with an application dated 6th May 2014 on 12th May 2014"

In paragraph 5 he states:-

"That I was surprised as I had no knowledge of the said application and upon looking at my diary I found that the same had not been indicated as is the norm upon service of an application or hearing notice. Annexed herewith and marked 'SKM2' is a copy of my diary for the week of 9th June 2014 to 13th June 2014 concerning the same".

17. The honourable learned magistrate considered the notice of motion dated 30th July 2014 and dismissed it with costs to the respondent. In the supporting affidavit to the notice of motion dated 30th July 2014, the advocate cited that office assistants failed to diarise the hearing date. I agree with counsel for the respondent's submissions that the said office assistant ought to have sworn affidavit to explain why he/she failed to diarise the hearing date. In the case of the **Attorney General vs the Law Society of Kenya Civil Appeal No.133 of 2011** it was held that:-

"Sufficient cause" or "good cause" in law means:-

"…the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused".

See Black Law Dictionary, 9th Edition, page 251.

"Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leave doubts in a judges mind. The explanation should not leave the unexplained gaps in the sequence of events"

I am of the view that the explanation given by the appellants at the time was not convincing. I find that the same explanation is not plausible owing to the absence of an affidavit from the office assistant who was supposed to diarise the matter. The honourable learned magistrate cannot therefore be faulted for rejecting this explanation.

18. In the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630 Visram J** (as he then was held):-

"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their case before a decision is given (as cited in Civil Case No 285 of 2010, Nilesh Premchand Mulji Shah & Another T/a Ketan Emporium vs M.D. Popat & Others [2016] eKLR".

It should be noted that the appellants herein were given an opportunity to defend the notice of motion dated 6th May 2014 but they failed to do so.

In the case **of Richard Nchapai Leiyangu vs IEBC & 2 Others** it was stated:

> ***"We agree with the noble principles which go further to establish that the court's discretion to set aside exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident in advertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice".***

19. I find that the honourable learned magistrate exercised her discretion judiciously in declining to set aside the judgment and decree granted on 11th June 2014. This is because no sufficient reasons have been placed before her in order to exercise discretion in favour of the appellants.

20. I have gone through the appellant's statement of defence dated 29th January 2014 (pages 49 – 50 of the record of appeal). Paragraph 10 of the said statement of defence provides that:-

> ***"The defendants aver that the plaintiff was refunded the sum of Kshs.1,190,000/- in full and final settlement and confirmed that he had no claims as against the defendant".***

21. It is the respondent's contention that at no time did it sign any disclaimer that the appellants did not owe him money. The respondent maintain that it was owned money by the appellants. I have gone through the said statement of defence and find that it rises no triable issues. The respondent had to move godowns at the request of the appellants thereby incurring expenses.

22. I find that the honourable learned magistrate was justified in holding that the appellants' statement of defence did not raise any triable issues. In the case of **Mbogo & another vs Shah EALR [1968] page 13** the court of appeal stated:-

> ***"the court will not interfere with the exercise of the trial judge's discretion unless it is satisfied that the judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.***

As an appellate court I find that the honorable learned magistrate clearly took into account all relevant to mattes and am unable to say there are any matters she took into account which were irrelevant to the matter before here.

23. In conclusion, I find no merit in this appeal and the same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9TH day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Appellants

.....Advocate for the Respondent

.....Court Assistant