Kotecha & Sons Limited & another v Amalo & Company Limited (Civil Appeal 81 of 2019) [2025] KECA 65 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 65 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 81 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 24, 2025

BETWEEN

KOTECHA & SONS LIMITED ..... 1ST APPELLANT

HEMAL KOTECHA ..... 2ND APPELLANT

AND

AMALO & COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Kisumu, (Cherere, J.) delivered by (Ochieng, J.) on 14th March, 2019 in HCCC No. 11 of 2018)

JUDGMENT

1. This appeal arises from a ruling of the High Court (Cherere, J.), dismissing a Notice of Motion application dated 4th July, 2018, in which B.N. Kotecha & Sons Limited (the 1st appellant) and Hemal Kotecha (the 2nd respondent), who are now the appellants before us, sought *inter alia*, an order setting aside the interlocutory judgment that had been entered against them, and granting them leave to defend the suit.

2. The applicant's motion was opposed by the respondent, Amalo Company Limited, through grounds of opposition wherein it was contended that the judgment was entered following proper service of summons to enter appearance, and that the delay to enter appearance was inordinate.

3. In her ruling the learned Judge found that the judgment entered against the appellants was a regular judgment, as the service of summons to enter appearance had been properly done. The learned Judge also found that the appellants had not explained the delay in instructing counsel to enter appearance, but that the delay though unexplained and deplorable, was not inordinate.

4. The learned Judge relied on *Philip Kiptoo Chemwolo & Mumias Sugar Company Limited v Augustine Kubede* (1982 – 1988) KAR, on the courts discretion to set aside an interlocutory judgment, and

considered whether the draft defence put forward by the appellants raised any triable issues. The Judge found that all the issues raised by the appellants were not triable issues which should go to trial; and that there was no justification for her to exercise her discretion in favour of the appellants. She, therefore, dismissed the appellants' motion.

5. The appellants, who are aggrieved, have lodged this appeal raising nine grounds. They fault the learned Judge for:

   i. Dismissing the appellants' motion for lack of merit;

   ii. dismissing the appellants' defence as lacking triable issues, when the defence was raising triable issues;

   iii. solely relying on the deed of guarantee and indemnity and settlement agreements which in their construction abused the well laid out tenets of contract law, for being vague and couched in general terms;

   iv. concluding that due to the non-disclosure by the appellants, the transaction subject of the suit between the 1st appellant and the respondent, were strictly for the supply of good and products, yet the deed of guarantee and indemnity, and settlements agreements indicate the alleged indebtedness is a result of loans, advances or credit facilities;

   v. declaring that the requirements in law on the issue of passing of board resolutions of a company with respect to transactions undertaken by the company, as against or with other parties, is not a triable issue;

   vi. failing to take into consideration the witness statement of the co-director of the 1st appellant (Harshil Kishore Kotecha), that any documents allegedly signed by the co-director (2nd appellant), was without the board resolution of the 1st appellant;

   (vii)) holding that the deed of guarantee and indemnity, and deed of settlement agreement, stand unchallenged due to lack of an affidavit renouncing the same, when it is clearly pleaded that whereas the said documents might have been altered and executed by the 2nd appellant the same were done without the resolution of the board;

   viii. failing to recognise that the deed of guarantee and indemnity, and the deed of settlement, were an alleged admission of liability allegedly made by the 2nd appellant, without the board resolution of the 1st appellant as a result of coercion and undue influence by the respondent's directors;

   viii. finding that the appellants are seeking to deliberately evade or otherwise obstruct the cause of justice when there was no such evidence.

6. The appellants filed written submissions through their advocates, Prof. Tom Ojienda & Associates. In their submissions the appellants have identified four issues for determination. First, whether the learned trial Judge, erred in law in dismissing the application; secondly, whether the learned Judge erred in law and fact in dismissing the draft statement of defence as not raising a prima facie case; thirdly, whether the learned Judge erred by prematurely relying on, and examining the evidence before the main trial; and finally, whether the appellants were deliberately evading or otherwise obstructing the cause of justice.

7. The appellants submitted that although they had filed a draft statement of defence to demonstrate that they had a prima facie case, the learned Judge, rather than focusing on whether the application had merit, and whether the defence raised triable issues, proceeded to investigate, interrogate, and decipher

the pieces of evidence which were otherwise meant to be dealt with at the substantive hearing stage. They faulted the learned Judge for focusing mainly on the deed of guarantee and making her findings at the preliminary stage, without giving the parties an opportunity to robustly interrogate the documents or giving the appellants an opportunity to scrutinise the respondent's liquidated claim.

8. The appellants submitted that notwithstanding the fact that they gave adequate reasons for the delay in filing the defence, and the learned Judge having found the delay excusable, the learned Judge did not properly exercise her discretion in dismissing the appellants' motion, as the draft defence raised issues that were "triable". Relying on *Black's Law Dictionary* Eighth Edition the appellants defined triable as "subject to liable to judicial examination and trial." They argued that a bonafide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial, and need not be an issue that would necessarily succeed. In this regard, the appellants cited *540 Aviation Limited v Trade Winds Aviation Services Limited* [2015] eKLR.

9. The appellants also cited *Independent Electoral & Boundaries Commission (IEBC) v Wilson K.C. Sholei* [2018] eKLR, arguing that the issues in the defence which were addressed by the learned Judge were the same issues that ought to be determined in the substantive suit. The appellants submitted that it was not the function of the trial court at that stage to examine the evidence in depth, to determine the case.

10. The appellants argued that the defence raised triable issues regarding the veracity of the local purchase orders, and the transactions giving rise to the liquidated amount claimed as the documents are alleged to be forgeries. Secondly, the deed of guarantee and indemnity is voidable as the alleged indebtedness arises from loans or credit facilities that were undertaken without the 1st appellant's board resolution.

11. Regarding the striking out of the defence, the appellants relied on *DT Dobie and Company (Kenya Ltd) v Joseph Mbaria Muchina & another*, Civil Appeal No. 37 of 1978, arguing that no suit should be summarily dismissed unless it is so hopeless that it obviously discloses no reasonable cause of action. The appellants also relied on *Coast Project v Mr. Shah's Construction K Limited* [2004] 2KLR 118, for the proposition that striking pleadings is a summary procedure which is a radical remedy that the court should be slow in resorting to.

12. Further, the appellants contended that they were condemned unheard, in a matter resulting in their being required to pay a punitive amount of Kshs.260,593,381.52 with interest at 21 percent. They cited a decision from the Supreme Court of India *Sandram Singh v Election Tribunal Kotich* AIR 1955 SC 664 at 711, for the proposition that the parties should never be condemned unheard. The appellants urged the Court that justice should not only be done but must be seen to have been done and therefore the court should render justice by setting aside the ruling of the learned Judge in its entirety, and allow the appellants to file a defence, so that the matter can proceed to hearing on merit.

13. The respondent opposed the appeal through written submissions that were duly filed by its counsel, Behan & Okero Advocates. In its submissions, the respondent maintained that the appellants were not condemned unheard, but were heard on their application that was seeking to set aside the default judgment, which application was determined on merit, applying prescribed laws and principles. The respondent pointed out that the enormity of the debt does not require the application of different laws or principles in the determination of an application to set aside a default judgment. It argued that the learned Judge made a correct finding as the appellants did not explain why, having been served with summons on the 4th June, 2018, they waited for fifteen days before instructing their counsel on 19th June, 2018.

14. The respondent, citing *Mugunga General Stores v Pepco Distributors Limited* [1987] eKLR, asserted, that the draft defence tendered in support of the appellants application, was nothing more than a flat denial, and was, therefore, not a sufficient defence as it did not give any reason for the denial of

liability. In addition, the respondent argued that the analysis that was made by the learned Judge, affirmed not only that the defence was a bare denial, but that it was based on supporting documents that contradicted the bare denials.

15. The respondent reiterated that there was no bonafide triable issues raised in the draft defence or any matter that required further interrogation by the court at a full trial; that the appellants did not, in their defence or in the two affidavits that were sworn in, support of their application challenge the veracity of the local purchase orders or question the transactions subject of the debt, and no proper basis was therefore laid for displacement of the 2nd appellant's ostensible authority, in its interactions with the respondent, to bind the 1st appellant under Section 34(1) of the *Companies Act* (No. 17 of 2015).

16. The respondent dismissed as spurious and baseless the appellants allegation that the learned Judge made final orders at an interlocutory hearing; that the documents having been presented by the appellants in support of their application, the learned Judge had a duty to scrutinise them against the draft defence and that scrutiny revealed, that the documents were either contradictory of the defence or plainly lacking in the evidence they purported to be. It was submitted that the learned Judge was considering an application to set aside a judgment, and, therefore, the cases cited by the appellants on interlocutory application for summary judgment, were irrelevant to the appeal and of no assistance. The respondent urged the Court to find that the learned Judge exercised her discretion judiciously and made a lawful and proper determination dismissing the application which was before her.

17. We have carefully considered the record of appeal, the respective submissions by the parties and the law. The court record reveals that judgment in default of entering appearance or filing a defence, was entered against the appellants on 21st June, 2018, after the appellants were served with summons to enter appearance on 4th June, 2018, and they failed to file the required documents within the specified time. This led to the appellants filing the notice of motion dated 4th July, 2018, which resulted in the ruling subject of this appeal. In that notice of motion, the appellants sought orders as follows:

    i. The Honourable Court be pleased to order that this application be heard on priority to the pending application for summary judgment dated 28th June, 2018.

    ii. The interlocutory judgment entered against the defendant on (sic) be set aside upon such terms as are just.

    iii. The defendant be granted leave to defend its suit.

    iv. This Honourable court be pleased and do hereby allow the firm of M/S Prof. Tom Ojienda & Associates to come on record for the defendants.

    v. Any other or further relief that this Honourable Court may deem fit to grant.

    vi. Cost of this application.

18. As stated on the face of the notice of motion, the application was brought under Order 10 Rule 11, and Order 9 Rule 10 of the *Civil Procedure Rules, 2010*; Article 22, 23 and 159 of the *Constitution*; and Sections 1(A), 1(B), 3, 3(A) and 63(e) of the *Civil Procedure Rules*. Order 10 deals with consequences of non- appearance, default of defence and failure to serve.

19. Under Order 10 Rule 4, the court has powers, where the plaint includes a liquidated demand, and the defendant fails to enter appearance on or before the day fixed in the summons, to enter judgment against the defendant for any sum not exceeding the liquidated demand. According to the respondent's plaint that was filed against the appellants on 28th May, 2018, the respondent sought judgment for a sum of Kshs.260,593,381.52 together with interest at twenty one percent. The amount was in

respect to various transactions in regard to goods and products supplied to the appellants, and a deed of settlement agreement duly signed by the 1st appellant committing to payment of the debt. The judgment entered against the appellants was therefore in accordance with Order 10 Rule 4 of the *Civil Procedure Rules*.

20. We have endeavoured to demonstrate from the record that the judgment subject of the applicants' motion dated 4th July, 2018, was not summary judgment or interlocutory judgment, but judgment entered upon a liquidated demand, in default of appearance and defence. Therefore, the submissions that were made by the appellants in regard to summary judgment and interlocutory judgment, are not of relevance.

21. Order 10 Rule 11 of the *Civil Procedure Rules* gives the Court discretion to set aside any judgment entered under Rule 10. In effect this is the substantive procedural Rule under which the learned Judge acted in dismissing the appellants notice of motion dated 4th July, 2018. The main issue for consideration in this appeal is whether the learned Judge properly exercised her discretion in refusing to set aside the judgment that had been entered against the appellants.

22. In considering the exercise of discretion by the learned Judge, we reiterate what this Court (differently constituted), stated in *CMC Holdings Limited v James Mumo Nzioki* [2004] KECA 143 KLR:

> " We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition. One such authority is that of *Magunga General Stores v Pepco Distributors* [1987] 2 KAR 89 to which we were referred and in which this Court stated as follows:-
>
> > 'The Court on an appeal will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts.'"

23. In the same case of *CMC Holdings Limited* (*supra*), the Court went on to say:

> " In the case of *Shah v Mbogo & Another* [1967] EA 116 decided by the High Court of Kenya at Nairobi it was held inter alia as follows:-
>
> '(iv) Applying the principle that the Courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused'.
>
> > The above was upheld by the Court of Appeal in its decision in *Mbogo & Another vs Shah* [1968] EA 93. Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back

> to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle."

24. The learned Judge appreciated the application before her and the need to exercise her discretion judiciously. She considered the delay for entering appearance and the reasons for the delay and was satisfied that although the delay was not explained, it was not inordinate, and that the procedural lapse was excusable. However, the learned Judge proceeded to consider a draft defence that had been availed by the appellants.

25. In *CMC Holdings Limited* (supra), the Court of Appeal referring to the case of *Tree Shade Motors Limited v DT Dobie & Company (K) Limited & Joseph Rading Wasambo*, Civil Appeal No. 38 of 1998, had this to say on the issue of draft defence:

> "In that case this Court stated as follows:
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> > "The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend."

26. The learned Judge having considered the draft defence found that it was a mere denial which did not raise any triable issues. The appellants have complained that the learned Judge instead of addressing whether the defence raised triable issues proceeded to "investigate, interrogate and decipher" pieces of evidence which were otherwise meant to be dealt with at the substantive hearing stage. As stated in *CMC Holdings Limited* (supra) the learned Judge's obligation in dealing with the application for setting aside included examining the draft defence that was availed by the appellants, in order to make a decision whether on its face value it raised a triable issue. This was neither investigation nor interrogation, but simply juxtaposing the defence against the respondent's claim as set out in the plaint.

27. The ruling is clear that the learned Judge examined the defence and noted that other than the general denial, it purported to rely on an allegation that the 2nd appellant acted without authority from 1st appellant as there was no board resolution from the 1st appellant. The learned Judge rightly found that this did not raise a triable issue in regard to the respondent's claim, as it was a matter between the two appellants and could not affect the respondent's claim. Similarly, the appellants tried to disown the deed of guarantee and indemnity, settlement agreement, but again there was no triable issue in that regard as the documents were not denied. The appellant appears to be concerned with the enormity of the claim and the fact that they had commissioned an audit, but again this did not raise any issue regarding the transactions or supply of the goods to the appellants, or the appellants' liability for the amount claimed.

28. The appellants having been served with summons to enter appearance, they were given an opportunity to defend the claim against them by entering appearance and filing a defence. Having failed to take any advantage of this opportunity without any plausible reason, the appellants cannot be heard to complain that they were denied a right to be heard

29. We come to the conclusion that the appellants have failed to demonstrate that the exercise of the discretion by the learned judge was wrong in principle or that the learned judge acted unreasonably or irrationally as to justify the intervention of this Court. Consequently, we dismiss this appeal with costs.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar