Kenya Medical Supplies Agency v Revital Health Care (EPZ) Limited & 2 others (Civil Appeal (Application) 65 of 2016) [2023] KECA 291 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 291 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) 65 OF 2016

GV ODUNGA, JA

MARCH 17, 2023

BETWEEN

KENYA MEDICAL SUPPLIES AGENCY .... APPELLANT

AND

REVITAL HEALTH CARE (EPZ) LIMITED .... 1ST RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

(Application to set aside the Ruling on Taxation by the Deputy Registrar (Hon Adika) dated 1st November, 2021)

RULING

1. By a motion on notice dated September 20, 2022, the 1st respondent, who is the applicant herein, seeks an order that the proceedings relating to the appellant's bill of costs dated July 31, 2018 including the ruling on the taxation by hon H Adika, Deputy Registrar delivered on November 1, 2021 and the consequent certificate of taxation issued and dated November 27, 2022 be set aside and that the applicant be granted leave to respond to the said bill of costs.

2. The applicant's case is that following the delivery of the judgement by this court on June 22, 2017 allowing the appeal with costs, the appellant filed its bill of costs dated July 31, 2018 which was taxed unopposed in the sum of Kshs 6,510,068.00. According to the applicant, its then advocates on record, Ms Khaminwa & Khaminwa Advocates, neither informed it of the said bill nor responded to the said bill and that the applicant learnt of the taxed costs on or about August 2, 2022 when the 1st respondent was informed of the same by the appellant's counsel.

3. The fact that the applicant was unaware of the taxation was confirmed by its then advocate on record, dr John Khaminwa.

4. According to the applicant the bill is excessive, inordinately high, exaggerated and unjustified and wishes to be afforded an opportunity to persuade the Taxing Officer that the costs ought to be taxed at a far much lower amount.

5. In opposing the application, the appellant who is the respondent in the instant application averred that there were several instances when the parties appeared before the High Court in respect of execution proceedings and the applicant ought to have been aware of the fact of the taxation.

6. It was contended that the procedure for objecting to taxation is by way of reference hence the instant application is not properly before this court. Since the prescribed period for filing a reference is long gone, it was submitted that the instant application ought not to be granted.

7. It was further contended that a party ought to solely rely on the mistake of counsel since parties are expected to follow up on their cases. Therefore, simple inaction is not ground for seeking an order for setting aside a court decision as that does not amount to mistake that cannot be visited on the client.

8. It was further contended that since the Taxing Master was satisfied as to the fact of service the application is unmerited.

9. I have considered the issues raised in this application. In the instant application the applicant seeks this court's exercise of discretion in setting aside the order made due to non-attendance at the taxation.

10. It is contended that such a decision may only be challenged on reference. The issue for determination is whether in the circumstances of this case the court ought to set aside the ex parte taxation of the bill of costs. The respondent in this application has taken the issue that the proper procedure for setting aside the taxation ought to have been by way of a reference. Taxation of costs before the Court of Appeal is provided for in rules 116 and 117 of the *Court of Appeal Rules*, 2022 (formerly rules 111 and 112 of the 2010 Rules). Rule 117(1) provides that a person who is dissatisfied with a decision of the Registrar in his or her capacity as taxing officer may require any matter of law or principle to be referred to a judge for the judge's decision and the judge shall determine the matter as the justice of the case may require. Specific mention of what constitute matters of law is in rule 117(2) which makes provision for decisions extending time or refusing to extend time for lodging of the bill of costs or the exercise of the Registrar's powers under paragraph 12 of the third schedule to the rules.

11. Rule 117(3) provides for reference to a Judge where it is contended by a party that the costs as taxed are manifestly excessive or manifestly inadequate. Rule 117(4) provides that an application for reference may be made to the Registrar informally at the time of the taxation or in writing within seven days thereafter.

12. In my view, a reading of the said provisions regarding the timelines for making a reference contemplates that either the applicant was present at the time of the taxation or became aware of the same within 7 days of the decision. The provisions do not address situations where a party was either not notified of the taxation or was, due to the mistake of counsel unaware of the same, as is contended in the instant case.

13. The question that arises is what remedy is available to a party in such circumstances. Such a party cannot move the Judge under rule 117(3) of the *rules* because he is not contending that the costs as taxed are manifestly excessive or manifestly inadequate. He is simply seeking that the bill be re-taxed. Similarly, since the matter of his non-attendance due to the mistake of his counsel was not and could not have been dealt with at the time the taxation was proceeding, it is my view, that it cannot be termed as a matter of law or principle. The question before me is simply whether this court to exercise its discretion and allow the applicant an opportunity of being heard on the bill of costs. In other words,

the matter before me is not, *strictu sensu*, a challenge to the exercise of the discretion by the learned Taxing Officer.

14. In the premises, I find that the strictures of time prescribed in rule 117(4) do not apply to the present circumstances.

15. As was held by the Court of Appeal in [*CMC Holdings Ltd vs Nzioki*] [2004] KLR 173:

> "In an application for setting aside *ex parte* judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such 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 be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non- appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.What the trial court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a *prima facie* triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence."

16. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs Mbogo & Another* [1967] EA 116.

17. In my view the principles set out above applies *mutatis mutandi* to setting aside orders.

18. That the order being sought to set aside was regular cannot be in doubt.

However, in considering whether or not to set aside the default order a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the order, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular order would not usually be set aside unless the court is satisfied that there is a case on the merits, namely a *prima facie* case which merit the reopening of the proceedings in question since the court, in such circumstances, ought not to act in vain.

19. The overriding guiding principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive

power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts *ex parte*. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence or objection, there is *prima facie* defence or objection. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* decision. See *Bouchard International (Services) Ltd vs M'mwereria* [1987] KLR 193; *Evans vs Bartlam* [1937] 2 All ER 647.

20. In this case the defendant's failure to appear in court is attributed to the oversight on the part of the applicant's legal counsel who though had a branch office in Mombasa, was stationed in Nairobi and his attention was not drawn to the fact of service of the notice for taxation. The court however recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline and that a defence on merits does not mean a defence, which, must succeed, but one, which discloses *bona fide* triable issue for adjudication at the trial.

21. This case is similar to a case where, for example, counsel fails to diarise or properly diarise the date. In *Kalemera vs Salaama Estates Ltd* [1971] EA 284 a matter that has striking similarities to the present case, the court expressed itself as follows:

> "the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. The court prefers to treat the circumstances as arising out of honest mistake.The test to be applied under section 101 which speaks of "the ends of justice" is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court. In this suit, the plaintiff's claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff's side, the court does not think that he will be prejudiced or suffer hardship if he can be adequately compensated by costs.The circumstances of this case are such that "ends of justice" require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety."

22. Accordingly, I find that the reason given by the applicant herein for the failure to attend the court on the taxation date is not altogether unheard of.

23. The second issue is whether the applicant has a prima facie arguable objection to the bill of costs. The question for the purposes of this kind of application is not whether the objections raised or sought to be raised by the applicant will succeed but whether they are arguable. In other words, the issue cannot, at this stage, be determined to be sham. Yes, the setting aside of a regular order will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the defendant to put forward its case on merits. In considering the exercise of discretion, the court must consider the risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd vs Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

24. Having considered the issues raised in this application, I find merit therein.Accordingly, I hereby set aside the proceedings relating to the appellant's bill of costs dated July 31, 2018 including the ruling on the taxation by hon H Adika, Deputy Registrar delivered on November 1, 2021 and the consequent certificate of taxation issued and dated November 27, 2022. I direct that the said bill be taxed *de novo*.

25. I however award the costs of this application to the appellant/respondent against the 1st respondent.

26. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR**