IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, JJ.A)

CIVIL APPEAL NO. 190 OF 2010

BETWEEN

NATIONAL INDUSTRIAL CREDIT

BANK LIMITED……..……...….....…….....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED…..…….. 1ST RESPONDENT

NANCY WAIRIMU MURIITHI…….....…..……..2ND RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi

Milimani Commercial Court (Kasango, J) delivered on the 27th June 2005

in

Civil Case No. 293 of 2001)

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JUDGMENT OF THE COURT

This is an appeal by the ***National Industrial Credit Bank Limited, the appellant*** arising from the Ruling and Order of the High Court (Kasango, J.) dated 27th June, 2005, where the learned Judge declined to set aside the judgment entered against the appellant on 23rd September, 2005.

To place the dispute into perspective, by way of a Hire Purchase Agreement dated 14th September 1999 made between the appellant and ***Nancy Wairimu Muriithi, the 2nd respondent***, the appellant agreed to finance the hire purchase of Motor Vehicle Registration Number KAL 263V (*the motor vehicle*). Pursuant to the Agreement, the appellant advanced the 2nd respondent a sum of Kshs. 1,204,000 inclusive of hiring charges, payment of which the 2nd respondent acknowledged. The 2nd respondent is said to have defaulted in the repayment of the instalments, causing the appellant to incur loss in recovery of the motor vehicle and thereby owing the appellant Kshs. 1,031,831 together with interest at 17.61% (flat rate) per annum from 1st March 2001.

In her defence and counterclaim, the 2nd respondent claimed a liquidated amount of Kshs.1,031,831 together with interest being the balance on the motor vehicle as well as its continued and unwarranted retention by the appellant from the 20th of February 2001, and a declaration that the appellants attempt to cancel a valid hire purchase contract was wrongful, when there were no arrears.

The suit was scheduled for hearing on 20th July, 2004, and on the material day, Mr. N. Muturi, the appellant's former counsel attended court and applied for an adjournment on the basis that he might be a potential witness for the appellant. The lower court refused to grant the application, whereupon the appellant's former counsel orally applied to cease acting for the appellant. This application was also declined for reasons that the counsel had not served the appellant with a notice to cease acting. Unrelenting, the appellant's counsel sought to be excused from the hearing, to which the court responded, '*please yourself counsel'*. And he promptly walked out of court. The hearing continued in his absence, during which time the 2nd respondent's counsel successfully applied for dismissal of the appellant's claim, and thereafter proceeded to prove her counterclaim. On 23rd September 2004 judgment was entered in favour of the 2nd respondent.

By a Chamber Summons dated 7th January 2005 the appellant applied for stay of execution and further proceedings pending the hearing and determination of its application to set aside the judgment of 23rd September 2004. The application was premised on the grounds that; the absence of the appellant's former counsel during the hearing was due to a mistake; that the appellant had a good claim against the 1st and 2nd respondents; that in the interest of justice the judgment be set aside and the appellant be provided an opportunity to be heard in the suit.

In the affidavit in support of the application, sworn by Reuben Nyangaga, an Assistant Manager of the appellant, it was also deposed to that the appellant was not aware that their advocate had walked out of court, otherwise other appropriate arrangements would have been made.

In the ruling dated 27th of June 2005, the learned judge dismissed the application to set aside the judgment upon concluding that the appellant had not made out a case for the exercise of the court's discretion in its favour as, the record showed that the appellant had consistently impeded the hearing of the case; that the actions of its former advocate on the hearing day could not be construed to be a mistake by counsel, but were deliberately motivated, and the appellant had failed to distance itself from its former counsel's actions. On the issue of whether the appellant had a good claim, the court found that there was no prayer in the application seeking to reinstate the appellant's suit, and further that the appellant had failed to respond to the avernments in the counterclaim.

Aggrieved by the ruling, the appellant filed the present appeal setting out five grounds as follows:-

> ***a) That the learned Judge erred in fact and in law in failing to find and hold that an advocate's mistake should not be visited upon the client.***
>
> ***b) That the Learned Judge erred in fact and in law in finding and holding that the appellant and its then advocates where in cahoots in attempting to obstruct the course of justice.***
>
> ***c) That the Learned Judge contradicted herself by finding that the appellant (plaintiff) did not respond to the Further Re-Amended Defence to Counterclaim and in holding that the appellant's Defence to Counterclaim did not provide a reasonable defence to the 2nd respondent's Counterclaim.***
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> ***d) That the Learned Judge erred in fact an in law in failing to find and hold that the appellant had a good defence to the 2nd respondent's Counterclaim.***
>
> ***e) That the Learned Judge erred in fact and in law in failing to find and hold that sufficient material had been placed before her to exercise her discretion to set aside the ex parte judgment.***

At the hearing of the appeal, learned counsel ***Mr. G.M. Mwangi***, appeared for the appellant while, learned counsel ***Mr. S.T. Wanjohi***, appeared for the 2nd respondent. ***The 1st respondent, Barclays Bank of Kenya Limited*** did not participate in the proceedings in the lower court. Both counsel for the appellant and 2nd respondent stated that they would rely on their filed written submissions together with their list of authorities.

In its submissions, the appellant submitted that a mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief. The appellant relied on the case of ***Kenwood Trading Company Limited vs Leonard Mutua [1997] eKLR*** for the proposition that the discretion of court is perfectly free, and the only question is whether based on the facts of any particular case, such discretion should be exercised. The appellant further argued that since its former counsel's view was that he could be called upon to testify in the proceedings, the ethics of the profession barred him from representing the appellant; that this being a mistake of the former counsel, it was a proper ground for setting aside the *ex parte* judgment, and the appellant should not be penalized for that mistake. It was emphasised that the court incorrectly found that the appellant or its former counsel had consistently impeded the hearing of the case, as both the appellant and 2nd respondent had sought adjournments. In response to the court's view that the appellant failed to distance itself from its counsel's conduct, it was argued that, it was not aware that its former counsel had left the proceedings, otherwise it would have made proper arrangements.

The appellant further submitted that the learned judge contradicted herself by finding on one hand that the appellant did not respond to the 2nd Respondent's further re-amended defence and counterclaim, and on the other hand also finding that the appellant's defence to the counterclaim did not provide a reasonable defence. Furthermore, it was contended, there were triable issues that the court was called upon to determine, including, whether the appellant illegally attempted to cancel the hire purchase agreement when there were no arrears yet, the 2nd respondent had admitted to owing arrears; whether the appellant was entitled to repossess the motor vehicle on account of the arrears; whether the 2nd respondent was entitled to the release of the motor vehicle upon settling overdue arrears and finally, whether the sale of the motor vehicle was in breach of a court order.

In response, the 2nd respondent submitted that the material before the court did not point to a mistake or error of the appellant's former advocate. The advocate was aware that the case was scheduled for hearing, but had attended court unprepared and without the appellant's representative with a clear intention of applying for an adjournment. The 2nd respondent further stated that a clear distinction ought to be made between excusable mistakes and slovenly conduct; that the court would be intolerant of an advocate who performed his or her duties in a slothful manner. In this regard the 2nd respondent relied on the case of ***Tana and Athi Rivers Development authority vs Jeremiah Kimigho Mwakio & 3 others [2015] eKLR*** in which the Court held that *"…while acknowledging that mistake of counsel should not be visited upon a client it should be remembered that counsel's duty is not limited to his client. He has a corresponding duty to the court in which he practices and even to the other side….thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client."*

On the finding that the appellant and its then advocates were in cahoots in attempting to obstruct the course of justice, the 2nd respondent submitted that, despite the existence of the court order, the appellant had ignored it, and sold the motor vehicle, which actions were aimed at

subverting the course of justice. The 2nd respondent further stated that she had filed a further re-amended defence and further amended counter claim on 2nd June 2014 introducing in the counterclaim the matter of the illegal sale of the motor vehicle at an under value, to which no response was filed; so that the learned judge was right in concluding that no reasonable defence to the counterclaim was proffered; that needless to say, the appellant's former advocate while applying for the adjournment had admitted that pursuant to his advice, the motor vehicle was sold; that nothing in this appeal showed that the learned judge misdirected herself in declining to exercise her unfettered discretion to set aside the judgment.

We have considered this appeal in light of the background and submissions. This being an appeal arising from exercise of discretion of the learned judge, we are reminded of our primary role in determining such matters, which was espoused in the case of ***Mbogo & Another vs Shah [1968] EA, p.15.*** that;

> ***"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."***

Taking these guidelines into consideration, it is our view that the issues for consideration are whether the appellant's former counsel's actions were a mistake; whether the learned judge rightly found that the appellant was in cahoots with its former advocates; whether the learned judge rightly found that the appellant's defence did not provide a reasonable defence to the 2nd respondent's counterclaim and whether the learned judge rightly concluded that there was insufficient material placed before her upon which she could exercise her discretion to set aside the *ex parte* judgment.

We will begin with whether the appellant's former counsel's actions, which culminated in his walking out of court on 20th July 2004, constituted an inadvertent and excusable mistake, or an error of judgment and whether the appellant associated itself with these actions.

The lower court's answer to this was expressed thus;

> ***"The plaintiff main ground for setting aside the exparte judgment is on the assertion that the then plaintiff's counsel committed a mistake. The work (sic) is defined in the Chambers 21st Century dictionary as***
>
> *"error, a regrettable action, or act of understanding or interesting (sic) something wrongly."*
>
> ***If that is the definition the plaintiff fails to explain the error committed by its then advocate. That counsel clearly attended court on 20th July 2004 with the full knowledge that the case was fixed for hearing. He failed to attend with the plaintiff or its representative.***
>
> ***The plaintiff in the present application glosses over the happenings of the day. They fail to state whether they knew that the case was coming for hearing, they fail to remove themselves from the association with the, yes rude action of its then advocate who walked out of court and that leaves the court with no option than to conclude that the plaintiff and its then advocates were in cahoots in attempting to obstruct the course of justice…"***

When the facts as they transpired on the material day are considered alongside the learned judge's observations, what becomes clear is that, despite the appellant's assertion that its former counsel's actions amounted to a mistake, it did not specify the nature of error or mistake made on the advocate's part. It was not apparent whether it arose from the failure to attend court without a witness on the hearing date, or whether it was as a result of the application for adjournment on the pretext that he was a potential witness in the trial, or whether it was the application to cease acting for the appellant or the act of walking out of court.

In the lower court's view, the appellant did not provide any explanation or express regret on its failure to attend court. In addition, nothing was said regarding the appellant's absence, whether or not they were aware of the hearing, or whether their absence resulted from inadvertence on their former advocate's part to inform them of the impending hearing. Instead, it sought to belittle the entire incident by condoning, the former advocate's actions in a manner that suggested that the former advocate merely acted in compliance with its instructions. Hence the learned judge's observation that the appellant and its former advocate *'…were in cahoots in attempting to obstruct the course of justice.'*

In our view, the facts as set out do not lend support to the commission of an error or an unwitting mistake on the part of counsel. We would agree with the learned judge that, as the appellant did not specify the nature of the alleged error or that such error was regretfully committed, and none was discernable from the material before the court, no error or mistake was established.

With regard to the issue that the court contradicted itself that the appellant had not replied to the counterclaim, and that the appellant had no good defence against the 2nd respondent's counterclaim, the learned judge had this to say;

> ***"On 20th July 2004, when the plaintiff walked out the 2nd respondent's counsel successfully applied for the dismissal of the plaintiff's claim for non-attendance. The plaintiff in seeking to set aside the judgment in favour of the 2nd defendant has not sought to reinstate the claim. Since there is the absence of that prayer the court in considering whether the plaintiff has a reasonable case will be restricted to look at the 2nd defendant's further re amended defence and counter claim and the plaintiff's defence to that counter claim.***

In that regard I note that the 2nd defendant filed a further re- amended defence and counter claim o (sic) 2nd June 2004, which the plaintiff did not respond to and the one thing that comes of amended pleading is the 2nd defendant's allegation that the subject motor vehicle was sold by the plaintiff at an under value. In totality looking at the plaintiff's defence to counter claim it does not provide a reasonable defence to the 2nd defendant's claim."

In determining whether there was sufficient and reasonable cause demonstrated for setting aside of the judgment, the learned judge took into account that; firstly in seeking to set aside the judgment in favour of the 2nd defendant, the appellant did seek to reinstate its claim; secondly, that it did not respond to the allegation in the 2nd respondent's re-amended defence and counterclaim that the motor vehicle was sold, and that; thirdly, the appellant's defence to the counter claim did not provide a reasonable defence to the 2nd respondent's claim.

We will begin by stating that a party is bound by its pleadings and the court cannot be expected to impute into a party's case matters that have not been pleaded.

In ***Nairobi City Council vs Thabiti Enterprises Limited Civil Appeal No. 264 of 1996*** this Court, citing ***Bullen Leaks, and Jacob*** (12th edition) stated thus;

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial court and which the court will have to determine at the trial."

Regarding the learned Judge's concern in respect of reinstatement of the appellant's claim, a review of the application to set aside the judgment reveals that, when seeking to set aside the judgment, the appellant neglected to include a prayer for reinstatement of its claim. Without such prayer, the court was not in a position to make an order for its reinstatement. Therefore to the extent that that there was no such prayer, we agree with the learned judge that the claim could not be reinstated, as a consequence of which the appellant's claim against the 2nd respondent stood dismissed.

This brings us to the 2nd respondent's case against the appellant. In her re-amended defence and further amended counterclaim, the 2nd respondent claimed that the appellant had sold the motor vehicle in defiance of a court order as a result of which she had suffered loss and damage. It is therefore clear that the 2nd respondent's claim was founded on the repossession and sale of the motor vehicle.

The 2nd respondent therefore claimed an order of injunction against the appellant for selling or disposing of the motor vehicle; a declaration that the purported termination of the hire purchase agreement was wrongful; and an order directing the release of the motor vehicle pending the determination of the suit; a declaration that the appellant having opted to sue for the balance of the hire purchase agreement was not entitled to repossess and sell the motor vehicle; a declaration that the appellant's failure to restore possession of the motor vehicle to the 2nd respondent after payment by the 2nd respondent's of the hire rentals in arrears was wrongful; a declaration that the sale of the motor vehicle was wrongful; damages for loss of the motor vehicle, general and aggravated damages.

When the 2nd respondent's pleadings are considered in terms of the appellant's defence to the counterclaim, contrary to the learned judge's finding that the appellant did not respond to the allegation that it had sold the motor vehicle, a reading of the appellant's reply to the further amended defence and amended counter claim shows at paragraphs 18 and 19 that;

"18. The order granted by this Honourable Court restraining the sale of the Motor vehicle were only valid up to 9th April 2001 when they expired and as such there was no order restraining the sale of the motor vehicle on 17.7.2001 when the sale took place and the plaintiff will require strict proof of the allegation to the contrary.

19. In view of the foregoing and the fact that the plaintiff was legally entitled to sell the motor vehicle the plaintiff denies that the ale was illegal as alleged in paragraph 23…."

From the above, there is no question that the appellant had responded to the allegation that the motor vehicle had been sold, and having chosen not to respond to it again in a further reply did not mean that the issue had not been addressed. Therefore, the reason advanced for declining to set aside the judgment, namely that the appellant had failed to respond to the allegation that the motor vehicle had not been sold was, in our view, had no basis.

In weighing out the circumstances of this case against the High Court's decision, we are inclined to find that the justice of the case leans in favour of partially setting aside the judgment. This is because on the one hand, it cannot be gainsaid that both advocates and litigants have a duty to uphold the dignity of the court, and to conduct themselves with the highest standards of decorum with a view to assisting the court in systematically and efficiently carrying out its constitutional mandate of rendering justice to all persons. But on the other, the appellant's former advocate's untoward conduct, notwithstanding, it has become apparent that the learned judge misdirected herself in the exercise of her discretion when she erroneously concluded that the appellant had not responded to the re-amended defence to the counter claim and therefore did not have a good defence. Having found to the contrary, we consider it necessary to interfere with that decision, and to provide the appellant an opportunity to ventilate its case.

The application having been brought under ***order IXB rule 8*** of the retired ***Civil Procedure Rules*** that allows the court to set aside or vary the judgment or order upon such terms as are just, we find that the appeal is merited in part. The ruling and order of the High Court dated 27th June 2005 is set aside in part to the extent that the appellant's claim stands dismissed.

We allow the appeal in respect of the counterclaim, and order that it proceed to full hearing before any judge of the High Court excluding Kasango, J.

As the appeal has succeeded in part we order each party to bear its own

costs.

It is so ordered.

Dated and delivered at Nairobi this 16th day of March, 2018.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

…….……

JUDGE OF APPEAL

A.K. MURGOR

…….……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR