



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, JJ.A)

CIVIL APPEAL NO. 178 OF 2012

BETWEEN

HOSEA KIPLAGAT.....APPELLANT

AND

JOHN ALLAN OKEMWA.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Dulu, J.), and delivered on the 5th June, 2012 by Hon. Mr. Justice D. Musinga)

In

H.C.C.C. No. 1413 of 2005)

JUDGMENT OF THE COURT

This is an appeal by Hosea Kiplagat (hereinafter referred to as the appellant) against the Ruling of the High Court (Dulu, J.), delivered on the 5th June, 2012 by Musinga, J. (as he then was).

By a plaint dated the 18th November, 2005, John Allan Okemwa (hereinafter referred to as the respondent) commenced the suit against the appellant in the High Court. In the plaint the respondent sought *inter alia* damages and an injunction to restrain the appellant from entering upon or using a parcel of land known as Land Reference Number 13287/85 situate in the former Nakuru District (hereinafter referred to as the suit property). The appellant was served with the Notice to Enter Appearance and duly entered appearance through the firm of Messrs Langat & Wandabwa Advocates. However, for one reason or another, the appellant and/or his advocates failed to file a defence to the respondent's claim which resulted in the respondent requesting for judgment in default of defence. The interlocutory judgment was entered on the 6th February, 2006.

On the 3rd September, 2008 the appellant filed a notice of motion seeking to set aside the interlocutory judgment. However, for unknown reasons the application was never prosecuted. The matter was set down for formal proof on the 9th July, 2009. On the 7th April, 2010 the High Court (Onyancha, J.), delivered its judgment. Under the judgment the learned judge ordered the appellant to pay the respondent Kshs.10,800,000/= as general damages and further issued an injunction restraining the appellant from entering or remaining on the suit property.

On the 4th May, 2010 the appellant filed a chamber summons seeking to set aside the judgment of Onyancha, J. Upon hearing this application Okwengu, J., (as she then was) dismissed it on the 29th September, 2010 after making a finding that the application was defective because it failed to properly invoke the jurisdiction of the court and it also did not challenge the interlocutory judgment. Hot on the heels of the dismissal of that application, the appellant filed another application on the 4th October, 2010 which *inter alia* sought an order setting aside the interlocutory judgment and leave to file a defence. Dulu, J. after hearing the application held that the application was misconceived as it presumed that there is an interlocutory judgment in existence. The learned judge further held that the matter was *res judicata* because the substantive decision had already been made. The learned judge was of the opinion that once the final judgment was made the only available avenue was to appeal it and not to request setting aside the interlocutory judgment. Consequently he dismissed the application.

Aggrieved by that ruling, the appellant filed the appeal now before us. The memorandum of appeal contained 10 grounds of appeal. The appeal proceeded by way of written submissions.

The appellant argued grounds 1, 4 and 10 of the memorandum of appeal together. The appellant submitted that the learned judge erred by paying undue regard to procedural technicalities contrary to **Article 159(2)(d)** of the Constitution. The appellant contended that the judgment by Onyancha, J was not entered on merit because the matter proceeded *ex parte*. He argued that he has always been keen to participate in the case and give his side of the story and that mistakes of his previous advocates should not be a basis to deny him justice.

On ground 2 the appellant submitted that the claim in High Court was not for a liquidated amount and therefore interlocutory judgment could not be entered. He argued that it was not clear how the amount of Kshs.100,000/= per month claimed by the respondent for loss and damage was arrived at. The appellant further submitted that he was condemned unheard contrary to the rules of natural justice. He argued that the respondent will not suffer any prejudice if he is allowed to defend himself. On grounds 3 and 5, the appellant argued that the learned judge erred by failing to properly consider the grounds for the exercise of judicial discretion and thereby failed to set aside the *ex parte* judgment. The appellant while relying on the case of ***CMC Holdings Limited vs Nzioki [2004] KLR 173***, contended that the learned judge failed to consider the reasons why he failed to defend himself by not filing a defence as well as whether he had a reasonable defence raising triable issues.

On grounds 6, 7 and 8 the appellant submitted that the learned judge erred by relying on *res judicata* when the matter was not heard on merits. The appellant further submitted that the learned judge erred by holding that there was bad faith on his part and his advocate without any evidence of such bad faith. Lastly on ground 9 the appellant contended that learned judge was wrong in creating a link between the case before him and Nakuru HCCC No.145 of 2009, when the two matters had different cause of action and sought different remedies. The appellant thus urged us to allow the appeal.

The respondent also filed his written submissions. On ground 1 and 10 he submitted that the dismissal of the appellant's application was not founded on technicalities and therefore the appellant's reliance on **Article 159** of the Constitution is without foundation. The respondent argued that the appellant was not keen to defend himself in the suit following his filing of a multiplicity of applications some of which were left unheard. On grounds 2, 4, 6 and 9, the respondent submitted that his claim in the plaint was for general and special damages as well as injunctive orders. He argued that upon entry of the interlocutory judgment the matter proceeded for formal proof and assessment of damages and culminated in a final judgment being entered. He therefore contended that the case went through all the procedural requirements for a non liquidated claim to arrive at the final judgment.

On the grounds 3, 5 and 8, the respondent whilst placing reliance on several authorities, submitted that the learned judge exercised his discretion properly by observing all requirements for exercise of discretion. In the end he implored us to dismiss the appeal.

Having considered the record, the respective submissions by learned counsels and authorities cited, we are of the view that the only issue arising for our determination was whether the High Court exercised its discretion judicially when it dismissed the appellant's application to set aside the interlocutory judgment.

This being a first appeal, this Court's mandate on a first appeal is set out in **Rule 29(1)** of the Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, the exercise of which is called to the Court's interrogation, the Court should remain guided by the principles enunciated in ***Selle vs Associated Motor Boat Company Ltd [1968] EA 123*** and ***PIL Kenya Ltd vs Oppong [2009] KLR 442***; that it will not interfere unless it is satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

Order 10 Rule 11 (formerly Order IX Rule 10) of the Civil Procedure Rules vests the courts with discretion to set aside or vary interlocutory judgments and any consequential decree or order upon such terms as are just. This Court in the case of ***Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR*** set out the principles governing the exercise of judicial discretion to set aside interlocutory judgment as follows:

"Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... 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 it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 and 76 C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48. C)"

The appellant contended that he has always been keen to defend himself in the case at the High Court and that mistakes of his advocates should not be visited upon him. He contends that he instructed his first advocates to enter appearance and file a defence but unbeknown to him they entered appearance but failed to file a defence. He contends further that his second advocates Messrs Muriithi, Oonge advocates filed an application to set aside the interlocutory judgment but failed to prosecute it. In ***CMC Holdings Ltd*** (supra) this Court stated as follows regarding mistakes in an application to set aside *ex parte* orders:

"[T]he 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 discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

In ***Philip Chemwolo & Another vs Augustine Kubende, [1986] eKLR***, Apaloo, J.A stated as follows regarding blunders:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter 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 parties and not the purpose of imposing discipline.”

We agree with the courts’ holdings in the above matters and adopt them. It is clear in this case the appellant’s two previous advocates did him a disservice. Whereas the first one failed to file a defence despite being instructed to do so by the appellant; the second one failed to prosecute the application it had filed to set aside the interlocutory judgment. In the circumstances of this case, we think these were excusable mistakes/blunders by the appellant’s advocates and our view is that the appellant should not suffer injustice as a result of those mistakes. The respondent argued that the appellant has not been keen to defend the suit having filed a multiplicity of applications to set aside the interlocutory judgment. However, we are of the view that the converse is actually a more plausible argument, that is that the tenacity shown by the appellant in his attempt to set aside the interlocutory judgment shows that he had every intention to defend himself.

The appellant also contended that the learned judge erred by failing to consider his defence and whether it raised triable issues. In CMC Holdings Limited (supra) this court held that:

“The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgment is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues. The case of Tree Shade Motors Limited vs DT Dobie & Company (K) Limited & Joseph Rading Wasambo, Civil Appeal No. 38 of 1998 was a case on an application to set aside a default judgment. However, the legal principles are the same as in a case where an ex parte judgment is obtained for non-appearance of a party at the hearing of his case. In that case this Court stated as follows:-”

“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.” (Emphasis added).

We note that in the application by the appellant to set aside the interlocutory judgment he annexed a draft statement of defence and counterclaim. However, having perused the ruling of Dulu, J.’ we observed that nowhere has he referred to the draft defence of the appellant. With due respect to the learned judge we hold the view that the learned judge was wrong when he failed not only to address the issue of why the appellant failed to file his defence on time but also failed to look at the defence and determine whether it raised any triable issues. It was incumbent upon the learned judge to look at the defence and make a finding on whether it raised triable issues. In the case of Mbogo vs Shah [1968] EA, this Court stated that it would not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion himself in some matter and as a result has 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 had been injustice. We hold the view that the learned judge was wrong in the exercise of his discretion by failing to look at the draft defence of the appellant and consider whether it raises triable issues.

We have also taken note that the appellant was not served with a notice of formal proof. In the case of Ngua vs Agip (Kenya) Ltd [1981] eKLR, this Court held that:

“Thus in compliance with Order IXB rule 1(1) where a defendant has appeared he must be given reasonable notice of the hearing of formal proof in order that he may have an opportunity if he so desires either to defend or seek leave to file a defence out of time. The appellant was given no notice. This entitles him to have the e parte judgment set aside and in consequence all subsequent orders including the order appealed against are nullified.”

Order IXA rule 1(1) of the repealed Civil Procedure Rules provided:

“At any time after the close of pleadings, the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set the suit down for hearing.”

Though the above provision was not retained under the current civil procedure rules, we agree with the finding in Ngua (supra) and adopt it. We hold the view that where a party has entered appearance he must still be served with the notice of formal proof.

The upshot of the above is that we allow this appeal and set aside the Ruling of the High Court dated the 5th June, 2012. We also set aside the interlocutory judgment entered on 6th February, 2006 and all consequential orders made thereunder. We order that the appellant be allowed to file his defence within 30 days of the delivery of this judgment and thereafter the case to proceed at the High Court before any judge other than Dulu, J. We further order that the appellant shall bear the costs of this appeal but the costs at the High Court shall abide the outcome of the suit.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR