



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 34 OF 2015

BETWEEN

ERWEN ELECTRONICS LIMITED.....1<sup>ST</sup> APPELLANT

ARJUN RUZAIK.....2<sup>ND</sup> APPELLANT

BINA RAJU PATEL.....3<sup>RD</sup> APPELLANT

BANKIM MANUBHAI PATEL.....4<sup>TH</sup> APPELLANT

VERSUS

RADIO AFRICA LIMITED.....1<sup>ST</sup> RESPONDENT

LINGAM ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT

*(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (L. Kimaru, J.) Dated 29th April, 2010*

in

H.C.C.C. No. 579 of 2008)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal arising from the Ruling of the High Court, **Luka Kimaru, J.** dated the 29<sup>th</sup> day of April, 2010, in which the learned Judge declined to set aside his orders made on the 10<sup>th</sup> day of December, 2009.

The brief background to the appeal is that, the first respondent sued the appellants, and the 2<sup>nd</sup> respondent in the High Court, at Nairobi vide a plaint dated the 12<sup>th</sup> day of September, 2008. The appellants and the 2<sup>nd</sup> respondent entered appearance on the 24<sup>th</sup> day of November, 2008 and filed a joint defence dated and filed on the 11<sup>th</sup> day of December, 2008. On the 10<sup>th</sup> day of March, 2009, the 1<sup>st</sup> respondent filed an application withdrawing the suit against the second respondent. On the 25<sup>th</sup> day of April, 2009, the 1<sup>st</sup> respondent filed a chamber summons dated the 2<sup>nd</sup> day of April, 2009 under **Order VI Rule 13(1) (b) (c) & (d)** of the Civil Procedure Rules and section **3&3A** of the Civil Procedure Act, substantively seeking to strike out the joint defence, and for Judgment to be entered against the appellants.

That application was grounded on the affidavit of **PARTRICK QUARCOO**, in which it was contended that the appellants' joint defence as filed was scandalous, frivolous, vexatious and could prejudice, embarrass or delay the fair trial of the suit. The application was not resisted by the appellants either by way of a replying affidavit or oral submissions during the hearing which proceeded exparte. In a Ruling dated the 10<sup>th</sup> day of December, 2009, the Judge allowed the application as follows:-

***“In the premises therefore, the plaintiffs application dated 2<sup>nd</sup> April, 2009 is therefore (sic) allowed. The defendants defence***

***filed on 11<sup>th</sup> December, 2008 is struck out with costs. Judgment is entered for the plaintiff for the liquidated sum of Kshs. 4.3 Million. The said amount shall attract interest at Court rates from the date of the suit was filed on 3<sup>rd</sup> October, 2008. In the event, that the plaintiff shall be desirous of pursuing other prayers in the plaint, it shall fix the hearing of that part of the claim for it to be disposed off by formal proof.***

The appellants were aggrieved. They filed a chamber summons dated and filed on the 16<sup>th</sup> day of December, 2009, pursuant to Order 1XB Rule 8 of the Civil Procedure Rules, supported by the affidavit of **James Rimui** and **Collins Otieno** substantively seeking an order of stay, to stay any further proceedings in the matter, and to set aside the exparte orders of the court. The application was resisted through a replying affidavit of **Kiprono Kittony** deposed and filed in court on the 23<sup>rd</sup> day of February, 2010.

The Judge after evaluating and assessing the record before him framed the issue for determination before him as whether the appellants had made out a case to persuade the Court to exercise its discretion in their favour. The Judge went on further to state and correctly, so in our view, that the principles that guide the court in the exercise of the courts' discretion to set aside an exparte judgment were already crystallized by a long line of case law. He relied on the cases of **Kanji Naran versus Velji Kimji [1954] 2IEACA20** for the principle that where it is established that there was no proper service, the court has no option but to set aside the exparte Judgment; the case of **Shah versus Mbogo [1967] EA116**, for the principle that where it is established that the defendant was served, the court has an unfettered discretion to set aside the default Judgment, provided that in so doing, no injustice is occasioned to the opposing party as the discretion to set aside an exparte Judgment is intended to a void injustice or hardship resulting from accident, in advertence, or excusable mistake or error but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice. Lastly, the case of **Maina versus Muguna [1983] KLR78** was relied on for the principle that the court must be satisfied that the defendant has a good defence on merit before allowing such a defence to go to trial.

Applying the above principles to the rival arguments before him, the Judge made findings that the appellants' counsel was aware of the date that the application for the striking out of the defence had been listed for hearing; that according to the return of service filed by one **Stephen Mwangangi**, the appellants counsel was served with the application on the 27<sup>th</sup> May, 2009; that the appellants were duly notified that the application was scheduled to be heard on the 8<sup>th</sup> day of July, 2009 at 9.00am; and that the appellants filed no papers in opposition to the said application. It was further the Judges' finding that although the appellants counsel had pleaded with the court not to punish his clients on account of his failure to attend court on the scheduled date when the application for striking out the joint defence was heard, it was evident that even if the said counsel had attended court, the appellants had filed nothing on record to oppose that application. Neither were any reasons given for the failure to file a replying affidavit or grounds of opposition to the application for striking out of the joint defence.

Lastly, the Judge appreciated the efforts made by the appellants' counsel to remedy the situation immediately it was brought to his notice that the application to strike out the defence had proceeded exparte but opined that the aforementioned efforts had to be weighed against the consideration as to whether such attendance and participation in the proceedings before the court in the condition in which they were would have made any impact on the ultimate outcome of the determination of that application. In the Judges' opinion, such attendance and participation by the appellants counsel in the application for striking out the joint defence would not have made any difference on the outcome of the application, because, although the appellants had contended in their supporting affidavit for setting aside that they had paid taxes to the Kenya Revenue Authority (KRA) for the years 2004 and 2005, the statements of accounts annexed to the supporting affidavit did not reveal such payment.

Second, there was no proof that the appellants paid the debt of Kshs. 300,000/= due to the Kenya Broadcasting Corporation (KBC). On that account, the Judge found as a fact that the appellants had not provided an answer to the 1<sup>st</sup> respondents claim, and therefore concluded thus:-

***“This Court has a discretion to set aside any of its orders issued in the absence of attendance by one of the parties to court during the hearing of the case. A part from satisfying the court that he had good reasons for his failure to attend court, the applicant must satisfy the court that he has a good defence on merit. In this application, I was satisfied by the reason advanced by the defendants' counsel for his failure to attend court on the day the application was scheduled to be heard. However, I am not satisfied that any useful purpose will be served by this Court setting aside the said order of this Court, when clearly, it is apparent that the defendants have no defence to the plaintiffs claim.”***

Those are the findings that aggrieved the appellants. They have raised nine (9) grounds of appeal which were compressed into four in the written submissions namely, that, the learned Judge erred both in law and in fact:

***(1) When he entered Judgment in favour of the 1<sup>st</sup> respondent in the absence of assignment of debts from the third party allegedly owed.***

***(2) In finding that the appellants had not paid taxes to the Kenya Revenue Authority in the years 2004 and 2005 and that there was no proof that the appellants had paid the debt of Kshs. 300,000 to Kenya Broadcasting Corporation.***

***(3) In finding that the appellants had no reasonable defence to the 1<sup>st</sup> respondent's claim when the evidence adduced by the 1<sup>st</sup> respondent was indicative of the fact that the 1<sup>st</sup> respondent had no cause of action against the appellants.***

***(4) In failing to exercise his discretion to set aside his ruling of 10<sup>th</sup> December, 2009.***

The appeal was disposed of by way of written submissions which learned counsel for the respective parties fully adopted, without oral highlighting.

In support of ground 1, the appellants contended that it was not disputed that the sum claimed by the 1<sup>st</sup> respondent in the plaint were

claimed on account of debts allegedly owed to KRA and KBC; that the Judge fell into error when he found for the 1<sup>st</sup> respondent and yet the first respondent did not adduce any evidence to show that the 3<sup>rd</sup> parties assigned to it the alleged debts and thereby accorded it the right to sue and recover the same on behalf of the 3<sup>rd</sup> parties.

The appellants contended further that no instrument of assignment of debt was presented to court. Nor was any evidence tendered to court to show that the said 3<sup>rd</sup> parties were pursuing the alleged debts; that in the absence of proof of an assignment of such debts to the 1<sup>st</sup> respondent by both KRA, and KBC, the 1<sup>st</sup> respondent had no right to claim these on behalf of the said entities. The appellants' added that clause 11 of the agreement stipulated clearly that the appellants would only be required to pay the purchaser for any liability already incurred, meaning that the appellants would only refund moneys already paid out by the 1<sup>st</sup> respondent, and since none had been paid out, the Judge should be faulted for his failure to take into account the fact that no monies had been paid out by the 1<sup>st</sup> respondent to KRA and KBC to warrant their right to claim a refund from the appellants .

To buttress the above submissions, the appellants relied on **Ben Mwangi Kihia versus National Bank of Kenya Limited [2005] eKLR** on the requirements for an assignment of debt to be valid, namely that, it must be absolute; second that it must be in writing; and third, that it must be given to the person against whom the right is to be enforced. In support of ground 2, the appellants contended that they annexed to the replying affidavit tax returns for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005 respectively, all of which according to them (appellants) went to demonstrate that taxes were fully paid. The returns showed nil outstanding balances for all the mentioned years and the 1<sup>st</sup> respondent never exhibited any notice from KRA demanding payments of the alleged taxes of Kshs. 4 million. They also contended that they had exhibited a cheque demonstrating payment of Kshs. 300,000/= to KBC. In light of the above arguments, the appellants submitted that there were triable issues which the learned Judge ought to have allowed to proceed to trial.

To buttress the above submissions, the appellants relied on the case of **Stephen Kinini Wang'ondy versus the Ark Limited [2016] eKLR** where it was held that a Judge must always consider all the evidence on record before making any finding of fact; and **Jacob Kilach versus Nation Media Group Ltd, Salaba Agencies Ltd and Michel Rono [2015] eKLR** for the proposition that if a defence raises even a single triable issue, the defendant must have unconditional leave to defend the suit.

In support of ground 3, the appellants' reiterated their submissions in support of ground 2 above and argued that on the facts on the record, it was wrong for the Judge to summarily conclude that the appellants owed the said amounts to those entities without sufficient proof; that in the circumstances, the 1<sup>st</sup> respondent had no cause of action against them, and that the Judge thereby exercised his discretion improperly when he denied them an opportunity to be heard on the application for striking out their joint defence.

Turning to ground 4, the appellants contended that the learned Judge, having accepted the explanation given by the appellants' advocate that non attendance of the said advocate on the date fixed for the hearing of the application was on account of the advocate's mistake, he ought to have allowed the appellants' to defend the application to strike out their defence. The failure to do so occasioned a miscarriage of justice.

Rising up to oppose the appeal, the first respondent relied on **Global Vehicles Kenya limited versus Lenana Road Motors [2015] eKLR and David Sirangole Tukai versus Francis Arap Muge & Others CA No. 76 of 2014** in support of the principle that parties are bound by their pleadings, on the basis of which the respondents submitted that the Judge could not be faulted for the failure to interrogate and make findings on the issue of assignability of debts as the same had not been raised before him. That being the case, it was submitted, this Court has no jurisdiction to decide the issue since it can only consider those matters that were agitated by the parties and ruled upon in the decision under review on appeal.

The first respondent continued to urge that the Judge appreciated the correct legal position, when he struck out the appellants' joint statement of defence, and which decision we were urged not to disturb; considering that even after being given an opportunity to be heard on their application for setting aside the ex parte proceedings, and the resulting ex parte order, the appellants failed to adduce evidence that they had indeed paid the tax liability due to the KRA and the debt due to KBC. There was therefore no basis in the circumstances, for the appellants to be accorded an opportunity to be heard on a mere denial in the joint defence that was struck out.

This is a first appeal arising from the trial courts' exercise of Judicial discretion in declining to restore the application for striking out of the appellants' joint defence. The principles that guide the interference with the exercise of Judicial discretion have crystallized in a long line of cases. **Sir Clement De Lestang V.P.** put it succinctly in **Mbogo versus Shah [1968] EA 93** at page 94 thus:-

***“It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

The President, **Sir Charles Newbold** agreeing, added his own understanding at page 96, thus:-

***“ A court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected 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 has been misjustice.”***

See also Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** wherein he

stated thus:-

***“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong.”***

We have considered the record in the light of our mandate, the rival submissions, and the applicable principles of law set out above. In our view, only one issue falls for our determination namely: whether the learned Judge exercised his discretion judiciously. The major reasons the Judge gave for withholding of the exercise of the said discretion in favour of the appellants was because upon consideration by him of the joint defence which then stood struck out, he found that, the said defence raised no triable issues and it would have been a waste of judicial time to allow it to go for a merit trial.

We have carefully reviewed the impugned ruling and it reveals that indeed the Judge appraised himself of the pleadings filed by the respective parties as was expected of him. He also applied the correct principles of law on striking out of pleadings as enunciated in the case of **DT Dobie & Co. Limited versus Muchina [1982] LR11**, wherein, at page 9 **Madan JA** (as he was then) had this to say:-

***“No suit ought to be summarily dismissed unless it appears so hopeless, that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”***

Applying the above principle to the 1<sup>st</sup> respondents’ argument in the light of the record before him, the Judge concluded thus:

***“It was evident from this Courts’ perusal of the defendant’s statement of defence that the same constitutes mere denial to the plaintiffs claim. It does not offer any defence or raise any triable issue to the matters pleaded by the plaintiff in its pleadings. Indeed the said defendant admits that the said amount is owed to the two institutions. The said defence is therefore frivolous, vexatious and is meant to delay the just determination of this suit.”***

As already observed above, the Judge declined to reopen the matter for the appellants to be heard on the application for striking out the joint defence mainly on the ground that it raised no triable issue. The appellants on appeal have tended to counter that finding by submitting that if any debts were owed by them, then these were owed to KRA and KBC; and that the 1<sup>st</sup> respondent could only benefit from such debts upon demonstration that the said debts had been assigned to it. The 1<sup>st</sup> respondent countered that submission by asserting that assignment of debts by KRA and KBC to the 1<sup>st</sup> respondent was never an issue before the trial Judge as it was never pleaded. It was also not agitated before the trial Judge during the hearing of the application for striking out.

After reviewing the record in the light of the sole submission by the 1<sup>st</sup> respondent, the Judge held the appellants liable to meet the claim of the 1<sup>st</sup> respondent because they had admitted so in their defence. This is found in paragraph 5(b) of the joint defence where they denied the amount claimed as having been due both to KRA and KBC. As correctly submitted by the 1<sup>st</sup> respondent, what the Judge was dealing with at that interlocutory stage were pleadings as laid before him by both parties. As correctly submitted by the first respondent, parties are bound by their pleadings. See a long line of cases including

**Odd Jobs versus Mubia [1970] EA 476, Independent Electoral Commission and another versus Stepher Mutinde Mule and 3 others [2014] eKLR and Dakianga Distributors (K) Ltd versus Kenya Seed Company Limited [2015] eKLR.**

We have considered the joint defence on record. Nowhere in the said joint defence do we find the appellants’ total denial of liability to KRA or KBC through the 1<sup>st</sup> respondent on account of lack of assignment of the debts to the 1<sup>st</sup> respondent. We therefore agree with the 1<sup>st</sup> respondent’s submission that this issue was being raised for the first time on appeal and is accordingly rejected. As correctly submitted by the 1<sup>st</sup> respondent, our mandate is limited to interrogation of matters that were considered and determined by the trial court. The above finding notwithstanding, we note that the appellants relied on the income Tax returns as proof of payments together with statements of accounts annexed thereto, which the learned Judge reviewed and gave reasons as to why he found that there was lack of proof of such payment. We have considered the material that the Judge reviewed and on the basis of which he rejected the appellants’ assertion that they had fully paid those debts and by reason of which they sought to defeat the 1<sup>st</sup> respondents claim against them with regard thereto. In our view, the most prudent way of proving discharge of any liability to KRA should have been simply by way of production of a certificate of compliance issued by KRA to that effect. None was exhibited.

Turning to the indebtedness to KBC, the trial Judge relied on the letter dated the 8<sup>th</sup> day of March, 2007 under the hand of the 2<sup>nd</sup> appellant in his capacity as the Managing Director of the 1<sup>st</sup> appellant, and a letter dated 19<sup>th</sup> July, 2007 from KBC stating clearly that the amount of Kshs. 300,000/= was owed to it by the appellants. Likewise the most prudent way of countering the contents of those two letters would have been for the appellants’ production of an acknowledgement receipt of payment from KBC. None was placed before the trial Court. The trial Judge cannot therefore be faulted for holding that all that the appellants wanted the trial court to hear them on with regard to any triable issue allegedly raised in the struck out joint defence was their denial that the amount of Kshs. 4.3 million was owed by them to both KRA and KBC, which contention we have discounted. We therefore find no basis for the alleged improper exercise of Judicial discretion by the Judge in refusing to reopen the matter for the appellants to be heard on the application for striking out of the joint defence.

The upshot of the above is that we find no merit in this appeal. It is accordingly dismissed with costs to the 1<sup>st</sup> respondent both on appeal and the court below.

**Dated and Delivered at Nairobi this 18<sup>th</sup> day of May, 2018.**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P.O. KIAGE**

.....

**JUDGE OF APPEAL**

**I certify that this is a  
true copy of the original.**

**Deputy Registrar**