



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, GATEMBU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 217 OF 2009

BETWEEN

JOMO KENYATTA UNIVERSITY OF AGRICULTURE

& TECHNOLOGY APPELLANT

AND

MUSSA EZEKIEL OEBAH RESPONDENT

*(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi Milimani
(Koome, J) on the 17th day of July, 2000*

in

NAIROBI HIGH COURT CIVIL SUIT NO. 340 OF 2009)

JUDGMENT OF THE COURT

1. In a ruling delivered on 17th July 2009 the High Court (M. K. Koome J, as she then was) exercising its discretionary power dismissed with costs the appellant’s application to set aside an interlocutory judgment in favour of the respondent entered on 21st April 2009 in default of appearance.

2. The question that arises for determination in this appeal is whether we should interfere with the learned Judge’s exercise of discretion. For us to do so, we must be satisfied that the learned judge of the High Court misdirected herself in some matter and as a result arrived at a wrong decision. As held by this Court in the often cited case of **Mbogo and Another v Shah [1968] EA 93:**

“A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

Background

3. The context in which the present appeal arises is as follows:

On 6th August 2008, the respondent's commercial motor vehicle was being driven along Nairobi/Thika Road when, on reaching Juja near or adjacent to the appellant's premises, it was descended upon and set on fire by what the respondent described in his plaint as "*rowdy and unruly students of the defendant*" and reduced to a shell. According to the respondents, the appellant is liable in negligence for the acts of its student, which according to the respondent resulted in the loss of his vehicle. On that basis, the respondent claimed Kshs. 2,230,000.00 as the value of the destroyed vehicle, loss of use of the vehicle at the rate of Kshs.12, 000.00 per day from 6th August 2008 until payment in full, special damages of Kshs. 5,420.00 in respect of assessment fees and police abstract report, general damages and costs. To buttress his case, the respondent averred that the appellant surcharged its students in "*order to meet the damage inflicted by the rioting students*" and that the money raised was "*sufficient to compensate for the loss and damage.*"

4. Summons to enter appearance and the plaint were served on the appellant on 30th March 2009. On 15th April 2009 the respondent filed a request for judgment in the High Court seeking for "*interlocutory judgment for Kshs. 5,271,420.00*" against the appellant "*who has failed to enter appearance within the time prescribed.*" On 21st April 2009 the Deputy Registrar of the High Court entered "*interlocutory judgement...as prayed*" and notice of judgment dated 24th April 2009 was then served on the appellant by the advocates for the respondent.

5. The notice of judgment precipitated the appellant's application to the High Court filed on 4th May 2009 seeking amongst other reliefs, to set aside the judgment. In the affidavit supporting the application, the Deputy Vice Chancellor of the appellant deposed that summons to enter appearance and the plaint were served on the appellant on 30th March 2009 but misplaced within its registry through an honest and inadvertent mistake. A draft defence was annexed to the affidavit in which the appellant denied the respondent's claim as pleaded in the plaint. The appellant further averred in its defence that, "*the alleged actions of the alleged students were executed beyond the defendant's precincts and /or jurisdiction. The defendant is not responsible and/or liable for actions criminal or otherwise of either students or civilians within or outside the defendant's jurisdiction.*"

6. After considering the application, the affidavits and the submissions by counsel, the learned Judge of the High Court was not satisfied that the appellant was deserving of the orders it was seeking to set aside the interlocutory judgment. After reviewing the legal principles on the basis of which an application for setting aside default a judgment is considered the learned judge concluded that:

"Whereas the court has unfettered discretion, as I understand the exercise of discretion it must be exercised judiciously based on evidence, and law. I am not persuaded by matters pleaded in the defence deserve the exercise of my discretion to set aside a regular judgment. The conduct of the defendant and lack of forthrightness by withholding material information when this application was filed has not helped its case. It is determinable from the material before this court that the defendant is merely acrobating (sic) and reprobating. At one time, the defendant intends to compensate the plaintiff; they surcharge the rioting students, and even used the plaintiff as a person whose property was destroyed by the students to defend itself, and at a convenient moment, the defendant deny the plaintiff's claim in ^{total}. I find the exparte judgment was regularly obtained; the issues regarding the assessment of damages can be canvassed during the formal proof. The defendant does not deserve the exercise of my discretion. On the other hand, the defendant who lost his commercial motor vehicle (matatu), cannot reasonably be compensated with costs, he will be prejudiced by being taken backwards by a defendant who did not respect the court summonses in the first place, and did not even care to disclose to this court vital information.

The defendant's application is dismissed with costs to the respondent ."

7. According to the appellant, the learned Judge erred in failing to consider the defence and to find that it raised triable issues; failing to properly apply the applicable legal principles to the appellant's application; finding that the appellant withheld information; failing to consider the reasons given by the appellant for the failure to file its memorandum of appearance; finding that the appellant intended to compensate the respondent and wrongly exercising her discretion to decline the application.

Submissions by counsel

8. E. M. Mukele, learned counsel for the appellant, cited the case of **Mbogo and Another v Shah** (supra) and submitted that we should interfere with the decision of the High Court because the learned Judge misdirected herself in the matter with the result that she made a wrong decision; that on the strength of the case of **Ceneast Airlines Limited vs. Kenya Shell Limited Civil Appeal No. 174 of 1999 [1999] eKLR** the concern of the court should be to do justice to the parties; that triable issues that should go to trial for adjudication were raised; that the Judge failed to consider the appellant's defence that it cannot in law be liable in negligence for the alleged actions of its students who allegedly burnt the respondent's vehicle; that the appellant explained the circumstances leading to the omission to file a memorandum of appearance and defence and the learned Judge ought to have exercised her discretion to set aside the default judgment to avoid injustice or hardship. In that regard counsel referred us to the case of **CMC Holdings Limited vs. James Mumo Nzioki Civil Appeal No. 329 of 2001**. Counsel concluded by submitting that despite the legal authorities cited before her, the learned Judge failed to analyse them in relation to the matter before her.

9. Opposing the appeal, Mr. Okweh Achiando learned counsel for the respondent started his address with a complaint that the appellant's written submissions were filed outside the time period stipulated by the Court without leave and that the same should therefore not be considered. Counsel went on to submit that there is no dispute that the respondent's vehicle was set ablaze and destroyed by the appellant's students; that the appellant's management board considered the respondent's request for compensation and resolved to donate Kshs. 1.5 million to the respondent; that the appellant went ahead to surcharge students and collected funds for that purpose; that the agreement to donate was based on the appellant's acknowledgment that the respondent's vehicle was damaged by the appellant's students; that in those circumstances there are no triable issues for adjudication and the learned judge correctly refused to set aside the judgment in favour of the respondent; that under the appellant's statutes the students are required to conduct themselves with integrity, personal discipline and morality and the appellant is therefore liable for the actions of the students when their conduct is in breach of those statutes.

10. According to the counsel the appellant did acknowledge in other court proceedings that its students were engaged in student protests on 6th August 2008 and that buildings and other "*property of other persons outside the university premises*" damaged and the learned judge of the High Court was right to say that the appellant should not approbate and reprobate at the same time. Counsel referred us to the High Court case of **Letangule & Company Advocates vs P. K. Rotich & others HCCC No. 200 of 2009** for the factors to be considered in an application for setting aside an *exparte* judgment and submitted that in the present case the High Court properly applied and rendered itself; that the delay in filing the memorandum of appearance and defence was not properly accounted for and it was not enough for the appellant to say that the summons were not brought to the attention of the appropriate office of the appellant.

11. In his brief reply Mr. Mukele apologized for filing the submissions out of time explaining that the delay was occasioned by change of personnel in his office and reiterated that the circumstances of this case warrant the interference of the discretion by the learned judge of the High Court.

Determination

12. We have considered the appeal and the submissions by learned counsel. As we have observed, we can interfere with the exercise of discretion by the judge if we are satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or if it is manifest that the judge was clearly wrong in the exercise of discretion with the result that there has been a miscarriage of justice. See **Mbogo**

and Another v Shah (supra).

13. The object of clothing the court with discretion to set aside judgment obtained *ex parte* has been pronounced in many decisions. Sample the following:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...” See : **Shah v Mbogo and Another [1967] EA. 116.**

14. In **Patel v E.A. Cargo Handling Services [1974] EA 75**, Sir William Duffus, P at page 76 stated:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

15. In **Philip Chemwolo & Another v Augustine Kebende [1982-88] KAR 1036** Apaloo J.A at P.1042, had this to say:

“I think a distinguished equity Judge has said:

“Blunders will continue to be made from time to time and it does follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits.”

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 the parties and not for the purpose of imposing discipline.”

16. In **Sebei District Administration v Gasyali and others [1968] EA 300** Sheridan J of the High Court of Uganda made the following remarks:

“The nature of the action should 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, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the Court.” (Emphasis added).

17. The overall effect of those judicial pronouncements is that where a defendant raises a reasonable defence to the plaintiff’s claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant. Applying those principles to the matter at hand, it is not in dispute that the summons to enter appearance was served on the appellant on 30th March 2009. Based on the respondent’s request for judgement filed on 15th April 2009 the Deputy Registrar entered interlocutory judgment on 21st April 2009. Notice of judgment dated 24th April 2009 was then served on the appellant by the advocates for the respondent, which moved to set aside the judgment by its application to the High Court filed on 4th May 2009.

18. In that application, the appellant explained in the supporting affidavit the circumstances leading to the omission to file a memorandum of appearance and defence which it attributed to an oversight and an honest mistake on their part. The learned Judge stated, rightly in our view, that the overarching consideration for the court is to do justice to the parties and where the court is satisfied that there is defence on merit, or a defence that raises triable issues, the court should exercise its inherent jurisdiction to allow that defence to proceed for trial. However, the learned judge was not impressed by the

explanation put forth by the appellant for the failure to file appearance stating that the “*plaintiff has nothing to do with the inefficiency and the mistakes committed by the defendant's registry staff*”.

19. There was no material before the court to suggest that the appellant deliberately sought to obstruct or delay the cause of justice; the appellant moved swiftly to court to apply for the setting aside of the default judgment immediately upon becoming aware of the entry of judgment on account of its omission to enter appearance. In our view the oversight by the appellant is excusable considering as we do that the defence put forth by the appellant did raise ‘triable issues’. In that defence the appellant denied that its students were responsible for the loss of the respondent’s motor vehicle, and further, that even if they were students from the appellant University, the appellant could not be held liable for acts committed by them within or outside its premises. Based on the draft defence, the matters that would require determination upon trial include the questions whether the persons who set the respondent’s motor vehicle on fire were students of the appellant university; if so, whether the appellant is liable for actions of its students whether within or outside its premises; and whether the appellant agreed to compensate the respondent for its loss and the quantum of loss.

20. In our view those issues are triable and call for trial. The court should have been reluctant to deny the appellant a hearing. In the circumstances it is clear that immediately the appellants became aware of the judgment on being served with notice of entry of judgment, it took steps to rectify the position. We consider that the learned judge misdirected herself by attempting to weigh the merits of the defence with insufficient material in a matter befitting trial with the result that she arrived at a wrong decision disallowing the appellant’s application.

21. For those reasons we consider this to be a proper case for us to interfere with the lower court’s exercise of discretion and accordingly allow the appeal. We set aside the order of the High Court dismissing the appellant’s application dated 29th April, 2009 and substitute the same with an order allowing prayer 4 of the appellant’s chamber summons application dated 29th April 2009 and filed in the High Court on 4th May, 2009. The appellant shall file and serve its defence within 10 (ten) days of delivery of this judgment. The costs of the appeal shall abide the outcome of the trial in the High Court.

Dated and Delivered at Nairobi this 18th day of December, 2014.

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

