



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 219 of 2009

MOUNT KENYA BOTTLERS LIMITED.....APPELLANT

AND

MARY GATHONI WERU.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Embu (Karanja, J.) dated 13th November, 2008

in

H.C.C.C. NO. 120 OF 2007)

JUDGMENT OF THE COURT

1. On 20th September, 2006, **Mary Gathoni Weru** (appellant) filed a suit at the Resident Magistrate's Court at Wang'uru against Mount Kenya Bottlers Ltd (respondent). The claim by the respondent was for damages as a result of loss of business at the rate of Kshs.250/= per day effective from 18th November, 2005 as well as general damages. This claim was based on allegations that the respondent bought some sodas from the appellant, and sold the same to a customer who caused commotion at her kiosk; that the soda was contaminated and the commotion caused her loss of business.
2. The suit was later transferred from the subordinate court to the High Court at Embu. The plaint and summons to enter appearance were served upon the appellant but they failed to enter appearance or file a defence within the stipulated period and an interlocutory judgment was entered against them on 27th October, 2006. On 31st December, 2007, the appellant applied to set aside the interlocutory judgment that was entered by the subordinate court on 27th October, 2006. That application was based on the grounds that the delay in entering appearance and filing defence was occasioned by a communication error between the appellant, their insurance brokers and its insurer. It was contended that the interlocutory judgment was irregularly applied for and entered hence the need to set it aside; the defendant had a good defence and lastly no prejudice would be occasioned to the respondent if the application was allowed.
3. These grounds were explained further by the supporting affidavit sworn by **Paul Okwemba Chimasia** on 31st December, 2007. The explanation offered for the delay is that the appellants were served with summonses in two related matters which they forwarded to their insurance company. Apparently the

insurance company acted on only one matter and failed to file an appearance and defence in this matter. Initially the appellant's advocates tentatively agreed with the respondent or her advocates to set aside the interlocutory judgment and they prepared a draft consent. However, due to the mix up of the case title and partly because the respondent withdrew instructions from her advocate who represented her at the time, that consent letter was not executed.

4. That application was heard by **Karanja, J** (as she then was), and was dismissed for lacking in merit. The Judge observed in part of her ruling as follows:-

“To start with I wish to differ with counsel for the appellant as to whether interlocutory judgment could be entered in respect of non-liquidated damages. Interlocutory judgment may be entered in a claim like this but the matter must go to hearing for formal proof so that the plaintiff can prove his or her case. If the claim is for liquidated damages, then the court enters judgment as for the amount without subjecting the same to formal proof. In the present case the magistrate entered judgment but the plaintiff still had the onus to prove her claim and the amount of damages she had claimed. There was therefore nothing illegal or unprocedural about the interlocutory judgment on record. The claim could still have been dismissed if the plaintiff failed to prove her case. Secondly, the issue of confusing the documents is neither here nor there. That was sheer negligence on the part of the defendant and there is no plausible reason why that negligence should be (sic) listed on the plaintiff. Setting aside an ex parte judgment is purely at the discretion of the court. This discretion must be exercised judicially and in the interests of justice for both parties. The discretion should be used to avoid hardship or injustice resulting from accident, inadvertence or excusable mistake or error. It should not be used to aid a negligent party or an indolent one as in the case here. I am disinclined to allow this application.”

5. Being aggrieved by that ruling the appellant appealed. The appellant listed 7 grounds of appeal but during the hearing, **Mr. Maramu**, learned counsel for the appellant, abandoned the first three grounds and summarized the other grounds as follows:-

- There was an arguable defence that was annexed to the application.
- There was a genuine mistake and mix up of documents for Wanguru RMCC No.60 of 2006 which related to the same parties and the same transaction.
- A consent letter dated 12th March, 2008 signed by counsel for the appellant and the respondent allowed the defence to be filed out of time.

6. On the part of the respondent this appeal was opposed. **Mr. Muyodi**, learned counsel for the respondent, supported the order dismissing the application. He submitted that the judge's exercise of discretion cannot be faulted because the application was made after one year and three months; the explanation for the delay was not plausible; the consent letter was never adopted as an order of the court; that when the respondent purported to sign a consent letter, she had an advocate on record acting for her and therefore she could not have entered into consent in person; and finally, the defence did not raise any arguable points.

7. We appreciate that the learned judge was exercising her unfettered discretion in the matter which is always done to ensure the ends of justice and to protect the court process and the rules of procedure from being abused. However, we are concerned that the learned judge did not consider the merits or otherwise of the proposed defence. Secondly, there was a consent letter on record dated 12th March, 2008 which was signed by the then counsel for the appellant and the respondent. This aspect, although it was part of the application was also unfortunately not considered in the ruling.

8. In *Phillip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-88) 1KAR-Page 1036* the Court of Appeal while dealing with almost similar circumstances observed as follows: -

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani v McConnell [1966] EA 545. Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is

a triable issue.”

9. A look at the material that was before the learned judge reveals that it was a claim by the respondent against the appellant seeking damages for alleged loss of business and general damages for psychological trauma. The loss claimed was allegedly caused by the appellant after the sale of a bottle of soda that was alleged to have been contaminated. The proposed statement of defence denied liability and specifically denied that the appellant was the manufacturer of the said Krest Soda with foreign bodies. This defence, in our view, raised arguable points, but it was not at all considered in the ruling by the learned judge. Moreover, the parties had even attempted to file a consent letter which, although not adopted as an order of the Court, was on record and parties had attempted to set aside the interlocutory judgment to allow the defence. This aspect was also never considered in the ruling.

10. In our own appreciation of the matter, we are satisfied that the defence was arguable, and that would explain why the parties had attempted to file a consent letter to allow the interlocutory judgment be set aside although the respondent's counsel later changed his mind. These are factors that were not considered by the learned Judge and if they were, we are certain she would have arrived at the same conclusion as we have, that the mistakes that caused the delay and mix up of pleadings were excusable mistakes and allowing the defence to be filed out of time was a mere inconvenience to the respondent which could have been cured by payment of costs.

11. In the case of ***Phillip Chemwolo (supra)***, Apaloo, J.A. (as he then was) posited as follows: -

“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...”

12. We think we have said enough to demonstrate that the judge was clearly wrong in the exercise of her discretion. We accordingly allow the appeal, set aside the ruling of 13th November, 2008 and grant the appellant leave to file a defence and serve it upon the respondent within 14 days from the date hereof. We however, award costs to the respondent for the application dated 31st December, 2007.

Dated and delivered at Nyeri this 16th day of May, 2013.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR