



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU, J.J.A. & ONYANGO OTIENO, AG.JA)

CIVIL APPEAL NO. 329 OF 2001

BETWEEN

CMC HOLDINGS LIMITED APPELLANT

AND

JAMES MUMO NZIOKI RESPONDENT

Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 31st July 2000

in

H.C.C.C. NO. 105 OF 1994)

JUDGMENT OF THE COURT

This is a second appeal. The respondent, who was the plaintiff in the Resident Magistrate's Court and the respondent in the Superior Court, James Mumo Nzioki (to whom we shall refer as the "respondent") sued the appellant, CMC Holdings Ltd, (to which Company we shall refer as the appellant) by way of a plaint dated 9th September 1988. In that plaint, the respondent claimed special damages at KShs 40,000/=, being the value of the subject motor vehicle; such other special damages as would be determined by Court under paragraph 6(b) of the same plaint; general damages; interest on the same special damages; such other damages and general damages plus costs of the suit. Such other damages according to paragraph 6(b) referred to loss of profits at KShs 24,000/= per month for a period that the Court would determine. The allegations giving rise to these claims as can be discerned from the plaint were that the respondent was at all material times the owner of a motor vehicle registration No KTP 171 Mitsubishi Pick Up while the appellant was a dealer in motor vehicles and motor vehicle spare parts as well as a motor vehicle repairer. Sometimes after 17th May 1985, the appellant sold or caused to be sold the plaintiff's said motor vehicle to a third party unknown to the respondent. The respondent alleged that the appellant converted the same motor vehicle to its own use and thus wrongfully deprived him of the same motor vehicle.

The appellant filed a memorandum of appearance, defence and counterclaim. In the defence, the appellant stated that it was a registered co-owner of the said vehicle. It claimed that by an express agreement dated 23rd February 1984, between the respondent and the appellant; it (the appellant) paid a sum of KShs 20,254/30 on behalf of the respondent on 23rd February 1984 being repair charges and insurance premiums. That agreement was agreed to act as an extension of an earlier hire purchase agreement. The

appellant alleged in that defence and counter-claim that that agreement stipulated that the respondent was to refund the same KShs 20,254/30 to the appellant by way of monthly instalments of KShs 6,751/ 45 with effect from 23rd March 1984 till payment in full failing which the appellant was at liberty to sell the motor vehicle to recover the money owed. The respondent breached the said agreement and paid only KShs 4,500/= and hence the seizure and sale of the same vehicle which the appellant contended, was done with the full knowledge of the respondent after having been given several notices to pay the same. The appellant further alleged in the defence that the subject motor vehicle was valued at KShs 21,000/=. In the counter claim, the appellant alleged that the respondent owed it KShs 19,149/30 being the balance of the sum incurred by it on behalf of the respondent together with interest and further the appellant claimed KShs 10,495.00 being repossession charges and legal fees although interestingly, when it came to the actual prayers, the appellant prayed for the total sum of KShs 19,149/30, costs of the suit; general damages for breach of contract, interest on the sum claimed ie KShs 19,149/30 and on costs. We say “interestingly” in regard to the prayers because, if we were to go by the pleadings in counter-claim, one would conclude that the appellant was claiming KShs 19,149/30 being the balance of the sum incurred by it on behalf of the respondent plus special damages in respect of repossession charges (KShs 3,495/=) and legal fees (KShs 7,000/=) making a total of KShs 29,644/30. That is what one would have expected to be claimed in prayers but for some unknown reasons, the prayers in the counter-claim did not touch on the special damages as pleaded in the counter-claim. Be that as it may, there was a counter-claim put forward by the appellant.

The respondent filed a defence to the same counter-claim in which he denied the counter-claim and maintained that there could not exist a hire purchase agreement for supply of or sale of spare parts. He contended that the counter-claim was bad in law and should be struck out and that the appellant’s claims of special damages were too remote and unrecoverable.

Before the suit was heard, the firm of advocates, then acting for the appellant, V A Nyamodi & Co, are on record as having applied to be granted leave to withdraw from acting for the appellant. That application was dated 11th May, 1989. The same application came up for hearing on 30th October 1989 but on that date, the application was withdrawn and the suit then came up for hearing on 14th December, 1989. On that date, the record shows that both parties attended Court, but the hearing did not proceed. No reasons were recorded for the adjournment but hearing was stood over generally and parties were to share costs of adjournment fees which was to be paid before the next hearing date. The next hearing date was 15th May, 1992. That date was fixed *ex parte* by the respondent’s advocates and notice was to issue to the appellant. On that date, the respondent appeared in person but his counsel was absent whereas the appellant together with its counsel were not present. It is not stated whether the appellant was served with the hearing notice or not but the Court stood over the matter generally and ordered the respondent to pay KShs 600/= Court adjournment fees forthwith. The suit was later set down for hearing on 15th December, 1993. On that day, the record shows that the respondent was present in person, but the appellant was absent, though served. There is nothing to show that the respondent’s counsel was present. However, on that day, Mrs Rashid, the learned senior resident magistrate, heard the case *ex parte* and having heard evidence of one witness, namely the respondent, she reserved judgment which was to be delivered on 17th December, 1993 but was delivered on 21st December, 1993. In that short judgment, the learned magistrate stated as follows *inter alia*:

“On the basis of the documents produced, I find that the plaintiff’s m/v was unlawfully sold and the defendant is liable to pay damages to the plaintiff. Consequently, I dismiss the defence and counter-claim in view of the receipts produced showing that he had completed payments, I enter judgment in favour of the plaintiff for KShs 40,000/= being the value of the m/v and non-user for 31/2 months at 24,000/= per month, making daily net of 800/= and there is a receipt to show that. There shall be judgment in favour of the plaintiff for KShs 124,000 plus costs and interest.”

The respondent, having obtained the *ex parte* judgment, apparently contacted Eastern Kenya Auctioneers to have the decree executed and the same auctioneers attempted to attach the appellant’s property on 18th February, 1994 to satisfy the decree. The appellant, on learning of the developments in the case, felt aggrieved and filed chamber summons dated 18th February, 1994 on 24th February, 1994 under certificate of urgency. In that chamber summons, the appellant sought two orders, namely, that the *ex*

parte judgment entered on 21st December, 1993 and all consequential orders be set aside *ex debito justitio* and that a stay of execution be granted *ex parte* at the first instance. Costs was also sought to be provided for. The grounds for that application were that V A Nyamodi & Company advocates who had been acting for the appellant did seek leave to cease acting for the appellant and did not serve the application or the order upon the defendant; that the respondent did not inform the appellant of the hearing date and the matter proceeded *ex parte* and that the appellant had a cogent defence to the suit. The affidavit in support of the same application was sworn by the company secretary I A Musotsi and the same affidavit highlighted the grounds in support of the application and mainly emphasized that Nyamodi & Company, Advocates', last communication with the appellant was when they told the appellant that they were withdrawing from acting for the appellant. Since then, neither the respondent nor the same advocates had communicated to the appellant and that the appellant had a good defence to the suit. The deponent then gave details of what it felt was a good defence. The learned magistrate on hearing the application made under certificate of urgency granted interim stay of execution until 3rd March, 1994 when the matter was set down for inter partes hearing. In the meantime, the respondent who did not file replying affidavit filed notice of objection dated 12th February, 1994 (sic) on 2nd March, 1994. It looks odd that the notice of objection was dated 12th February, 1994 and it was objecting to an application filed on 18th February, 1994. We can only imagine that there was some typographical error on the date of that notice of objection. We do not attach any importance to that apparent disparity and we treat it as an error on the face of the record. The chamber summons came up for hearing before the same learned magistrate, Mrs Rashid on the same date 3rd March, 1994 and after what would appear to have been a lengthy hearing, the learned magistrate delivered a short ruling on 19th April, 1994 in which she stated as follows:-

“Ruling

This is an application to have the *ex parte* judgment set aside because there are triable issues and the defendant's former counsel was negligent in not informing the defendant of the hearing date.

Counsel has cited various authorities, but I find that the defendant was duly served and if he has any grievances, he has recourse in law in suing his former counsel for professional negligence and on that basis, I dismiss the application with costs.”

That is the ruling that gave rise to first appeal to the Superior Court as the appellant felt aggrieved by the decision of the learned magistrate. Together with its memorandum of appeal dated 20th April, 1994, the appellant also filed application for stay of execution dated 20th April, 1994 which we think was wrongly drafted as it stated that the order sought was “execution of the decree and orders made on 19th April, 1994 – RMCC 5185 of 1988 at Sheria House be granted until the determination of the appeal.” We again feel this was clearly a typographical error and we note that the Superior Court proceeded with the application on the basis that it was an application for stay of execution until the determination of the appeal. We will say no more on the same.

After hearing the appeal, the learned judge of the Superior Court Aluoch, J in dismissing the appeal, stated as follows *inter alia*:

“From my own independent evaluation of the evidence on record, I find that the defendant's claim in the counter claim would appear to have been satisfied, considering the payments made as appearing in the evidence of the plaintiff and judgment by the learned magistrate.

In the application to set aside *ex parte* judgment, the magistrate was satisfied that the defendant was served, and having earlier in the judgment found that the plaintiff's motor vehicle was “unlawfully sold and the defendant liable to pay damages.”

I find that the magistrate exercised her discretion rightly in refusing to set aside the *ex parte* judgment because she had dismissed the defence and counter-claim, on the evidence adduced before her as the monies paid towards the claim in the defendant's counter-claim. I considered the submissions of both learned counsel on appeal (sic) however, I find no merit in the appeal filed and I proceed to dismiss the

same with costs to the respondent who is the plaintiff in the lower court.”.

The appellant again felt aggrieved and filed this appeal before us which as we have said hereinabove is the second appeal. Seven grounds of appeal have been raised. These are that:-

- “1. The learned trial judge erred in law in not adjudicating the issues raised in the appeal.
2. The learned trial judge erred in law in not appreciating sufficient or at all that no evidence on the value of the vehicle had been tendered to the trial court.
3. The learned trial judge erred in law in not appreciating sufficiently or at all that the daily earning of Shs 800/= for 31/2 months had neither been pleaded nor specifically proved.
4. The learned trial judge erred in law in not holding that on the evidence adduced by the respondent, the respondents’ suit ought to have been dismissed.
5. The learned trial judge erred in law in not appreciating sufficiently or at all that the appellant was deprived an opportunity to be heard.
6. The learned trial judge erred in law in not appreciating sufficiently or at all the jurisdiction conferred upon the Court on an application seeking to set aside an *ex parte* judgment.
7. The learned trial judge erred in law in awarding relief that was neither sought nor canvassed by the parties.”

We have considered the appeal as well as the able submissions by the learned counsel. In our view, the grounds of appeal can be divided into two categories. The first category is composed of the grounds against the substantive decision of the learned trial magistrate. This aspect is covered by the 1st, 3rd, 4th and 7th grounds of appeal. The second category is composed of the grounds for the appeal against the decision of the trial court to dismiss the application seeking to set aside the *ex parte* judgment. These are covered by grounds 2, 5 and 6. In our minds, there are two distinct aspects of this appeal and for reasons which will be clear later in this judgment, we propose to consider first, the aspect of the appeal that challenges refusal by the learned senior resident magistrate to set aside the *ex parte* judgment delivered on 21st December 1993 and the endorsement by the Superior Court of the same refusal as appears in the Superior Court’s decision dated 31st July, 2000.

We are fully aware that in an application before a court to set aside *ex parte* judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition. One such authority is that of *Magunga General Stores vs Pepco Distributors* [1987] 2 KAR 89 to which we were referred and in which this Court stated as follows:-

“The Court on an appeal will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts.”

In this case, the Trial Court, as we have stated above heard the case *ex parte* on grounds that the appellant, though served with hearing notice did not attend Court on the hearing date. There was defence and counter claim on record and from the judgment she delivered, it would appear that she came to the same decision on the basis of what the respondent told her in the only evidence she recorded at the hearing of the suit. When the appellant applied to have the same *ex parte* judgment set aside, she rejected the same application and dismissed it on grounds that as she found that the defendant was duly served, if it had any grievances its recourse in law was in suing its former counsel. The learned magistrate was alive to the non controverted evidence in the supporting affidavit of the appellant that the appellant was purportedly served through its advocate and its complaint was that the same advocate did not inform it of

the hearing date. That is why the learned magistrate was of the opinion that the appellant's recourse in law was only in suing the former counsel. We readily agree that the appellant could sue its former counsel in case of negligence (though we note that the applicant could not be right that by the time the *ex parte* hearing was proceeding, Nyamodi & Co Advocates had ceased acting for the appellant, as it is clear that their application to withdraw for acting for the appellant was in itself withdrawn on 30th October, 1989 so that as on 15th December, 1993 that firm of advocates was still on record as acting for the appellant and thus it was rightly served with hearing notice) but two matters arise from the same decision which are in our humble opinion, fairly disturbing. These are first, whether, it having been established through appellant's affidavits which was not challenged that the respondent was served through its advocates who did not inform it about the hearing date, the respondent could be said to have deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice or whether the respondent found itself in hardship resulting from excusable mistake. We pose this question because, we feel it is a matter of law as to under what circumstances a Court should exercise its discretion and what was the intention of law in giving the Court such discretionary power. The record, part of which we have referred to in this judgment, shows that the appellant filed appearance, defence and counterclaim within the time allowed by the law and it appeared for hearing on 14th December, 1998 when the hearing could not proceed. These would tend to show that the appellant was interested in the case. Its explanation as to why it did not appear on the date *ex parte* hearing proceeded was not challenged as we have said, as indeed the respondent did not file any replying affidavit, and further, the learned trial magistrate also appeared to have accepted that explanation. Under these circumstances, we do not think the appellant deliberately sought to obstruct or to delay the cause of justice. In the case of *Shah vs Mbogo & Another* [1967] EA 116 decided by the High Court of Kenya at Nairobi it was held *inter alia* as follows:-

“(iv) Applying the principle that the Courts discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause by justice, the motion should be refused”.

The above was upheld by the Court of Appeal in its decision in *Mbogo & Another vs Shah* [1968] EA 93. Our view is that in law, the 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 a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. In the case before us, it is our view that the learned magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it could not appear was true or not and if true, the effect of the same on the *ex parte* judgment that was entered as a result of the non appearance of the appellant and on the entire suit. We do not think the answer to that weighty issue was to advise the appellant of the resource open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.

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 D T 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 nonappearance 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.”

The decision in the case of *Patel v Cargo Handling Services Ltd*, [1974] EA 75 though is on judgment entered under order 9A is also on the same principles. Court has wide discretion in such cases to set aside *ex parte* judgment. In this case before us, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial Magistrate stated that she considered the same and dismissed it. We do not appreciate how she could have dismissed the same defence and counterclaim when the appellant was not in Court to put forward its case. Further, it appears to us that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant’s input. For example, the appellant alleged that although the respondent pleaded that the subject vehicle was worth KShs 40,000/=, the vehicle had been valued at KShs 21,000/=. This was in our view a reasonable triable issue and did entitle the appellant to be heard on his defence.

The learned judge of the Superior Court did with respect fall into the same trap when she held that as the magistrate was satisfied that the defendant was served and had earlier held in the judgment that the vehicle was unlawfully sold and defendant was liable to pay damages, the magistrate had exercised her discretion rightly in refusing to set aside the *ex parte* judgment because she had dismissed the defence and counterclaim, on the evidence adduced before her of the monies paid towards the claim in the defendant’s counterclaim. We are of the humble opinion that in so holding, the learned judge of the Superior Court did not apply the right approach to the issues that were raised before her. The respondent had a judgment which was not obtained by consent or as a consequence of a full trial. Both before the Trial Court and the Superior Court, the applicant’s counsel laid a lot of emphasis on the argument that there were several triable issues raised by the defence in its defence and counterclaim which was before the Court and urged the Trial Court to set aside *ex parte* judgment to allow the appellant ventilate the same issues, and further urged the Superior Court to allow the appeal on that ground. What we feel the Trial Court should have done when hearing application to set aside *ex parte* judgment, was to ignore her judgment on record and look at the matter afresh considering the pleadings before her (ie plaint, defence and counterclaim) and see if on their face value a *prima facie* triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised then, whether the reason for the applicant’s appearance were weak, she was in law bound to exercise her discretion and set aside *ex parte* judgment so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay throw away costs. The learned judge also should have, in our view, not considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.

In conclusion, it is clear to us that the Trial Court wrongly exercised its discretion in principle and the learned judge as we have stated fell into the same trap. For fear of prejudicing the entire case, we will not consider the grounds of appeal challenging the Trial Court’s judgment. This appeal has merits and we allow it. We do set aside the Superior Court’s decision and further set aside the judgment entered by the Trial Court on 21st December, 1993. The suit in the Resident Magistrate’s Court at Nairobi Civil case No 5185 of 1988 shall proceed to hearing as a defended suit. Because of the history of the case, we order each party to bear its own costs.

Dated and delivered at Nairobi this 12 th day of March, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR