Imani v Suntaria (Environment and Land Appeal 11 of 2022)
[2024] KEELC 4981 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4981 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 11 OF 2022

SM KIBUNJA, J

JUNE 12, 2024

BETWEEN

YUSUF NOORALI IMANI ..... APPELLANT

AND

SANJAY SUNTARIA ..... RESPONDENT

(Being an appeal from the judgement of Hon. C. N. Ndegwa, SPM, delivered on 23rd March 2022 in Mombasa CMCC No. 1219 of 2017)

JUDGMENT

1. The appellant, being dissatisfied with the ruling of Hon. C.N Ndegwa, SPM, delivered on 23rd March 2022 in Mombasa CMCC No. 1219 of 2017 preferred this appeal through the memorandum of appeal dated the 21st April 2022 raising six (6) grounds that:

    a. "the learned magistrate erred in law and fact in failing to consider the Appellant's pleadings and evidence on record in the trial court, including the evidence in chief of the Appellant in the trial court, essentially condemning him unheard.

    b. The learned magistrate erred in law and fact in entering judgement in favour of the Respondent in the sum of KES 605,000.00 in spite of the fact that the said party did not tender any evidence and/or demonstrate how the rental arrears accrued, including but not limited to, the number of months the Appellant was allegedly in default, and that the Appellant had not been in occupation since August 2016.

    c. The learned magistrate erred in law and fact in failing to recognise that the Respondent had not tendered any evidence of increase of rent from KES 25,000.00 to KES 35,000.00, the latter being the Respondent's basis of his claim for KES 605,000.00 as the alleged rental arrears.

d. The learned magistrate erred in law and fact in failing to recognise that the auctioneer appointed by the Respondent did not account for the auction proceeds and therefore it could not be ascertained if the said party had not fully recovered the alleged rental arrears sought.

e. The learned magistrate erred in law and fact in awarding the Respondent special damages without them being specifically proven.

f. The learned magistrate erred in law and fact in awarding the Respondent interest on the sum of KES 605,000.00 from the date of filing suit together with costs."

The appellant seeks for the appeal to be allowed, the suit against him before the trial court be dismissed with costs.

2. The appeal was canvassed through written submissions. The learned counsel for the appellant and respondent filed their submissions dated the 12th April 2023 and 19th May 2023, respectively, which the court has considered.

3. The following are the salient issues for determination by this court:

a. Whether the Appellant has established that the decision of the trial court was not based on the pleadings, evidence presented, and the law.

b. Whether the trial court considered the evidence tendered by the appellant.

c. Who bears the costs?

4. The court has carefully considered the grounds on the memorandum of appeal, the Record of Appeal, the submissions by the learned counsel, the superior courts decisions cited thereon and come to the following determinations:

a. This being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions on whether or not to allow the appeal. In *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021*) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court held as follows:

> " A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others {1968} EA 123 and in Peters v Sunday Post Limited {1958} E.A. page 424."
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> The court further stated as follows:
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> > " A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See Kurian Chacko vs. Varkey Ouseph AIR 1969 Kerala 316. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of

Civil Procedure Act, Cap 21 Laws of Kenya, a court of first appeal can appreciate the entire evidence and come to a different conclusion."

b. In the trial court, the respondent had commenced the suit through the plaint dated 28th July 2017 seeking for a mandatory injunction compelling the appellant herein to open up the suit property known as Mombasa/Block XXXI/47, and payment of Kshs. 605,000 as accrued rent plus interest at 14% p.a from August 2016, to date. The claim was based on an alleged tenancy relationship between the late Govindji Jiwandas Sutaria and the appellant where the tenant was expected to pay Kshs. 35,000 p.m. That the appellant was consistent in defaulting in rent payment prior to the demise of the late Govindji Jiwandas Sutaria who died on 18/5/2016, and as at the time of filing the trial suit, the arrears had accumulated to Kshs. 605,000.

c. The appellant opposed the respondent's claim through the filed statement of defence and counterclaim dated 5th November 2018, inter alia averring that the rent payable was 25,000 p.m and not 35,000. That he has not had access to the premises since 5th August 2016, when the respondent padlocked it, after seizing his goods. In the counterclaim, he alleged that the respondent obtained a break in order and his goods worth Kshs 4,000,000 were taken away by the respondent and sold off at Kshs 30,000. He further alleged that the rent arrears was 450,000, and wanted it set off from the alleged Kshs. 4,000,000 and sought as judgement for general damages for loss of business, special damages for Kshs. 3,550,000, and access to the premises.

d. The proceedings at pages 139 to 149 of the record of appeal confirms that both parties were represented by counsel. The proceedings of 22nd March 2021 shows that Sanjay Sutaria, who I take to be the respondent, testified and closed his case. The proceedings of 14th December 2021 further confirms that Yusuf Noorali Gulla Hussein Imani, that I take to be the appellant, testified as DW1, and then closed his case.

e. The learned trial magistrate delivered his judgement that is at pages 150 to 151 of the record of appeal, on the 23rd March 2022. In his judgement, the learned trial magistrate started by briefly setting out the capacity of the respondent in filing the suit, restating the tenancy relationship between the parties, and a summary of the claim. The honourable trial magistrate then at paragraphs 4 and 5 of the judgement observed that:

> "Although the defendant filed a statement of defence and counterclaim on 6/11/2018, he did not attend court during the hearing to prosecute its defence and or counter-claim. There is no dispute that the defendant was in rent arrears of Kshs. 605,000/- by the time the suit was filed, and that money has never been paid.
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> I according enter judgment for the plaintiff against the defendant for Kshs 605,000/ = plus costs and interest from the date of filing suit." [emphasis mine].
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> The proceedings of 14th December 2021 that I referred to above clearly confirms that the appellant attended court, and indeed testified as DW1, was cross examined by Mr. Adhoch advocate, who I take to be counsel for the respondent, and it is surprising that was not captured at all in the judgement. The court having come to the above conclusion, has no difficult in agreeing with the appellant that the trial court's judgement was arrived at without giving any consideration to his pleadings and evidence. That amounted to a serious misdirection on the part of the trial court,

resulting to gross miscarriage of justice. In my opinion, the judgment has to be set aside ex debito justitiae.

f. All the other grounds that the appellant raised in the memorandum of appeal were as a result of the trial court completely disregarding the defendant's pleadings and testimony, which is a travesty to the rules of natural justice. In the case of James Kanyiita Nderitu & Another [2016] eKLR, the Court stated:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I KLR 173.
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> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."
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> Though in above suit the defendant was not given the opportunity to even file a defence, the decision is relevant in this case because the appellant was heard in court and evidence taken, but the judgment did not consider his pleadings and evidence, and therefore fails to be a judgement on merit. Indeed, the judgement delivered by the trial court was akin to a default judgement, as it did not consider the defendant's case.

g. In the case of R v Sussex Justices ExP. Mc Carthy [1924] 1 KB 256 the court held: -

> " Justice should not only be done but should manifestly and undoubtedly be seen to be done."

Justice cannot be said or seen to have been done in this case, as the learned trial magistrate completely failed to give due or any considerations to the appellant's pleadings and evidence. The court has to consider the orders that can meet the justice of the case for both parties.

h. Order 42 Rule 32 of the Civil Procedure Rules provides as follows: -

> " The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."

Rule 26 thereof provides as follows:

> " if upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it think fit, to order that the judgement and decree shall be set aside, and that a new trial shall be had."

In the circumstances of this suit the end result that commends itself to me, is to set aside the trial court's judgement and order for a new trial, through which the parties' contestations will be determined on merit.

i. That in terms of section 27 of the *Civil Procedure Act* that costs follow the events, unless otherwise ordered for good cause. I find no reason to depart from that edict and the appellant will have costs in the appeal. The costs in the trial court will abide the outcome of the fresh trial.

5. Flowing from the foregoing determinations, the court find and orders as follows:

a. The appeal is allowed, and the trial court's judgement delivered on the 23rd March 2022 is set aside.

b. That the suit be heard denovo/afresh before another magistrate other than the Trial Magistrate, Hon. C. N. Ndegwa.

c. Costs of this appeal to be borne by the respondent.

d. Costs in the trial court to abide the outcome of the fresh trial.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant : M/s Gatimu for Mwanzia

Respondent : M/s Otuya for Adhoch.

Leakey – Court Assistant.