



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.42 OF 2017

[Formerly High Court Civil Appeal No.29 of 2013]

SCHREURS NAIVASHA LIMITED..... APPELLANT

VERSUS

ABIGAIL KERUBO AYIENIRESPONDENT

[Being an appeal against the ruling and order of E. Riany Resident Magistrate at Naivasha dated 29th February, 2013 in Naivasha CMCC No.495 of 2011]

JUDGEMENT

By application dated 12th November, 2012 the appellant had moved the lower court seeking for orders of stay of execution of the decree and warrants of attachment issued and that the *ex parte* judgement entered against the appellant [the respondent in the lower court proceedings] be set aside and the appellant be granted leave to file defence.

The application by the appellant was based on the grounds that the appellant's insurer failed to give instructions to the advocates to enter appearance and file defence within the prescribed time for the reasons that the summons and plaint were inadvertently filed away with some other documents and which escaped the immediate necessary action. The appellant failure to file defence within time was inadvertent and excusable and there is a good defence and the judgement entered should be set aside to allow for defence hearing as there shall be prejudice on the appellant.

The respondent and plaintiff before the trial court filed a Replying Affidavit and averred that the application by the appellant was made in bad faith and in abuse of the court process. The appellant was served with summons and plaint and failed to attend at the hearing and the court procedurally heard the matter and rendered judgement. There is no good cause shown to justify the grant of the orders sought.

The trial court heard the parties and by the ruling delivered on 29th February, 2013 dismissed the appellant's application on the grounds that there was proper service of summons and there was no good reasons and grounds given as to why there was no attendance at the hearing or a defence filed and such application had been made in abuse of the court process.

Aggrieved the appellant has filed the appeal herein on five grounds which can be summarised that the trial court erred in law and in fact in dismissing the application dated 12th November, 2013 after the appellant had shown good cause to setting aside the judgement and orders issued on 20th September, 2012; the affidavit filed in support of the application was not considered or the submissions made and that there was a meritorious defence.

Both parties have filed written submissions.

The appellant submitted that the trial magistrate failed to considered Order 10 Rule 11 of the Civil Procedure Rules and set aside the *ex parte* judgement for a just cause as demonstrated in the supporting affidavit of Linda Mukami for the appellant which judgement should have been set aside on terms which are just so as to do justice to both parties before the court. Unless the court is satisfied that there is no good defence that has a chance of success and which raises *prim facie* defence, then to deny a party audience is unjust.

The appellant has relied on several cases to support its case – **James Wanyoike & 2 others versus CMC Group Limited & 4 others [2015] eKLR; Patel versus EA Cargo Handling Service Limited [1974] EA; Shah versus Mbogo [1967] EA.**

The respondent submits that she filed CMCC No.495 of 2011 on 15th September, 2011 and summons and plaint were served upon the appellant on 25th October, 2011 and duly acknowledged. Interlocutory judgement s requested on 16th November, 2011 since there was no appeared or defence filed. There was formal proof and a Hearing Notice dated 29th February, 2012 was sent to the appellant by registered

post. There was no attendance. The respondent was heard on her case and judgement delivered on 20th September, 2012. A notice of such judgement was served on 23rd October, 2012 and the appellant did nothing until warrants of execution issued on 7th November, 2012 and a proclamation on 8th November, 2012. The execution process moves the appellant into filing the application subject of this appeal.

The appeal filed is in abuse of the court process as no ground grounds have been set out to justify the setting aside of the judgement which was procedurally entered and the failure to attend court despite notices being issued were not honoured.

Determination

The gist of the appeal is that the failure by the trial court to set aside the ex parte judgement delivered on 20th September, 2012 is not justified and is contrary to the Civil Procedure Act and the Rules thereto where under Order 10 Rule 11 a party with a good cause and defence with triable issues should be allowed on the reasonable terms which are justice to argue its case.

In the Supporting Affidavit of Linda Mukami in support of the application dated 28th November, 2012 she avers that as the legal officer for APA Insurance Co. Limited the insurers of the appellant were served with summons and plaint and which were sent to the appellant's agent's insurance and before they could instruct advocates to defend the suit time had lapsed and the documents inadvertently filed away with other documents. The lapse arose since the respondent had filed another suit in Naivasha PMCC No.1034 of 2010 and the secretary was under the impression that the instructions had been sent to the advocates.

The details of the *secretary* who inadvertently misfiled the summons and plaint are not stated. There was no material of affidavit placed with the trial magistrate in this regard.

In any event, even where the respondent had filed several suits against the appellant and there was proper service and acknowledgement of the service, this prima facie was proper service and upon failure to enter appearance and filed defence, the respondent was in order to move the trial court to have the matter heard in formal proof.

There is no word as to why the appellant failed to attend at the hearing. Even where the summons and plaint were misfiled, further notices of the hearing dated 29th February, 2012 were not honoured. Further there was notice of judgement dated 23rd October, 2012 and this too did not move the appellant into action until execution commenced.

In the ruling o the trial court due regard has been given to the provisions of order 10, 22 and 51 of the Civil Procedure Rules and assessed material before the court especially the fact of the appellant being served with Notice of Judgement and made a finding that the appellant had notice of the proceedings but ignored to attend until execution commenced. There was no action taken to defend the suit until execution process which woke the appellant from slumber.

The trial court has well looked at the law, made reference to case authorities by the High Court and Court of Appeal and on good basis found the appellant was only in abuse of the court process and proceeded to dismiss the application.

This court has also analysed the appeal and the subject application, affidavits and the findings of the trial court in the ruling delivered on 29th February, 2013 and finds no good grounds to disturb the same.

Accordingly, the appeal herein is found without merit and is dismissed. The appellant shall meet the costs due to the respondent in the appeal.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of:

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