



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
E&LR APPEAL NO. 10 OF 2015

BETWEEN

MUMIAS SUGAR COMPANY LIMITED..... APPELLANT

AND

MARTIN WESONGA KADIMARESPONDENT

(An Appeal From The Ruling And Order Of The Chief Magistrate's Court Kakamega Hon. J. Ong'ondo P.M) Delivered On 21/7/2014 In Kakamega Cmcc No. 435 Of 2012)

between

MARTIN WESONGA KADIMA PLAINTIFF

-versus-

MUMIAS SUGAR COMPANY LTD DEFENDANT

JUDGEMENT

The Respondent in this appeal who was the plaintiff in the main suit instituted proceedings against the appellant seeking, among other things, general and special damages for injuries sustained while working for the appellant.

The suit was heard ex parte and judgment given in favour of the respondent. Being aggrieved the appellant sought to have the judgment set aside. However, before the appellant's application could be heard, the respondent filed an application by way of Notice of Motion dated 12th March 2014 seeking to have the appellants Motion and all other pleadings filed by the appellant's counsel struck out. The application was premised on the ground that Mr. Omayo, the appellant's counsel was at the time of filing the application suspended from the roll of advocates and was therefore not allowed to practice law. The application was allowed and the appellant's application to set aside ex parte judgment was struck out alongside all other pleadings filed by Mr. Omayo.

Mr. Omayo did get his house in order and he was issued with a valid practicing certificate for the year 2014. On 10th April 2014, Mr. Omayo again filed an application to stay execution and set aside the ex parte judgment entered against the appellant but the same was again struck out. The trial magistrate was of the view that the appellant was guilty of laches and Counsel was yet to regularise his suspension. Yet again the appellant was not satisfied and filed the present appeal challenging the ruling dismissing his application for setting aside the ex parte judgment. In the appeal he has cited 5 grounds which can be summed up as follows:

- a) That the trial magistrate ignored the applicable principles for setting aside a judgment obtained ex-parte
- b) That the trial Magistrate ignored material evidence placed before him
- c) That the magistrate did not have territorial jurisdiction to determine the matter
- d) That requisite notice under Order 22 Rule 6 of the Civil Procedure Rules was not served
- e) That the trial court treated the matter as res judicata

Parties filed written submissions. Mr. Omayya for the appellant submitted on three grounds, first, that the trial magistrate departed from the laid down principles applicable in setting aside an ex parte judgment. Counsel was of the view that the trial magistrate should have had regard to the Draft defence annexed to the application and the explanation given by the appellant's legal officer for the delay. He relied on the case of *Sebei District Administration vs.- Gasyali & Others*[1968] E.A 300 where the court stated thus:

In my view that is not the sole matter which must be considered. In cases of this kind, the nature of the action should be considered, the defence if one had been brought to the attention of the court however irregularly, should be considered. The question as to whether the plaintiff can reasonably be compensated by costs for any delay. Finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court.

Counsel further argued that the trial magistrate erred in finding that the application was filed by an unqualified advocate. He submitted that by the time the application dated 10th April 2014 was filed there was a valid practicing certificate issued and it clearly indicated that he was entitled to practice. He was of the view that the trial magistrate simply chose to ignore that fact at the expense of the appellant.

Lastly, Counsel argued that the previous application was never argued as the same was struck out on a technicality. As such no leave was necessary to file a competent application if the advocate's circumstances had changed and it was therefore not res judicata. Mr. Omayya concluded by urging this Honourable Court to allow the appeal.

The respondent strongly opposed the appeal. It was argued for the respondent that the appellant had not demonstrated why the ex parte judgment should be set aside. The respondent argued that the issue of jurisdiction is one that ought to have been dealt with in the suit but not on appeal. Counsel submitted that the appellant had several chances to raise this issue but failed to raise it. Further that at the time of filing the application the appellant's advocate did not take any step to show that he was licensed to practice law but instead just went ahead to file the application. The respondent relied on several authorities to support his case.

I have duly considered the arguments by counsel and the authorities filed to support each party's case and I am of the considered view that 2 major issues arise for determination namely:

- a. Whether the application dated 10th April 2014 was bad for res judicata,
- b. If the answer to the issue above is in the negative, whether or not the learned magistrate misdirected himself and/or applied the wrong principles so as to arrive at a wrong conclusion, thereby dismissing the appellant's application.

Res judicata

Section 7 of the Civil Procedure Act, provides as follows :-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

It will be seen from Section 7 above, that for a matter to be declared res judicata, at least four ingredients must be met. These are as follows :-

- (a) There must have been a former suit.
- (b) The matter in the subsequent suit must have been directly and substantially in issue in the former suit.
- (c) The former suit must have been between the same parties or between parties under whom they or any of them claim, litigating under the same title.
- (d) The issue in the subsequent suit must have been heard and finally decided.

In my mind I have no doubt that there was a former application in matter. In fact the application in question is a replica of the application dated 6th December 2013. In both applications the appellant is seeking to set aside the judgment of the trial court dated 9th September 2012 and the parties are the same. I am not however convinced that the fourth ingredient has been met, that is, that the issue in the former suit must have been heard and finally decided. I say so because the appellants application of 9th September 2012 was not determined on merit. The same was struck out alongside all other pleadings filed by the appellant's counsel on the ground that at the time of filing counsel was suspended from the roll of advocates and was thus not allowed to practice law. This was despite the fact that Mr. Omayya held a valid practicing certificate by the time the second application was filed. The court never got to consider the draft defence annexed to the application and the matters in issue were never heard and decided.

I am guided by the decision of ***Keharchand vs Jan Mohamed (1919-1921) EAPLR VOL VIII at 64***. In that case, a suit had been filed under summary procedure on two promissory notes. The limitation period under that procedure was six months. The suit was dismissed as being out of time. A latter suit filed through ordinary procedure was then brought. An objection was raised that the suit was *res judicata*. The High Court held that the suit was *res judicata* and the plaintiff appealed. On appeal, it was held that the latter suit was not *res judicata*. Although the causes of action were one and the same, the issue was never heard and finally decided in the first suit. Sir W. Morris Carter C.J stated as follows:

"As stated above it is admitted that the cause of action in this and in the former suit are one

and the same, it is therefore clear that the main matter in issue in this suit i.e., the liability under the promisory notes was one and which was directly and substantially in issue in the former suit but I Consider that it was not heard and finally decided in that suit.

The only matter in issue in that suit which was in my opinion heard and finally decided was that the suit brought as it was under the provisions of chapter 39, was barred by the Limitation Act."

It is my opinion the present situation is similar. Although the issues in the two applications filed by the appellant are similar, the issues in the first application were not heard and determined.

Triable Defence

The applicable principles, in an application to set aside an *ex parte* judgment have been the subject of a long line of authorities, the leading ones being **Shah v Mbogo** (1967) EA 116 and the case of **C.M.C. Holdings Ltd v Nzioki** (2004) I KLR 173, where the law was stated as follows;

“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. The 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”.

In the present appeal, the court did not go into the merits of the application. The court never went deep to even consider the draft judgment that was annexed to the application to set aside. All the court did was to consider the point that counsel did not have a practicing certificate. In both the applications this was the point of departure. It is my opinion that the court's exercise of its discretion was wrong in principle and was not exercised judiciously.

This court has been asked to deal with the matter finally. It is my opinion that the Court can do so under section 78(1) of the Civil Procedure Act.

The appellant filed the first application seeking, in the main two substantive orders, namely stay of execution pending hearing and determination of the application and an order setting aside the *ex parte* judgment. In that application, the appellant admitted that there was indeed delay in entering appearance and filing a defence which was caused by a misplacement of the summons served on the appellant. The appellant also stated that it had a good defence which raised triable issues. As already stated, the application was struck out as counsel was not at the time allowed to practice law. The 2nd application which was a replica of the 1st application was also struck out. In the replying affidavits, the respondent contended that the appellant was guilty of laches and had come to the temple of justice with unclean hands as he had not revealed to the Court that he now had a valid practicing certificate. Even so the trial court was under a duty to consider the defence filed.

The Court in **Sebei District Administration vs.- Gasyali & Others[1968] E.A 300** stated that a court was under a duty to consider a defence brought to the attention of the Court however irregularly and to deny a subject a hearing should be the last resort of a court. I will agree with the court's rendition in the above matter. The fact that Counsel did not demonstrate that he now had a valid license at the time of filing the 2nd application should not have been the major and sole ground of denying the appellant a chance to present his defence.

Territorial jurisdiction

The issue of territorial jurisdiction has also been raised. It is the appellant's contention that the trial court lacked jurisdiction to deal with the matter the cause of action having arisen in Mumias and not in Kakamega.

The provisions relating to civil jurisdiction of magistrates are contained in both the Civil Procedure Act and the Magistrates Court Act. The relevant parts of section 15 provides as follows; “Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:

b)the Defendant or each of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

c)the cause of action, wholly or in part, arises.

The section is clear that all civil matters shall be filed in court within the local limits where the Respondent resides or where the cause of action arose. For a magistrate to decide whether he/she has territorial jurisdiction, section 15 of the Civil Procedure Act must apply. It is the governing statutory provision on territorial jurisdiction. Territorial jurisdiction is based on the premise that if the nearest court has no jurisdiction, then the suit ought to be filed in a court of competent jurisdiction within the same geographical jurisdiction. On the other hand, Section 3(2) of the Magistrate Courts Act (now repealed) conferred jurisdiction on magistrates Courts throughout Kenya.

The said provision was considered by **Ringera, J** (as he then was) in the case **Mohamed Sitaban vs. George Mwangi Karoki Civil Application No. 13 of 2002** in which the learned Judge expressed himself as follows:

“Section 3(2) of the Magistrates Courts Act provides that a Court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate’s Court) has jurisdiction throughout Kenya. Such a court is not the subject of the local territorial jurisdiction contemplated by section 15 of the Civil Procedure Act, in my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate Court. I am fortified in that view by the fact that the Magistrates Court Act, Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act. The Legislature was therefore aware of the provisions of section 15 of the Civil Procedure Act and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provision in the latter statute is deemed to amend the earlier provision must be applied. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the defendant resides as the cause of action but those reasons cannot oust a statutory jurisdiction”.

A similar scenario prevailed in **Doshi Enterprises Limited vs. Oriental Steel Fabricators & Builders Nairobi (Milimani) HCMA No. 627 of 2001** in which **Mwera, J** was of the opinion that the filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of section 15 of the Civil Procedure Act does not make it a nullity because section 15(b) thereof adds that a Court may give leave for the filing away from the local limits or the defendant may acquiesce in such institution.

In the matter at hand, the issue of jurisdiction was never raised. The only time there was mention of the issue of jurisdiction was in the draft defence which never got to see the light of day. At the time of filing the suit, Mumias was in Kakamega district. It therefore follows that if the Court at Mumias lacked pecuniary jurisdiction, the right Court to deal with the matter would be in Kakamega. Mumias Law Courts is a Senior Principle Magistrate's Court and thus had the jurisdiction to adjudicate on this matter. It is therefore upon this court to decide whether to exercise its discretion to transfer the matter to Mumias or to allow it to proceed in Kakamega.

The prayers of the appellant in this appeal are that this Court sets aside the lower Courts ruling and order made on 21st July 2014 and substitutes it with an order allowing the application dated 10th April 2014 and granting leave to the appellant to file a defence in Kakamega CMCC No. 435 of 2012. The appellant did not seek an order for transfer of the case to Mumias.

The upshot is that the appeal succeeds. The ruling of the lower court made on 21st July 2014 is set aside and in its place I make an order allowing the application dated 10th April 2014. The appellant is granted leave to file a defence in Kakamega CMCC NO. 435 OF 2012.

Taking into account that the respondent is not to blame for all the circumstances giving rise to this appeal, the appellant shall pay respondents costs of the appeal.

Orders accordingly.

Judgement dated, signed and delivered this 9th March, 2016

MAUREEN ONYANGO

JUDGE