Tamari v Ngare (Environment and Land Appeal 20 of 2020)
[2023] KEELC 15666 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15666 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 20 OF 2020

NA MATHEKA, J

FEBRUARY 21, 2023

BETWEEN

AMOS MATANGA TAMARI ..... APPELLANT

AND

WILSON DAVIES NGARE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the ruling of Principle Magistrate M Nabibya in CMCC No 2371 of 2014 Mombasa delivered on the August 6, 2020 on the following grounds;

    1. That the Honourable learned Magistrate misapprehended the fact that the Plaintiff had made an effort to trace his former advocates on record but in vain since he had closed his offices.

    2. The trial Magistrate in her ruling misapprehended the fact that judgement in the lower court was delivered on the June 22, 2018 by Hon J Kassam(SRM) and the Appellant filed the application to set aside judgement and the decree therein on the August 1, 2018 and hence there was no inordinate delay.

    3. The Hon Learned Magistrate Hon M Nabibya(PM) made her ruling based on wrong facts that the Appellants Notice of Motion application dated August 1, 2018 was filed more 2 years since the Plaintiff was last in court while the Plaintiff was never informed of the hearing by his advocates which mistake should not visited upon the Plaintiff/Appellant.

    4. The Honourable Learned Magistrate failed to appreciate the fact that one ought to be heard since there was no inordinate delay in filing the Notice of Motion application dated August 1, 2018, judgement having been entered on the on the June 22, 2018

    5. The trial Magistrate misapprehended the facts deponed to by the Appellant in his supporting affidavit and further affidavit regarding the absence of his advocate on record and arrived at

wrong decision that no explanation has been given for the non-attendance of the Appellant in court during the hearing.

6. The Learned Honourable M Nabibya failed to apply the principle that a party must be given an opportunity to be heard and therefore arrived at wrong decision by dismissing the Appellants application to set aside the judgement delivered on the June 22, 2018 and re-open the case to start de-novo considering that both parties have made a claim on the suit property.

7. The Learned Trial Magistrate erred in fact and in law that a party has a right to be heard and that the Appellant was willing to abide by the terms of the court in the event the application is allowed.

8. The learned Trial Magistrate erred in law and in fact in failing to take into account the applicable principles in setting a side judgement and proceedings.

2. The Appellant prays that the appeal be allowed and the following orders do issue;

   a. The Appeal be allowed and the lower court judgement and proceedings be set aside and the matter commence *de-novo* and be heard and determined on merit

   b. The cost of this Appeal,

3. The Appellant submits that the court should in the dictates of interest of justice invoke its wide discretional powers to avoid injustice and hardship which result from a mistake or error not of the applicant but his former advocates on record being meted upon the Appellant. A litigant should not suffer due to a mistake of his advocates. In HCCC No 18 of 2020, Eldoret, *David Kiptanui Yego vs Benjamin Rono & 3 Others*, Lady Justice H A Omondi held as follows in paragraph 1 1 on page 4: "The general principle is that an applicant should not suffer due to a mistake of its counsel. This was the position in *Lee G Muthoga vs Habib Zurich Finance(K) Ltd & Another*, Civil Application No 236 of 2009, Nairobi where it was held that: "it is widely accepted principle of law that a litigant should not suffer because of his advocates oversight"

4. In *Winnie Wambui Kibinge & 2 Others vs Match Electricals Limited* Civil Case No 222 of 2010, the court held that; "It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."

5. That borrowing from the finding of Lady Justice H. A. Omondi in the above cited decision, the court's power to set aside a judgement is exercised with a view of doing justice between the parties. Her Ladyship Justice H A Omondi also cited the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede*(1982-1988) KAR

6. They submit that it is the discretion of the court to grant or refuse stay considering that circumstances vary in each and every case .The court ought to make the best decision in every circumstance. In this circumstances, the matter proceeded ex-parte in the absence of the Plaintiff and judgement delivered on the June 22, 2018. The then advocates for the Plaintiff/Appellant nor the Appellant did not attend court. The Plaintiff/Appellant was not informed of the hearing neither was he notified whatsoever of the hearing. He only learnt of the execution on the site of the suit property when he was called while in Nairobi since he works in Nairobi. It is when he learnt that the matter had proceeded ex-parte while he had on several occasions visited the offices of his advocates and he was not informed of the hearing date. The trial court ought to have considered the predicament of the Plaintiff/Appellant who was not aware of the hearing. Article 50(1) of the *Constitution* provides that no one should be condemned unheard. This is the principle of natural justice. The Plaintiff was not heard not because of his making but the making of his then advocates on record. The Plaintiff came to know of the judgement had already been

entered at the time execution proceedings were taking place. He immediately moved the court with speed to set aside judgement and for the matter to start de novo. There was no inordinate delay.

7. The Defendant/Respondent did not demonstrate the substantial loss, damage or and prejudice to be suffered in the Appellant's application dated August 1, 2018 in the lower court to set a judgement and the matter to start *de-novo*.

8. This court has considered the Appeal, the Appellant Memorandum of Appeal dated August 19, 2020 and submissions therein. Order 10 rule 11, provides circumstances under which a Court can set aside a judgement. It reads thus; -

> 'Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.'

9. The principles for setting aside a default judgment were spelt out in the case of *Patel vs East Africa Cargo Handling Services Ltd* (1974) EA 75 thus;

> The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

10. That the Court of Appeal in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another* Civil Appeal No 6 of 2015 (2016) eKLR held;

> From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v EA Cargo Handling Services Ltd (1975) EA* 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings vs Nzioki* (2004) 1 KLR 173). 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 justitiae, 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."

11. Having perused the lower court proceedings and documents filed by both parties, and ruling dated August 6, 2020 I make the observation that the said ruling was based on wrong facts. The ruling avers

that the Appellant case was closed on October 17, 2017 for non-attendance of the Appellant when in fact it was closed on March 15, 2018. It also states that judgment of the matter was delivered on June 11, 2018 when in fact it was delivered June 22, 2018. The ruling also states that the application by the Appellant to have the judgment set aside dated August 1, 2018 was made more than two years after he was present or represented in court which is not factual as the Appellant was last represented in Court on October 17, 2017, by the Law firm of Mwahunga Mtana & Company Advocates, 9 months 14 days after his last appearance in court.

12. Having perused the record of proceedings, I make further observation that the Appellant was last represented by his former Advocates on October 17, 2017 before Honorable Lewa. The matter then came up for mention on December 4, 2017 but the Appellants Advocates were absent The matter then came up for hearing on March 15, 2018 and on account of non-appearance from the Appellant or his Advocates the case was closed. Judgment in the matter was delivered on June 22, 2018. From documents on record Advocates of the Appellant were duly served for hearing of the matter. On September 1, 2018 the Appellant *vide* his new Advocates the Law firm of Kennedy Ngaira & Associates filed the Application to have the judgment dated June 22, 2018 set aside.

13. I find that former Advocates for the Appellant were absent for three court sessions between December 4, 2017 and June 22, 2018.However, I make note that the Appellant moved speedily upon being made aware of the judgment delivered against and hired new Advocates to represent him and had filed an application for setting aside of judgment dated June 22, 2018, that is 47 days later.

14. Consequently, I find that the Appellant should not be punished for the mistakes of his former Advocates. I am guided by the case of Ringera J in *Omoyo vs African Highlands & Produce Co Ltd* (2002)1 KLR, where it was held;

> Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavor. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment".

15. The upshot is I find that the appeal merited and I allow it with no orders as to costs. I order that the judgment dated June 22, 2018 be set aside and the matter commence denovo.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2023.

N.A. MATHEKA

JUDGE