



**SS Mehta & Sons Limited v Kingoo (Civil Appeal 537 of 2017)  
[2024] KEHC 1840 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1840 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 537 OF 2017**

**DAS MAJANJA, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**SS MEHTA & SONS LIMITED ..... APPELLANT**

**AND**

**CHARLES MUTUA KINGOO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. T. Ngugi, SPM dated 19th August 2015 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 7435 of 2006)*

**JUDGMENT**

1. The Respondent commenced the suit before the Subordinate Court by a Plaint dated 21.06.2006 through the firm of Ong’uti & Company Advocates. The Respondent claimed compensation from the Appellant for injuries sustained after an accident that allegedly took place on 02.11.2005 while he was engaged in his duties as an employee of the Appellant. The Appellant entered appearance through John M. Mwangangi, its Human Resource Manager. In a Statement of Defence dated 13.11.2006, the Appellant denied that the accident occurred as alleged or that the Respondent was its employee. Thereafter, the firm of Taibjee & Bhalla Advocates filed a Notice of Appointment dated 02.06.2010 to act for the Appellant.
2. The record of the trial court shows that the Respondent’s Advocates took several hearing dates in the period between 2007 and 2011 but the matter did not proceed as scheduled for one reason or the other. On 14.06.2011 counsel for the Respondent and counsel for Appellant recorded a consent on liability which was apportioned at 80:20 in favour of the Respondent. It was also agreed that medical reports by Dr. Okere dated 05.11.2009 and Dr. B. Shah dated 01.09.10 be admitted without calling the makers. Special damages were agreed at Kshs. 1,500.00.00. The parties proceeded to file submissions on quantum. The court rendered its judgment on 26.07.2011 (“the Judgment”).



3. The Appellant then filed an application dated 23.11.2011 to seeking to change advocates from the firm of Taibjee & Ballah Advocates to the firm of Oriaro & Company Advocates. The court allowed the firm of Oriaro & Company Advocates to come on record. The firm proceeded to file their notice of appointment dated 28.11.2011. The Appellant then filed an application dated 29.11.2011 seeking to set aside the Judgment on the ground that counsel on record at the material time entered the consent on liability without instructions from the client. On 31.01.2012, the court allowed the application and set aside the Judgment.
4. After several false starts, the matter was finally set down for hearing on 14.08.2014. A hearing notice dated 04.12.2013 was served on Oriaro & Company Advocates and received on 06.12.2014. As the Appellant or its Advocates failed to attend court at the hearing, the court heard the Respondent's case and reserved judgment. Thereafter, Oriaro & Company Advocates filed an application dated 06.03.2015 to set aside the ex-parte proceedings of 04.12.2014 on the ground that counsel had inadvertently forgotten to diarize the matter and that the mistake by the advocate should not be visited on the disputant.
5. By the ruling rendered on 19.08.2015, the trial court dismissed the application with costs. It observed that the application was an abuse of court process and unmerited. Unfortunately, Mr. Oriaro, the advocate who had been appearing for the Appellant in the Subordinate Court, passed away on the date the ruling was delivered. The Appellant thus proceeded to instruct the firm of Hamilton Harrison & Mathews.
6. This appeal relates to the ruling of the Subordinate Court declining to set aside the ex-parte proceedings of 04.12.2013. In its Memorandum of Appeal dated 07.09.2017, the Appellant raises the several issues for determination. Whether the court ought to have allowed the application since it was unopposed and the facts supporting the application unchallenged. Whether the court failed to consider the reasons raised by the Appellant's advocate's failure to attend court on 04.12.2013. Whether the court failed to consider the principle that the mistake of counsel should not be visited upon an innocent party and whether the court denied the Appellant its right to fair hearing under Article 50(1) of the Constitution by declining to set aside the ex-parte proceedings. The appeal was canvassed by way of written submissions which I have considered.
7. As this is an appeal from the exercise of discretion of the trial court, this court is guided by the principle that that it will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself on some material matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and others v. East African Underwriters (Kenya) Ltd* [1985] eKLR).
8. Turning to the issue before the trial court, it is trite law that the Court has unfettered discretion to decide as to whether or not to set aside ex-parte proceedings. Such discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. It is however not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (see *Shah v Mbogo & Another* [1967] EA 116).
9. While it is correct that the application was not opposed, that by itself does not mean that the court ought to automatically allow the application (*Gideon Sitela Konchellah v Julius Kekakeny Ole Sunkuli & Others* [2018]eKLR). The Applicant has the burden of establishing the legal threshold for the granting the application. A reading of the ruling though discloses that the trial magistrate did not consider the grounds proffered by the Applicant. She did not give reasons for the conclusions and did not state why the application was an abuse of the court process or unmerited and why it was not in



the interests to grant it. Failure to give reasons for the decisions constitutes an error as the duty to give reasons is a fundamental function of judicial decisions making (see *Saj Ceramic Limited v Robinson Mongare* [2015]eKLR).

10. Had the trial court considered the facts of the application, it would have come to a conclusion one way or another. It failed in its duty to resolve and explain its reasoning. The function of the appellate court is to determine whether the trial court exercised its discretion within the confines of the established principles and I have no doubt that it did not. I therefore allow the appeal.
11. The failure to attend the court on the date scheduled for hearing despite service was occasioned by the Appellant's advocate hence the Appellant shall bear the costs of the application before the Subordinate Court and of this appeal. In view of the age of the matter, I direct that the trial court to expedite the hearing and determination of the matter.
12. In conclusion, I allow the appeal on the following terms:
  - a. The ruling of the Subordinate Court dated 19.08.2015 is set aside and substituted with an order allowing the application 06.03.2015.
  - b. The Appellant shall pay the costs of the application before the Subordinate Court and this Appeal assessed at Kshs. 30,000.00 which shall be paid within 14 days from the date hereof.
  - c. The matter shall be mentioned before the Subordinate Court within 14 days from the date hereof for fixing a hearing date.
  - d. That suit before the Subordinate Court shall be determined within 6 months.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the Appellant.

Mr Ongeri instructed by Onguti and Company Advocates for the Respondent.

