Makoro v Molyn Credit Ltd & 2 others (Civil Appeal E119 of 2022)
[2024] KEHC 5661 (KLR) (Civ) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 5661 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E119 OF 2022

JN MULWA, J

MARCH 22, 2024

BETWEEN

EMMANUEL ONYINKWA MAKORO ..... APPELLANT

AND

MOLYN CREDIT LTD ..... 1ST RESPONDENT

THOMAS NYABARO OGERO ..... 2ND RESPONDENT

LINET ACHIENG' OKOTH ..... 3RD RESPONDENT

JUDGMENT

1. The background to this Appeal is straight forward.

   An Interlocutory Judgment was entered in favour of the Respondents herein being the Plaintiffs in the lower court against the Appellant who was the Defendant therein for an alleged failure to enter appearance and file defence within the statutory periods.

2. Before the interlocutory judgment was entered there was filed by the Appellant a Memorandum of Appeal filed on 5/03/2021 and defence filed on same date. The interlocutory judgment was endorsed by the trial court on the 12/05/2021 faced with the above the Appellant filed an Application on the 23/06/2021 seeking an order to set aside the Interlocutory Judgment. The Respondent filed a Preliminary Objection challenging competency of the court 18/08/2021.

3. The trial Court Magistrate on the 27/08/2021 gave directions that the Preliminary Objection would be heard first and directed parties to file their submissions which they did and upon consideration of the same the trial Magistrate dismissed the Preliminary Objection.

   At the time the Respondent had not filed any other pleading and therefore without either a Replying Affidavit or Grounds of Opposition the Application stood unopposed.

4. With the above and despite the Application to set aside the Interlocutory Judgment still on record the Preliminary Objection having been dismissed the trial Magistrate without giving the Applicant (Appellant) a chance to prosecute his application proceeded on its own motion on the same date to dismiss the Preliminary Objection dated 14/02/2022 also dismissed the Application for setting aside the Interlocutory Judgment.

5. The dismissal of the Application dated 23/06/2022 without giving the parties and particularly the Applicant/Appellant a chance to be heard on merit is the subject of the Appeal before this court.

6. The Memorandum of Appeal is dated 4/03/2022 and raises 10 grounds that may be grouped and summarized into three:

    a. Whether the learned Magistrate erred in law and fact in dismissing the Appellant's Application dated 23/06/2021 without subjecting it to a hearing.

    b. Whether the orders sought by the Appellant are deserved.

    c. Costs.

7. By the Appeal the Appellant seeks orders that: -

    a. The appeal be allowed

    b. The order/ruling of the trial Magistrate dismissing the Application dated 23/06/2021 be set aside and be substituted with an order reinstating the said application dated 23/06/2021 and directing the same to be heard on merit by the trial court, by any other Magistrate other than the Hon. Aduke JPA.

    c. Costs be borne by the Respondent.

8. Both parties filed submissions the Appellants' are dated 12/05/223 while the Respondents' are dated 13/10/2023 and filed out of time without leave of court. Nevertheless the court shall consider the said submissions

Analysis and Determination

9. It is not disputed and indeed is expressly admitted by the Respondents in their submissions that the trial magistrate determined the application for setting aside the interlocutory judgment in its own volition without inviting the applicant to prosecute its application.

10. It is trite that a party ought to be accorded humble opportunity to put and argue its case before a court of law on its merit unless upon consideration the trial court finds it unnecessary say like in an Appeal when the Appeal presents itself as devoid of any arguable point and thus causes a summary rejection by the court by none admission.

11. The scenario herein is quite different.

    In the case *Wachira Karani v Bildad Wachira* [2016] eKLR the Court emphasized the duty of the court that parties should each be allowed to a proper opportunity to argue their case before a court of Law as a fundamental principle of national justice if not adhered to, the affected party is entitled ex debitio justice to have any such determination set aside.

    That was the position in earlier case notably *Savings & Loan Kenya Ltd v Odongo* [1987] eKLR and *Nzioki v Kitusa* [1982] eKLR.

12. I fully associate myself with the principle that courts have unfettered discretion to set aside ex-parte judgment or Orders/Ruling to avoid injustice or hardship resulting from numerous incidences excusable mistakes of inadvertence and generally not to assist a party which deliberately seeks to abstract or delay the course of justice. However, in the present matter nothing of the above is evident.

13. The trial Magistrate not only failed to adhere to laid down procedure of inviting the Applicant to the impugned Application to appearing before her for prosecution of the application or by way of submissions of affidavit evidence. So that when the Respondent argues in their submissions at paragraph *18* that in employing the overriding the objective of the court in dispensing justice to save time the court was right in considering the merits of the draft defence already on record and canvassing the application would have possibly not altered the outcome then they totally missed the import and purpose of section 1A &1B of the *Civil Procedure Act* that provides as the overriding objectives to facilitate the just, expeditious resolution of disputes.

14. Further Section 3A of the said Act accords inherent power to courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

15. In my considered view, what the trial Magistrate did was completely opposite of what the two Sections of the *Civil Procedure Act* speak to as instead the impugned ruling on own motion of the Magistrate caused prejudice was unjust and caused delay to the appellant's case notwithstanding the Provisions of Article 159 (2) (d) of the *Constitution*. That promotes administration of justice without undue regard to procedural technicalities.

16. Where a particular procedure of determining a case is provided under statute and is the practice across board, then such procedure ought to be adhered to, unless there are good reasons to depart therefrom. Such reasons are lacking in this matter.

17. Article 50(1)(2) of the *Constitution* of Kenya gives every person the right to have any dispute resolved by application of the law decided in a fair independent and impartial tribunal of court which includes to being accorded an opportunity to present its case before the court.

18. To that extent I find and hold that the trial magistrate erred grossly in law and fact in dismissing the Appellant's Application without hearing him and taking into account that the application was not challenged. This scenario was what the court of Appeal had to deal with in the case *Nzioki v Kitusa* [1982] eKLR when upon analysis the material facts came to a finding that the application for review which had not been heard could not have been lawfully dismissed and proceeded to set aside the dismissal order and remitted it back for hearing before a different judge.

19. For the above reasons, I hold and find that the Appeal hereof is merited and is allowed with costs.

    I direct that the Appellant's Application in the subordinate court dated 23/06/2021 is hereby reinstated for hearing on merit and determined by any other Magistrate other than the Magistrate under whose hand the same was dismissed.

20. The Appellant shall have the costs of the Appeal.

    Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND MARCH, 2024.

J. N. MULWA

JUDGE