Motrex Limited v Kalimbo & another ((Suing as the legal representatives of the Estate of John Masha Luganje)) (Civil Appeal 91 of 2023) [2024] KEHC 5278 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 91 OF 2023

SM GITHINJI, J

APRIL 30, 2024

BETWEEN

MOTREX LIMITED .... APPELLANT

AND

KANZE ZIRO WANJE .... 1ST RESPONDENT

CHRISTINE MBEYU KALIMBO .... 2ND RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN MASHA LUGANJE)

(An appeal from the ruling of Hon. R. M Amwayi, PM at Kaloleni, delivered on 21st June, 2023 in PMCC No. 225 of 2022)

JUDGMENT

Representation:

Mr Osene Advocate for the Appellant/Applicant

Mr Ngure Advocate for the Respondent

1. This appeal arises from the ruling of Hon. R. M Amwayi, PM at Kaloleni, delivered on 21st June, 2023 in PMCC No. 225 of 2022. The Appellant raised the following grounds in their memorandum of appeal dated 22nd June 2023: -

    1. The learned magistrate erred in law and in fact in dismissing the notice of motion application dated 18th April 2023, seeking to set aside default judgment delivered on 12th April 2023 obtained by the respondent against the appellant.

    2. The learned magistrate erred in law and in fact in failing and or declining to grant the appellant leave to defend the suit, despite the Appellant having annexed a draft statement of defence

that raised triable issues against the purpose and spirit of Article 159 (2) of *the Constitution* of Kenya, as read together with Sections 1A and 1B of the *Civil Procedure Act*.

3. The learned magistrate erred in law and in fact by failing to consider the merits of the Appellant's statement of defence, in total violation of the overriding objective principle, under Article 159 (2) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act*.

4. The learned magistrate erred in law and in fact by failing to consider all the material facts that had been placed before the court including the Appellant's submissions and thereby failed to take into account relevant matters that ought to have been considered, and as a result arrived at an erroneous decision.

5. The learned magistrate in arriving at the impugned ruling, failed to consider the Applicant's constitutional right to defend the suit, and the right to be heard, thereby resulting to a miscarriage of justice.

6. The learned magistrate therefore erred in both facts and in law by failing to exercise discretion judiciously.

2. The Appellant urged the court to set aside the impugned ruling and in turn order a stay of execution and setting aside of the judgment dated 12th April 2023; and leave be granted to defend the suit before the subordinate court.

3. A brief history of what transpired at the lower court is that, the Respondents had sued the Appellant for damages as a result of a fatal road accident that occurred on 19th May 2022 along the Mombasa-Nairobi highway, and which caused the death of one John Masha Luganje.

4. The Appellant, who was the defendant therein, failed to enter appearance or file a defence within the stipulated time and interlocutory judgment was entered against it on 25th January 2023. On 12th April 2023, the trial court delivered judgment in favour of the Respondents awarding them a total sum of Kshs. 3,480, 556.40 as damages plus costs.

5. Consequently, the Appellant filed an application dated 18th April 2023 seeking an order for stay of execution on the judgment delivered on 12th April 2023. Upon consideration, the trial court dismissed that application in its ruling dated 21st June 2023 that is the subject of the present appeal. The trial court observed that the Appellant had not fulfilled the requirements for setting aside interlocutory and ex-parte judgment.

6. Parties agreed to canvass the appeal by way of written submissions.

7. Having considered the grounds of appeal and submissions presented by both parties, I find the following issues arising for determination;-

   i. Whether the trial magistrate considered the relevant laws or misapprehended them and rules in dismissing the application dated 18th April 2023.

   ii. Whether the appeal is merited.

Analysis and Determination

8. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion. This principle of law was well enunciated in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123.

9. Order 10 Rule 11 of the *Civil Procedure Rules* gives the court of first instance unfettered discretion to set aside orders made ex-parte. It follows therefore that this Court sitting on appeal should exercise some restrain in interfering with the discretion granted to the lower court, save for only when it is demonstrated or shown that the exercise of discretion was done injudiciously or was based on a wrong principle. The said provision reads;

> " 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."

10. In the case of Mohamed & Another -v- Shoka (1990) KLR 463 the Court set out the factors a court should consider in an application for setting aside interlocutory judgment to include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

11. Further, in the case Mwala-v-Kenya Bureau of Standards EA LR (2001) 1 EA 148, the court stated;

> " to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justiciae for a court should never countenance an irregular judgment on its record."

12. The court in *Corporate Security Services Limited v Linksoft Communication Systems Limited [2016]* eKLR also observed: -

> " 17. Nevertheless, it is trite law that the setting aside of an interlocutory judgment by the Court is discretionary. In Patel Vs EA Cargo Handling Services [1974] EA 75 the Court observed that there are no limits or restrictions on the Judge's discretion except that, if he/she does vary the judgment, it should be on such terms as may be just. It is now trite that the said discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought to obstruct or delay the Course of justice (see Shah Vs. Mbogo (1967) EA 116)."

13. In the present case, the plaint was filed on 10th November 2022 and summons to enter appearance issued on 18th November 2022. There is no dispute that the Appellant was duly served but failed to enter appearance or file a defence within the statutory time. Interlocutory judgment, in this case a regular judgment, was subsequently entered on 25th January 2023. On 27th March 2023, the Appellant filed an application seeking leave to enter appearance and to arrest judgment. Before that application was heard and determined, the trial court delivered its judgment on 12th April 2023. This prompted the

Appellant to file another application dated 18th April 2023 which, as already established, was dismissed, prompting this appeal.

14. The reasons for failure to enter appearance and file a defence on time were advanced by the Appellant as that the same was occasioned by its insurer due to a mix-up and apparent internal error, thus failing to appoint an external advocate in time to defend the suit. The trial magistrate was not satisfied with this explanation. She observed that the Appellant did not avail any evidence showing that it had instructed the insurer or that it made any follow ups. She further observed that there was no draft defence attached to the application to enable her decide on whether the defence raised triable issues.

15. I have perused the record of appeal; it is evident that the Appellant did not attach a copy of the draft defence in the application for setting aside. In a supplementary affidavit sworn and filed on 15th May 2023, the deponent indicated that a copy of the draft defence was on the court record. He attempted to produce a copy of the draft defence as VCK-1 but failed to annex therein the actual document.

16. That notwithstanding, I note that the draft statement of defence had been filed in the initial application filed on 27th March 2023. My view is that the trial magistrate should have, in the interest of justice, exercised her discretion and refer to the draft statement of defence on the court record so as to make a determination on merit. I will therefore consider the draft statement of defence and determine whether or not the same raises triable issues.

17. I am guided by the case of, Sebei District Administration -v- Gasyali & others (1968) EA 300 where Sheridan J. observed that:

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

18. Looking at the draft statement of defence, the Appellant denies the allegations in the Plaint. It pleads the doctrine of volenti non-fit injuria to attribute and demonstrate the deceased's negligence in the accident. The particulars of negligence are equally pleaded therein. Given that the nature of such a case is founded around liability and quantum, I am satisfied that the draft statement of defence raises triable issues. The application to set aside was filed six days after judgment was delivered. This delay is in the circumstances excusable.

19. In the foregoing, I find that the appeal is merited. It is hereby allowed as follows: -

    1. The ruling dated 21st June 2023 and judgment dated 12th April 2023 are hereby set aside.

    2. Leave is granted to the Appellant to defend the suit before the trial court and the draft defence be admitted therein.

    3. The Appellant do take steps within the next 45 days to set the suit down for hearing failure to which the orders herein will stand vacated.

    4. The Appellant do pay to the Respondents throw away costs of Kshs. 20,000/- within 7 days from the date herein.

    5. Each party to bear its own costs of this appeal.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 30TH DAY OF APRIL, 2024.

S.M. GITHINJI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of; -

1. Ms Osene for the Appellant

2. Mr Michael Ngure is for the Respondent