Nzoia Sugar Company Limited & another v Ndegwa (Civil Appeal E132 of 2021) [2024] KEHC 4850 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E132 OF 2021

RN NYAKUNDI, J

APRIL 25, 2024

BETWEEN

NZOIA SUGAR COMPANY LIMITED ..... 1ST APPELLANT

ISAAC MURUNGA MALOBA ..... 2ND APPELLANT

AND

WYCLIFFE IMAALA NDEGWA ..... RESPONDENT

JUDGMENT

Representation:

M. Korongo & Company Advocates

M/s Z.K. Yego Law Offices

1. The appeal emanates from the ruling and decision of Honourable Diana Milimu in Eldoret CMCC 184 of 2021 delivered on 8th October, 2021.

2. The respondent instituted a suit at the trial court vide a plaint dated 5th March, 2021 and filed in court on 11th March, 2021. The Respondent claimed general and special damages arising from a road traffic accident that took place on 28th July, 2019 where the Respondent was lawfully being carried on a motor cycle registration No. KMEV 530J as a Pillion passenger along Eldoret-Bungoma road, when at Generation area, the 2nd Appellant while driving motor tractor registration No. KBU 215T ZD 5233 New Holland Tractor/trailer, knocked down the Respondent as a result he sustained injuries.

3. The appellants did not respond to the claim and as such an interlocutory judgment against them was entered. The matter was set down for formal proof hearing on 27th May, 2021, a date that was served upon the Appellants but they never entered appearance. The Respondent testified and closed his case and an award of Kshs. 1,414,475/= was given. This triggered the appellants' application dated 9th August, 2021 seeking to set aside the interlocutory judgment.

4. The court considered the said application and it was found wanting of merit and as such the appellants could not file a defence to the said claim.

5. The Appellants are aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (10) grounds: -

    a. That the learned magistrate erred in law and in fact denying the Appellant an opportunity to file defendant written defence and to prosecute the case.

    b. That the trial magistrate erred in Law and fact in finding that the appellants had not given sufficient reasons for filing the statement of defence out of time.

    c. That the trial magistrate erred in law and fact for failing to consider whether the appellants had an arguable defence deserving to be heard on merits.

    d. That the trial magistrate erred in law and fact in upholding exparte judgment without granting the appellants an opportunity to be heard at all.

    e. That the trial magistrate erred in law and fact in failing to consider that no prejudice would be visited on the Plaintiff if the exparte judgment was set aside upon such terms and conditions as the court would deem fit.

    f. That the trial magistrate erred in law and fact in failing to consider that the delay in filing the statement of defence was not inordinate not intentional but an inadvertent error.

    g. That the trial magistrate erred in law and fact by disregarding all the evidence that was adduced by the appellants as proof for filing the statement of defence out of time.

    h. That the trial magistrate erred in law and fact by arriving at a ruling that was against the weight of evidence on record.

    i. That the trial magistrate erred in law by misinterpreting the provisions of the law with respect to denying the appellants opportunity to present their case.

    j. That the decision demonstrated partiality and bias.

6. The appeal was canvassed through written submissions. The Appellant on 23/02/2023 filed submissions dated 13/02/2023 whereas the Respondent filed his submissions on 10th March, 2023 dated 08/03/2023. none at the time of drafting this judgment.

The Appellants' Submissions

7. The appellants made their submissions in two segments, which addressed all the grounds of appeal.

8. On ground 1,2,3 and 4 the appellants submitted that the trial court did not consider all the evidence on each and every issue raised by the defendants/appellants. The learned trial magistrate failed in finding that the appellants had not given sufficient reasons for filing the statement of defence out of time.

9. It was the appellants' case that the trial court disregarded the prayers and authorities relied upon by the appellants that the appellants had an arguable defence deserving to be heard on merits and disregarded and/or failed to consider that the delay in filing the statement of defence was not inordinate nor intentional but an inadvertent error.

10. The appellants further argued that their draft statement of defence raises triable issues which ought to be ventilated at the trial. On this, counsel cited the case of Abdalla Mohamed & another v Mbaraka Shoka (1990) eKLR.

11. It was submitted for the appellants that in determining whether or not to set aside an ex-parte/default judgment, a court is required to consider whether a party has a triable defence even where service of summons is found to be proper. In so saying, they cited the case of Tree Shade Motors Ltd v D.T. Dobie & another (1995-1998) IEA 324 which relied upon the case of M/s Jondu enterprises Limited v Spectre International (2019) eKLR thus;

> " Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

12. According to the appellants, the draft defence consists of triable issues which can only be adequately ventilated at the hearing of the suit. That the learned trial magistrate did not address her mind to the subject of the draft statement of defence annexed to the motion. The appellants contend that the trial court similarly erred in finding that it had not given any plausible explanation for the delay in bringing the application and yet the same had clearly been laid out therein.

13. The appellants argued that the trial magistrate erred in law and fact in upholding exparte judgment without granting the appellants an opportunity to be heard at all. That the same is in contravention with Article 50 of *the Constitution*. On this counsel relied on the case of Onyango v A.G (1986-1989) E.A 456, the case of Mbaki & others v Macharia & Another (2005) 2EA 206 and Sangram Singh v Election tribunal Kotech Air 1955 SC 664 at 711.

14. The appellants urged the court that in the interests of justice and in line with the Audi alteram partem, the judgment, decree and any other consequential orders should be set aside. The appellants cited the case of Patel v E.A Cargo Handling Services Limited (1974) E.A 75, where the court held as follows:

> " 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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."

15. On grounds 5,6,7,8 and 9, the appellants submitted that the trial magistrate erred in law and fact in arriving at a ruling that was against the weight of evidence on record. That the trial magistrate did not consider all the evidence, pleadings, facts and law before it and failed to make a finding on each and evert issue raised by the defendant/appellant and instead considered contradictory evidence from the Plaintiff.

16. The appellants submitted that the trial magistrate did not set out the issues for determination as required by the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010 but instead glossed over the issues in dispute thereby arriving at a judgment that failed to determine the issues raised by the Plaintiff/appellant which was uncontroverted. That she failed to exercise her discretion judiciously by

misinterpreting the provisions of the law with respect to denying the appellants opportunity to present their case and later arriving at a ruling that was against the weight of evidence on record.

17. The appellants added that the judgment of the trial court was coloured with errors of commission which negated its substance as it ran contrary to the clear provisions of the law and amounts to a travesty of justice. They concluded that the appeal stems from the fundamental principle of natural justice which requires that no party should be condemned unheard.

Respondent's submissions

18. The respondent identified five issues for determination as follows:

    i. Whether the supporting affidavit by one George Korongo should be expunged from the court record.

    ii. Whether the Appellants were duly served with the Plaint and summons to enter appearance, the formal proof hearing date and notice of entry of judgment.

    iii. Whether the draft defence raises triable issues.

    iv. Whether the appellants were denied a chance to file a defence.

    v. Who shall bear the costs.

19. To the first issue, the respondent submitted that the appellants in their application dated 9th August, 2021 did not swear a supporting affidavit to anchor its grounds as to why the orders prayed for should be granted by this honourable court. Instead, their advocate on record purported to depone on internal matters of the Defendants/Applicants contrary to Order 19 (3) (1) of the Civil Procedure Rules which the respondents submitted to be hearsay and that this court should not admit his testimony deponed upon in the supporting affidavit.

20. It was submitted for the respondent that Rule 9 of the Advocates Practice Rules prohibits advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By Swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences. The Respondent submitted that this renders the prayers in this instant application not grounded on any deposition as such he prayed that the instant application be dismissed by this honourable court being fatally defective. On this counsel relied

21. on Gerphas Alphonse Odhiambo vs felix Adiego (2006) eKLR.

    The 2nd issue regarded service of summons. It is the Respondent's case that the appellants herein were served with the Plaint and summons to enter appearance on 15th March, 2021 and which documents were duly received as is evidenced by paragraph two (2) of the Affidavit of service of one Joseph O. Onawa on record, dated 16th March, 2021.

22. The appellants having not entered appearance and filed a defence within the prescribed period, the Respondent filed a request for judgment under Order 10 Rule 6 of the Civil Procedure Rules, 2010. The respondent submitted that on 12th May, 2021 via both email and registered post the appellants and their insurer M/s Africa Merchant Assurance Company Limited were served with the formal proof hearing.

23. The Respondent maintained that having fulfilled the requirements set out in Order 5 Rule 6, Order 5 Rule 15 and Order 10 Rule 2 the appellants ought not to benefit from the provisions of Order 10 Rule 11 as this is tantamount to abuse of the court process.

24. As to whether the draft defence raises triable issues, the respondent submitted that the Appellants' draft defence does not suffice to answer the Respondent's claim, since it discloses no triable issues as the appellants' statement of defence only contains mere denials to the Respondent's claim and does not answer the facts in issue.

25. The Respondent further argued that the application is a waste of the court's time as the application was not filed in good faith but rather brought in bad faith as an afterthought to aid an illegality. That the appellants have not put in a defence as regarding these issues and as such cannot purport that they have a good defence to the Respondent's Claim. Counsel argued that the draft statement of defence is frivolous, scandalous and vexatious contrary to Order 2 Rule 15 of the Civil Procedure Rules.

26. The Respondent urged the court not to admit the draft statement of defence by the defendant/ applicant. He cited the case of Kibanga estates Limited n National Bank of Kenya Limited (2017) eKLR.

27. On whether the appellants were denied a chance to file a defence, the respondent submitted that the allegation that the appellants were denied chance to file their defence was not true.

28. In concluding, the respondent submitted that the appeal lacks merit. That the appellants were duly served with the requisite pleadings and a Notice of Entry of Judgment. He prayed that the appeal be dismissed with costs to the Respondent.

Analysis & Determination

29. Being a first appeal, the court is called upon to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion. The principles were set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

    a. "...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

30. I am conscious of the fact that this court ought not to interfere with the exercise of the discretion by a lower court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so, arrived at a wrong conclusion.

31. The application before the lower court in a nutshell was one that sought setting aside of the exparte judgment and leave to enter appearance and file its defence and have the matter heard on merit. The application was based on grounds that the applicant instituted an application dated 13th July, 2021 and filed on 30th July 2021 seeking stay pending hearing and determination of the application and execution. The applicants argued that the said application was never assessed at the registry to date. Further that the Respondent's advocates herein were duly served with the Notice of appointment on 12/7/2021 which they affixed their stamp and acknowledged receipt.

32. I have considered and evaluated the pleadings and the evidence adduced before the trial court by the parties to this appeal, and the submissions in this appeal and it is my view that the main issue for determination is whether the trial magistrate erred in law and fact in dismissing the appellant's application dated 9.08.2021.

33. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The principles applicable under this rule were laid down by the Court of Appeal in Pithon Waweru Maina v Thuka Mugiria [1983] eKLR and restated in Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR as;-

> "(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... 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 it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E
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> (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA
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> (c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93."

34. The Court of Appeal in the case of Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR stated that:

> "The power of the court to set aside an interlocutory judgment under that provision is discretionary. See CMC Holdings Limited vs. Nzioki [2004] 1KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because the he failed to take into consideration matters which he should have taken into consideration."

35. It is not in dispute that the appellants were duly served. The same has been admitted in the affidavit in support of the application. The appellants argue that they were served but the insurance legal team failed to enter appearance on their behalf.

36. The two major grounds advanced by the Appellants in their application to set aside are that they instituted an application dated 13th July 2021 and filed on 30th July, 2021, which was never assessed. Secondly, they admitted service of summons but the insurance legal team failed to enter appearance. The advanced reasons made the respondent think that the appellants did not give sufficient reasons for failure to enter appearance and file a defence within the stipulated time.

37. I couldn't agree more. It is my considered view that the said reasons are not sufficient to set aside an interlocutory judgment. The appellants ought to have gone a mile further to explain what caused the delay. The only conclusion that can be drawn from such omission is that there were no reasons other than indolence on the part of the Appellants.

38. The trial court properly considered this and found no merit. The Learned Magistrate certainly cannot be faulted on this front. The Appellant in this appeal has totally failed to convince this court that it

had good reason or valid basis for the delay and in the absence of good reason certainly the Learned trial Magistrate was right to find that there were no sufficient ground for him to exercise his discretion in favour of the Applicant.

39. I have equally had occasion to peruse through the draft statement of defence and I find it wanting for reasons that it consists of mere denials, which in my view hardly raised any triable issue.

40. Besides that, my attention was drawn to the argument by the Respondent that the appellants did not swear a supporting affidavit to anchor its grounds as to why the orders prayed for should be granted by the court. Instead, their advocate on record purported to depone on internal matters of the Defendants/Applicants contrary to order 19 (3) (1) of the Civil Procedure rules.

41. Does the said supporting affidavit offend Rule 9 of the Advocates (Practice) Rules?

42. Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 is instructive. This rule provides that:

> " Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

43. Further, Rule 9 of the Advocates (Practice) Rules provides: -

> " No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration of Affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.."

44. In Tahmeed Coach Limited & 2 others v Salim Mae Peku (Legal Representative of Sadiki Salim Peke (Deceased) [2014] eKLR Chitembwe J held that: -

> " It is clear that this is a matter arising from a road accident. Ordinarily it is the insurance company that would be called upon to satisfy the decretal sum. The insurers of the accident vehicle were served with a statutory notice and although the "insurance company is not a party to the suit; it is interested in the outcome of the dispute. It is therefore, in order for one of the officers of the insurance company to swear an affidavit in support of the application. The legal officer of the insurance company cannot be held to be a stranger to the dispute."

45. The long and short of it is that the affidavit in support of the application ought not be sworn by an advocate on such contentious and factual matters that he is not privy to and the averments therein carry no legal weight.

46. In the end I find no merit in this appeal and the same is dismissed with costs.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 25TH DAY OF APRIL 2024.

In the Presence of:

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R. NYAKUNDI

JUDGE