Milhan Access Capital Ltd v Kaptui (Civil Appeal E111 of 2022) [2024] KEHC 6109 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E111 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

MILHAN ACCESS CAPITAL LTD .... APPELLANT

AND

WINFRED WANZA KAPTUI .... RESPONDENT

(Being an appeal from the Ruling of Hon. O. Gweno Resident Magistrate in the Nairobi SCCCOMM No 762 of 2021 delivered on 24th February 2022)

JUDGMENT

1. This appeal arises from the ruling of the Small Claims Court at Nairobi dated 24th February 2022. In the said ruling, the Court dismissed the appellant's application dated 9th November 2021 wherein it sought to have the Judgment on the respondent's counter claim set aside. Being dissatisfied with the ruling it filed the Appeal dated 03/03/2022 on the following grounds:

    i. The learned magistrate erred both in law and in fact in failing to appreciate that the appellant had a right to be heard as provided for under Article 50 of *the Constitution*, notwithstanding the procedural mistakes of counsel;

    ii. That the learned magistrate erred both in law and fact in failing to appreciate the provisions of the *Small Claims Court Act* on the hearing of claims and counterclaims;

    iii. That the learned magistrate erred both in law and fact in failing to appreciate the provisions of Article 159(2)(d) of *the Constitution* in so far as resolution of disputes is concerned;

    iv. That the learned magistrate erred both in law and fact in failing to take into account the fact that the appellant was ready to pay the respondent throw away costs in order to be granted

an opportunity to be heard on the counterclaim on merit and not on the claim that had been dismissed with costs.

2. The suit herein originated vide a statement of claim dated 24th October 2020 where the appellant sought a judgment in the sum of Kshs. 564,300/= and the cost of the suit against the respondent. The respondent filed a statement of defence and counterclaim where she claimed Kshs. 250,000/= on account of overpayment of the money owed to the appellant. On 15th October 2021, the learned magistrate entered a judgment thereby allowing the counterclaim. It is on the backdrop of the foregoing that the appellant filed the notice of motion dated 9th November 2021 seeking to set aside the interlocutory judgment entered on 15th October 2021 in respect of the respondent's counterclaim.

3. The notice of motion was premised on the grounds that the appellant proceeded with its case oblivious of the fact that the respondent had filed a counterclaim and that the appellant had a good defence to the counterclaim. The appellant also pleaded that the failure to respondent to the counterclaim was not deliberate. The respondent on her part opposed the application stating that the appellant wanted to re-open the case simply to seal the loopholes that existed in their case. It was also the respondent's assertion that the judgment entered by the trial Court was not a judgment in default but one borne of full hearing of the matter.

4. This appeal was canvassed by way of written submissions. The firm of Ondabu & Co. Advocates filed submissions dated 14th November 2023 in support of the appeal. According to counsel, the appellant had a right to be heard under Article 50 of *the Constitution* regardless of the procedural mistakes by its advocate. He also urged that the trial magistrate ought to have considered the appellant's draft defence to the counterclaim which raised triable issues. He urged that the provisions of the *Small Claims Act* cannot override Article 159 (2)(d) of *the Constitution* which guaranteed the appellant's right to dispute resolution without giving due regard to procedural technicalities. It was counsel's submission that the trial Court failed to exercise its discretion judiciously when it dismissed the application. He urged that the appeal be allowed to enable the appellant to canvass its defence to the counterclaim.

5. For the respondent, M/S Maina Wairimu & Associates Advocates filed submissions dated 5th May 2022. Counsel referred to the proceedings and submitted that all the procedural edicts under the *Small Claims Act* were complied with prior to the delivery of the judgment and that the judgment dated 15th October 2021 was a regular judgment. He also submitted that the application dated 9th November 2021 did not raise any grounds set under section 41 of the Small Claims Act to warrant a review or setting aside of the judgment. Counsel referred to the cases of *Deacons (East Africa) PLC Ltd vs. Modern Techno Fitness Gym Ltd & Another* (2021) eKLR and *Mwala vs. Kenya Bureau of Standards* EA LR (2001) 1 EA 148 to expound on the difference between a regular and irregular judgment. He also submitted that the appellant is not deserving of the prayers sought as they were properly represented by counsel and were also aware of the counterclaim and chose not to respond to it. Counsel submitted that this was an appeal against the exercise of discretion and argued that the threshold for the interference with the exercise of such discretionary powers had not been met. He urged this court to dismiss the Appeal.

Analysis and determination

6. I have reviewed the record and considered the memorandum of appeal, the submissions, and the authorities relied on by both parties. The issue that this court must grapple with is whether the appellant advanced a ground for the trial Court to re-open a matter that it had determined.

7. The powers of the Small Claims Court to review its ruling or order are provided for under section 41 of the *Small Claims Act* which provides:

> "(1) An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that—
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> (a) the order was made ex-parte without notice to the applicant;
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> (b) the claim or order was outside the jurisdiction of the Court;
>
> (c) the order was obtained fraudulently;
>
> (d) there was an error of law on the face of the record; or
>
> (e) new facts previously not before the Court have been discovered by either of the parties.
>
> (2) The application referred to under subsection (1) shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow."

8. In the case of *Taylor & Another vs Lawrence & Another* [2002] 2 All ER 253, the Chief Justice, Lord Woolf held that:

> "A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes."

9. In the case of *Mukuru Munge vs. Florence Shingi Mwawana & 2 Others*, Civil Appeal No. 191 of 2011, the Court of Appeal held that it has a residual jurisdiction to reopen a decided matter in exceptional cases. This is how the Court addressed the matter;

> "The residue power of the court to reopen its decisions is therefore a circumscribed power to be exercised in exceptional circumstances. That power is not intended to circumvent the principle that, save in those cases where *the Constitution* allows an appeal to the Supreme Court, decisions of this Court are otherwise final."

10. Clearly, therefore, the jurisdiction to review a past decision by the court which had already made its determination, is one that should be exercised sparingly, and only in exceptional circumstances. The special circumstances in this case are those that are provided for under section 41 of the *Small Claims Act*.

11. In this case, the judgment the appellant sought to set aside was not an ex parte judgment nor an interlocutory judgment as pleaded by the appellant. The trial Court conducted a substantive hearing of the case and complied with all processes before the hearing. The appellant cannot feign ignorance of the counterclaim when in fact they filed a response to it. At the time of the hearing, the appellant was aware that there was a counterclaim lodged by the respondent and they ought to have addressed it. In fact, the trial Court pointed out as much in its judgment.

12. Similarly, no case was made out to bring the impugned judgment within the provisions of sections 41 (1) (c), (d), (e) of the *Small Claims Act*. On the contrary, I hear the appellant plead that the failure to properly address the counterclaim resulted from a mistake by counsel on record. In my view, an excusable mistake is a ground for setting aside an ex parte judgment *(Shah vs. Mbogo & Anor* [1967] EA 116) and not a judgment properly delivered inter partes (*Mukuru Munge vs. Florence Shingi*

*Mwawana & 2 Other*s, Civil Appeal No. 191 of 2011). A judgment delivered inter partes, like the one issued by the trial Court, can only be reviewed within the borders of section 41 of the *Small Claims Act* and anything beyond that would amount to a Court sitting on appeal of its own judgment. The pre-existing clear demarcation between the two types of judgment (See *Deacons (East Africa) PLC Ltd vs. Modern Techno Fitness Gym Ltd & Another* (2021) eKLR and *Mwala vs. Kenya Bureau of Standards* EA LR (2001) 1 EA 148) must be maintained for proper order and to avoid abuse of the Court process.

13. The appellant cannot also plead that their right to a fair hearing was infringed. That is far from the truth because the appellant was represented by counsel and prosecuted its case up to its close. They were also served with the defence and counterclaim before the trial began. Furthermore, they also participated in the defence hearing, put in submissions and appeared in Court when judgment was read.

14. From the foregoing discussion it is clear that the appellant did not meet the threshold for review of judgment within the provisions of section 41 of the *Small Claims Ac*t. Its failure to address the counterclaim cannot be cured by Article 159 as pleaded. I must add that rules are handmaidens of the law and that the provisions of Article 50 and 159 are realized with the help and within the boundaries of the *Small Claims Ac*t.

15. In the end, I find this appeal to be without merit and proceed to dismiss it with costs to the respondent.

16. Orders accordingly

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

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JUDGE

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR