Mwale & another v Simplifi Networks Limited (Civil Appeal 46 of 2020) [2024] KEHC 6408 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6408 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 46 OF 2020

SC CHIRCHIR, J

MAY 30, 2024

BETWEEN

JULIUS MWALE ..... 1ST APPELLANT

TUMAZ & TUMAZ ENTREPRISES LTD ..... 2ND APPELLANT

AND

SIMPLIFI NETWORKS LIMITED ..... RESPONDENT

(Being an Appeal from the ruling of the Honourable F.Makayo in Butere CMCC No. 59 of 2018 and delivered in 10th September 2020)

JUDGMENT

Background

1. On 17/4/2018, the respondent filed suit against the appellants a seeking for a liquidated amount of US. Dollars 28,957.46 (approx.Ksh2,916,016) on account of breach of contract. The Appellants failed to enter appearance and judgement in default of a was entered against them on 15/8/2018.

2. The Appellant filed on Application dated 27/8/2018 seeking for the setting aside of the default judgement. That applicant was allowed through the consent of the parties on 13.9.2018.

3. Subsequent to the setting aside of the exparte judgment, the Appellants filed the application dated 9/10/2018, seeking that the court stays the proceedings and to refer the matter to Arbitration. That Application was dismissed on 5/2/2019 and trial court thereafter scheduled the matter for pre-trial conference.

4. The matter was thereafter mentioned on 26.3.2019, 30/4/2019, and 14/5/2019. On the last mention on 14/5/2019, the respondent brought to the attention of the court the fact that the Appellant had not filed a defence and sought for judgement in default. The prayer was allowed and the matter listed for

formal proof n 18/6/2019. On the date of the said date , the court noted that the claim was liquidated and th e formal proof abandoned.

5. The Appellants filed the application dated 21/5/2019. The application sought for the setting aside of the default judgement and a chance to defend the suit. The applicant also sought for stay pending the determination of the application.

6. On a ruling delivered on 16/8/2019, the trial court allowed the application on condition that the appellants deposit half of the decretal sum in an interest-earning account ,within 30 days of the ruling.

7. The appellants filed yet another application. This was dated 27/9/2019. It sought for a review of the orders of 16/8/2019. The review sought was for extension of time for compliance to 60 days. It also sought for stay of proceedings. The application was dismissed by the trial court on 11/11/2019.

8. The appellants moved to the high court by way of a miscellaneous application seeking for leave to appeal out of time against the entry of the default judgement. The High Court determined the applicant on merit and dismissed it.

9. The appellants went back to the lower court. They filed 2 applications both dated 3/7/2020 and filed the same date, that is 6/7/2020. The first application sought for stay of execution pending the interparties hearing of the petition (sic) ,while the 2nd one sought for a review of its orders made on 11/8/2018.

10. The trial court heard the 2 applications and through the ruling dated 10/9/2020 the trial court dismissed both applications on grounds that there was nothing new to warrant a review .It is this ruling that formed the subject matter of this appeal.

Memorandum of appeal

11. The Appellants have set out the following grounds:

    1. That the learned magistrate erred in both law and fact by refusing to exercise his discretion judiciously to the detriment and prejudice to the Appellants.

    2. That the trial magistrate erred in both law and fact by misapprehension and misunderstanding of the facts as presented by the parties before him and particularly the Appellant.

    3. That the learned magistrate erred in both law and fact by misapprehension and misunderstanding of the law applicable to review Applications.

    4. That the learned magistrate erred in both law and fact by making a ruling premised on facts and arguments not presented ignoring the 3rd ground relied on by the by the Appellant.

    5. That the learned magistrate erred by relying o two grounds as the main threshold for review Applications

    6. That the learned magistrate erred in both law and fact when he failed to appreciate the facts surrounding the case.

    7. That the learned magistrate erred in failing to take into consideration the submissions by the Appellant and the fact that the erstwhile Advocate had against Instructions failed to defend the suit.

8. That the learned magistrate failed to appreciate the risk faced by the Appellants if denied the opportunity to defend the suit.

12. The appeal proceeded by way of written submissions.

Appellants' Submissions

13. It is Appellants' submissions that they are entitled to a review on grounds of "sufficient reasons". In this regard they have relied on section 80 of the *civil procedure Act* and order 45 Rule 1 of the civil procedure rules; that section 80 of the *civil procedure Act* gives the court unfettered discretion giving and that as per the current jurisprudential thinking the words "insufficient reasons" need not be analogous to the other grounds specified under order 45. In this regard, the appellants have relied on the case of Pancras. T. Swai Vs Kenya Breweries (2014) eKLR and Zhenzu investments LTD vs Commissioner of lands.

14. It is further submitted that there were mere compelling reasons given on the supporting affidavits in support of the applications dated 3/7/2020. They blame the actions of their advocates for their failures to comply, and that as such, they have been condemned unheard. The appellants blame their advocate for their failure to:

    1. Communicate on every stage of the proceedings to the appellants.

    2. For failing to file a defence.

    3. For failing to open a joint account as directed by the advocate.

15. On the issue of representation, the appellants state that a consent dated 1/7/2020 and a notice of cheque dated 3/7/2020 was filed and hence their current Advocate was properly on record.

Respondent's submission

16. On representation, the respondent submits that, considering that the present advocate came on record after the entry of judgement, they ought to have complied with Order 9 rule 9 of the civil procedure rules.

17. The respondent refutes the assertion by the appellants that they were not notified about what was going on during trial. According to the respondent, the content of the affidavit dated 27/9/2019, show that they were aware about the conditions set by the trial court and other directions given by the court.

18. The respondent accuses the appellants of filing frivolous applications, all in an attempt to delay the fruits of the judgement going to the respondent. In this regard, the decision in Shah vs Shah (sic) 1968 E.A. has been relied on.

19. The respondent further argues that the appellants have no a defence that raises triable issues; that the judgement was regular and the appellant ought to have demonstrated that they have a defence on merit as held in the case of Patel Vs Africa Cargo Holding handling services Ltd (1974) EA 75; that indeed the appellant issued cheques but which were dishonored and therefore can not be said to have had any plausible defence.

Analysis & Determination

20. This is a first appeal and this court is under the duty to relook at the evidence, re-evaluate and arrive at its own determination (Ref Selle & Ano vs Associated Motor Boat Co. Ltd 7 others (1968) EA).

21. I have considered the memorandum of Appeal and the parties submissions . In my view the following issues arise:

    a. Whether the appellants are properly on record.

    b. Whether the appellant are entitled to orders of review the areas of whether the appellants advocate were properly on record.

Whether the Appellant's counsel was properly on record.

22. The appellants have argued that they filed a consent and a Notice of cheque of advocates. The filing of consent between the previous and the in- coming advocates is allowed pursuant to order 9 rule a (b) of the civil procedure rules .

23. A perusal of the record shows there was a consent dated 1/7/2020 but filed on 5/8/2020. The two applications, the outcome of which form the subject matter of this appeal was filed on 6/7/2020. It follows that as at the time of filing the appellants' Applications dated 3/7/2020 the current Advocate was not on record. His contention that there was a consent dated 1/7/2020 without making reference to the date of filing appears to me to be an attempt to mislead the court. As far as court documents go the date of filing document is the material consideration not the date of drawing of the document. The filing of the consent on 5/8/2020 did not cure the defect of 6/7/2020.

24. In my view, failure by an advocate to place himself or herself properly on record is substantive procedural defect not even the oxygen principle envisaged by article 159 (2) of *the constitution* can cure. In this regard, I borrow the words of Justice Musyoka in Dancan K. Owino t/a Bio path healthcare vs Breeze petroleum station Ltd (Civil Appeal E042 OF 2023[2024] KEHC383 when he stated, "There is surely a limit to which parties, who default with respect to procedure can be accommodated, and this principle (referring to Oxygen principle) should not be utilized to aid a party who is bent on abusing the process. The substantive justice principle cannot be elastic, to be applied mechanically to aid a party who is repeatedly in default. A party cannot claim to have been denied a right to be heard when it is his own actions or omissions that prevent him from accessing justice".

25. Also in the case of James Ndonyu Njogu vs Muriuki macharia (2020) e KLR the court held, "Although the applicant has a constitutional right to be represented, yet when there are clear provisions of the law regulating the procedure in such representation the same should be adhered to. The procedure set out under a rule 9 rule 9 Is mandatory and this cannot be termed as a mere technicality.

26. On the issue of representation alone , the trial court would have been in order to dismiss the Applications.

Whether the Appellants are entitled to a review

27. In support of their application for review the 1st appellant stated that his then advocate on record did not inform him of what transpired in court on 13/9/2018 when the exparte judgement was set aside by consent of the parties. One of the orders the Appellants were to comply with was to file the defence within 14 days from the said date of 13.9.2018.

28. The appellant further states that they were also not aware about the subsequent orders made thereafter including the requirement to deposit half of the decretal sum; that as a matter of fact it was not their wish to seek for extension of time : that they would have complied with requirement of the deposit and finally that he should be made to suffer on account of his erstwhile advocate.

29. In response, the respondent refutes the above assertion and points out that from their averments in an affidavit sworn on 27th of September, 2019, t it is evident that he appellants were made aware about the conditions set by the court.

30. I have perused the said affidavit. It was sworn by he 1st appellant herein describing himself as the Director of the 2nd Appellant. The application was the one seeking for extension of time to deposit the decretal Sum. In paragraph 2 of the said affidavit, he states "That vide the ruling dated ...judgement was successfully set aside with condition that we do deposit half the sum claimed in the plaint which is about 1.5 million in a joint investment earning account. Annexed and marked JM1 in a copy of the ruling."

31. He goes on to state that he could not raise the said amount within a period of one month set by the court and sought 60 days to comply. He could not have been seeking extension of time to pay the sum if he was not aware of the court order. It also follows that he could not blame the respective advocates for failing to open an account. There is no evidence that he had availed the funds for the deposit, so as to exonerate himself from the omissions of his advocate.

32. Thus the Appellants cannot blame their erstwhile Advocate solely, yet as it is evident that they were walking alongside him, as evidenced by his affidavit of 27/9/2019.

33. I entirely agree with the respondent's assertion that the appellants were on the know in as far as what was going on in court was concerned.

34. It is evident that the appellant has no regard for truth. He keeps swearing affidavits based on what he wants to achieve at any given time. He does not even bother to check what he said previously in an affidavit ,before appending his signature on the next one. He is an abuser of the court process.

35. Whereas I entirely agree that a party would be entitled to a review on "sufficient grounds" there are really no grounds for review in this case.

36. Further I have taken note of the fact that in their application dated 3/7/2020, the appellants did not bother to attach a draft defence to demonstrate that they have any triable issues . The supporting affidavit too does not demonstrate any issues they may wish to raise in the intended defence.

37. The entry in judgement was regular and as pointed out by the respondent, it can only be set aside if the court is satisfied that there is a defence on merit. (See Patel vs. East Africa Cargo Holding Services LTD (supra)

38. In conclusion it is my finding that:

    1. The advocate's purportedly represented the Appellants was not properly on record

    2. There are no grounds for review.

    3. The application seeking stay was simply facilitative in nature , and it had to equally fail

39. In the end I find no merit in the appeal. It is hereby dismissed.

    40. The respondent is hereby awarded costs of this appeal as well as the costs of the two applications dated 3/7/2020 in the lower court.

Dated, signed, and delivered at Nairobi, via Microsoft Teams this 30th day of May, 2024.

S.Chirchir

Judge

In the presence of:

Godwin – Court Assistant

Mr. Agwata for Mr. Munzala for the 1st and 2nd Appellants

4