Nine Trading Limited v Premier Industries Limited (Civil Appeal E463 of 2022) [2024] KEHC 6097 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E463 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

NINE TRADING LIMITED ..... APPELLANT

AND

PREMIER INDUSTRIES LIMITED ..... RESPONDENT

(Being an appeal from the Ruling delivered in CM COM NO E567 OF 2020 Chief Magistrate court at Milimani by Hon. Kagoni Principal Magistrate on 24th June 2022)

JUDGMENT

1. The appellant who was the defendant in the lower court filed a notice of motion dated 16th March 2022 in which he sought to reopen the case as the hearing was done in the absence of its counsel on record. The same was dismissed by the trial court on 24/06/2022. Being dissatisfied with the ruling, he filed this appeal dated 27/06/2022 on the following grounds:

    a. The learned magistrate erred in law and fact by dismissing the appellant's application despite the appellant's explanation as to the circumstances leading to its failure to attend the hearing of the main suit on the material day.

    b. That the learned magistrate erred in law that in dismissing the appellant's application, he failed to appreciate the provisions of *the constitution* particularly articles 50 and 159(2) and the consequences thereof which lays emphasis on the rights to fair hearing and administering justice without undue regard to procedural technicalities as guiding principles in exercising judicial authority.

c. That in dismissing the application, the court has effectively denied the appellant a chance to adduce and challenge evidence contrary to the provisions of article 50 of *the constitution* of Kenya 2010 with great prejudice to its case and the ensuing and unavoidable injustice to him,

d. That the learned chief magistrate erred in fact by laying emphasis on extraneous facts and paying undue regard to procedural technicalities contrary to provision of article 159(2) especially when those procedural missteps have been fairly explained.

e. That the learned magistrate erred in law and fact in failure to weigh the competing interests of both parties which error would have been avoided if the court had taken into account the prejudice its decision would cause by dismissing the appellant's application vis a vis allowing the application and have the appellant testify and state its case before an impartial arbiter.

2. The background of the dispute between that parties is that the respondent herein filed a suit at the Milimani Chief Magistrate Court vide a plaint dated 18th August 2020, which was amended on 25th November 2020. The respondent sought a judgment of Kshs. 8,881,063.04, interest and costs of the suit against the appellant herein. The appellant filed a defence dated 23rd October 2020 and amended it on 6th April 2021. In his defence, he denied the allegations and stated that the respondent was in breach of the contract. The matter came for a hearing on 14th March 2022 where the respondent testified and closed its case without the participation of the appellant whose case was equally closed as there was non-attendance on the part of the appellant.

3. The appellant filed a notice of motion dated 16th March 2022 where he sought orders, inter alia, that the court be pleased to suspend the tendering of written submissions and/or stay any other further proceedings pending the inter parties hearing and determination of the application; the court be pleased to grant leave to the defendant and reopen the plaintiff's case and have the plaintiff's witness cross-examined; thereafter allow the defendant to defend its case with corresponding leave to the plaintiff to cross-examine the defendant's witness and costs. The appellant argued that his advocate experienced a technical hitch which prevented him from cross-examining the respondent's witness and participating in his case.

4. The application was opposed by the respondent vide the replying affidavit sworn by Sundip Shah. The deponent averred that neither the applicant's witness nor its advocate logged in for the hearing session despite having been duly served with a hearing notice to that effect. He further averred that the explanation given by the applicant's advocate for the non-attendance was not supported by sufficient grounds to warrant the grant of the order sought. In its ruling, the learned Magistrate dismissed the application noting that the appellant and its counsel did not advance a satisfactory explanation for failure to attend Court on the hearing date.

5. This appeal was canvassed by way of written submissions.

Appellant's submissions

6. These are dated 13th December, 2022 having been filed by Mogeni & company advocates. Counsel reiterated that the reason for the non-attendance at the hearing was that the advocate's call dropped and attempts to rejoin the session were not successful. He urged that the proceedings as they stand deny the appellant its right to a fair hearing under Article 50 of *the Constitution* of Kenya 2010. Counsel further referred to Article 159(2) (d) of *the Constitution* of Kenya 2020 to urge that justice should be administered to all without undue regard to procedural technicalities. According to counsel, this appeal should be allowed and the trial Court be directed to allow the appellant and its counsel to participate in the trial hence guaranteeing the appellant's right to a fair hearing. The appellant also

reiterated its submissions before the trial Court and urged the Court to put them into consideration. Therein, counsel anchored his submissions on Order 18, Rule 10 of the Civil Procedure Rules, Articles 50 and 159(2)(d) of *the Constitution* on the right to a fair hearing and the administration of justice without undue regard to procedural technicalities respectively. Counsel also relied on Trishcon Construction vs. Vikash Enterprise & Another [2020] eKLR where the Court ordered a retrial where the respondent's evidence had been expunged and an opportunity to tender oral evidence denied.

Respondent's submissions

7. These are dated 11th March 2024 having been filed by Macharia-Mwangi & Njeru advocates. Counsel submitted that the appellant's advocate had plenty of time to prepare for the hearing scheduled for 14/03/2022, which preparation included obtaining as many devices as were necessary to secure their attendance. He pointed out that the hearing on 14/03/2022 was one among many dates reserved by the court that the appellant's advocates failed to attend and that the appellant's advocate was also notably absent on the dates preceding the hearing on 07/06/2021 and 24/01/2022. Counsel relied on the case of *Samoei vs. National Housing Corporation & another (Civil suit E008 of 2020*) [2023] KEHC 17919 (KLR) (23 May 2023) where the court distinguished a bona fide error from negligence on the part of the advocate on record in making a determination.

8. Counsel also referred to the case of Omwoyo vs. African Hioghlands & Produce Co Ltd [2002] 1KLR to buttress the submissions that the mistake herein was not a bona fide mistake to warrant leniency on the part of the Court. According to counsel, the explanation offered by the appellant for his failure to attend the hearing of the main suit on the material date was not sufficient. To this end, he referred to the cases of Mawji vs. Lalji & Others [civil application No 236 of 1992] and Odoyo Osodo vs. Rachel Obara Ojuok & 4 others [2017] eKLR. On whether the learned magistrate erred in law by failing to appreciate the provisions of Articles 50 and 159(2) of *the Constitution*, counsel submitted that the appellant had not identified which limb of Article 50 it relied on in mounting its appeal and that it cannot seek shelter under the umbrella of Articles 50 and 159(2) having neglected to defend its rights in the matter. To buttress this submission, counsel referred to the Court of Appeal pronouncement in Ransa Co. Ltd & 2 Others vs. Manca Francesco (2015) eKLR and the Supreme Court decision Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others [2013] eKLR,; Law Society of Kenya vs. the Centre for Human Rights & Democracy & 12 Others, Petition No 14 of 2013, and Raila Odinga and 5 Others vs. IEBC & 3 Others, Petition No 5 of 2013 (2013) eKLR. He thus urged this court to dismiss the appellant's Appeal as allowing it would prejudice the respondent.

Analysis & Determination

9. Under Order 12 Rule 7 of the Civil Procedure Rules, 2010, the powers of the Court as exercised and subject of this appeal are discretionary. Closely related is the provision of Order 10 Rule 11 to which the Court of Appeal in CMC Holdings Ltd vs. James Mumo Nzioki [2004] eKLR pointed out as follows:

> " We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition. One such authority is that of Magunga General Stores vs Pepco Distributors [1987] 2 KAR 89 to which we were referred and in which this Court stated as follows:-

> "The Court on an appeal will not interfere with the exercise of a discretion on an application for summary judgment unless the exercise was wrong in principle or the judge acted perversely on the facts."

10. Setting aside a judgment entered under Order 12 being a discretionary matter, an appellate Court can only interfere if it is proved that the trial Court misdirected itself or that it acted on matters on which it should not have acted upon or that it failed to take into consideration matters which it should have taken into account. Having considered the grounds of appeal, the rival submissions and the entire record, the sole issue for determination is whether the learned magistrate erred in law and fact by dismissing the appellant's application despite the appellant's explanation as to the circumstances leading to its failure to attend the hearing of the main suit on the material day.

11. The appellant's counsel submitted that his call dropped while he was in attendance virtually for the hearing. However, he has not produced any evidence of any attempts, he made to cure the problem. The jurisdiction of the court to set aside its decision is wide and unfettered. In Shah vs. Mbogo & Anor [1967] EA 116 the Court of Appeal for East Africa held as follows: -

> " This discretion (to set aside exparte proceedings or decision) is intended to be exercised so as to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

12. Similarly, in CMC Holdings Ltd vs. James Mumo Nzioki (supra), the Court pointed out that when exercising discretion, the court should ensure that a litigant does not suffer an injustice or hardship. This is what it stated:

> " Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle."

13. The discretionary powers of the court are granted under Order 12 Rule 7 of the Civil Procedure Rules and section 3A of the *Civil Procedure Act*. Such powers are meant to enable a Court seized of a matter to make such orders as may be necessary for the ends of justice or prevent abuse of the court's process.

14. The appellant argues that their non-attendance on the hearing date was due to a technical hitch that occasioned a drop in the counsel's call into the online platform. The appellant is also attributing the non-attendance to a mistake of its counsel and that which should not be visited upon it as a litigant. In essence, the appellant is pleading a bona fide mistake on the part of counsel. Ordinarily, where a mistake of counsel has been pleaded, this Court and the Court of Appeal have stated many times that a party advancing such a plea must on its part show that it was not indolent. To this end, the Court of Appeal pronouncement in Ransa Co. Ltd & 2 Others vs. Manca Francesco (2015) eKLR suffices where the Court of appeal stated that;

> " with introduction with these principles parties can no longer hide their failures behind abstract excuses that the advocates mistakes cannot be visited upon them. Article 159 and section 3A and 3B Civil Practice Act have clearly replaced section 3A of the *Civil procedure Act* which was before the enactment of Article 159 and the ''O2 principle'' the most

misapplied provision, where advocates and parties took refuge in whenever they were not certain. These inherent powers are to be resorted to only in situations where there are no specific or alternative (sic) of the law."

15. I have carefully considered the explanation by counsel for the appellant regarding his failure to attend court on 14/03/2022 and the respondent's submissions that the hearing on 14/03/2022 is one among many dates reserved by the court that the appellant's advocates failed to attend. The appellant's advocate was also notably absent on the dates preceding the hearing on 07/06/2021 and 24/01/2022. These assertions are further supported by the record of the proceedings itself. The appellant on its part have not tendered any averment or evidence to show that it was not indolent on its part. It is unlikely and unfortunate that the appellant did not follow up on its matter. Even when the advocate failed to attend Court on more than one occasion, the appellant never raised any issue or made a follow-up with the registry. In my view, the surrounding circumstances portrays the appellant as one who was an accomplice in its counsel's indolence.

16. It follows therefore that the said applicant's counsel's explanation for failure to attend court is not plausible and that this court is not convinced by the same. However, I am also aware that more often than not clients are not on top of how their cases progress in the courts as it is their advocates who are the appointed agents who run the show. Hence, the litigants must be taken into consideration whenever their advocates fail in their duties. Furthermore, the transition to virtual platforms remains challenging even on the part of the courts. Sometimes internet connectivity remains a going concern with periodic drops and outages. In the case of Philip Keiptoo Chemwolo & Anor vs. Augustine Kubende [1986] eKLR the court held:-

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not knowing his case heard on the merits."

17. It is noted that the appellant acted with speed in filing the application dated 16/03/2023. This was two days after the exparte hearing. It is further noted that the appellant has already secured orders of this court staying the proceedings before the trial court pending the determination of the appeal herein. In my view, albeit the flimsy excuse of counsel's mistake, the interest of justice is in favour of this court allowing the appellant herein another chance to prosecute its case before the trial court. In my view, the appellant stands to be prejudiced if the orders made on 24/06/2022 are not set aside. The respondent's inconvenience on the other hand can be cushioned by an award of damages and interests as well as costs if the case succeeds.

18. In light of the foregoing, the appeal is allowed on the following terms;

    a. The orders made on 25/06/2022 are hereby vacated.

    b. The proceedings of the trial court are hereby reinstated for the hearing inter parties. The appellant to be given an opportunity to cross - examine the respondents witness.

    c. There being a pending suit, the costs to abide the outcome of the said suit.

19. Orders accordingly.

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

H. I. ONG'UDI

JUDGE