First Assurance Company Limited v Mutahi (Civil Appeal E405 of 2022) [2024] KEHC 8865 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8865 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E405 OF 2022

AB MWAMUYE, J

JUNE 27, 2024

BETWEEN

FIRST ASSURANCE COMPANY LIMITED .... APPELLANT

AND

ANTHONY MAINA MUTAHI .... RESPONDENT

(Being an Appeal against the Ruling and Orders of the Hon. D.W. Mburu (SPM) delivered on 3rd June, 2022 in Milimani CMCC No. E1254 of 2022)

JUDGMENT

1. The Memorandum of Appeal dated 3rd June, 2022 sets out ten (10) grounds all of which revolve around a solitary question. That question is whether the Trial Court was in error in dismissing with the costs to the Respondent the Appellant's Application dated 22nd December, 2021 which sought to set-aside the interlocutory judgment entered against the Appellant on 21st October, 2021 together with all its consequential orders, and also grant the Appellant leave to file a defence and defend the suit.

2. The Appellant's Written Submissions dated 22nd April, 2024 contend that the Learned Magistrate was in error in declining to exercise the lower court's discretion in favour of the Appellant. The Appellant contends that it raised a good defence to the claim, and that the Trial Court erred in law and in fact in making a finding to the contrary. The Respondent did not file submissions in the appeal.

3. In its argument that the Trial Court erred by failing to exercise its discretion properly to set aside the ex parte judgment the Appellant has cited the following famous passage from the Court of Appeal's

decision in CMC Holdings Limited V James Mumo Nzioki, [Nairobi COA Civil Appeal No. 329 0f 2001]:

> " 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."

4. The Appellant's Written Submissions dated 22nd April, 2024 also cite that other mainstay of appeals against a failure by a trial court to set aside an interlocutory judgment, the dicta of the Court of Appeal in *Pithon Waweru Maina V Thuku Mugira, [Nairobi COA Civil Appeal No. 27 of 1982*] in which the Court of Appeal cited with approval the seminal decisions of Shah V Mbogo, [9167] EA 116 and Patel V E.A. Cargo Handling Services Limited, [1974] EA 75. The passages reproduced by the Appellant reads as follows:

> " ... if a default judgment is a regular one, the Court has unfettered discretion to ser aside such judgment and any consequential decree or order...the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice....it should always be remembered that to deny a person a hearing should be the last resort of the court."

5. The Appellant is perfectly correct that this court, sitting on appeal, must examine the Trial Court's finding in light of two questions, namely:

   a. Did the Appellant provide a good, compelling, and acceptable reason; and

   b. Did the Appellant point to a good defence that raises triable issues?

6. The Appellant's Memorandum of Appeal dated 3rd June, 2022 at Paragraphs *3*,*4*, and *5* cite the then prevailing COVID-19 Pandemic as the reason why Appellant failed to enter appearance and thereafter file and serve a defence. The Memorandum of Appeal, however, does so in general terms without stating a specific impediment applicable to the Appellant arising from the Pandemic.

7. For this, one must harken back to the Appellant's Supporting Affidavit dated 22nd December, 2021 which supported the Notice of Motion Application dated 22nd December, 2021 which the lower court found had no merit. Paragraphs 3,4, and 5 of that affidavit state as follows:

   3. That I am aware that the Defendant was served with Summons to Enter Appearance in this Suit sometimes in April 2021 during the height of the Covid Pandemic and when most of the Defendant's staff were working remotely from home due to the Covid 19 Pandemic and therefore the said summons were not circulated to the Legal Department for action.

   4. That owing to the fact that the Defendant's staff were working remotely from home, the unnamed person who received the summons inadvertently failed to circulate the same to the Legal Department for action and therefore the summons to enter appearance and plaint were not acted upon.

   5. That it was not until sometimes in December 2021 that one of our agents from Wangai Nyuthe & Company Advocaets stumbled upon the Decree passed against us and they called me to

enquire whether we were aware of the same and upon checking our records, I discovered the mistake and I immediately instructed the Advocate to take action."

8. The internal failures and lack of proper procedures on the part of the Appellant do not constitute a good, compelling, and acceptable reason that should stir a court to exercise its discretion in favour of the Appellant. The Appellant's Supporting Affidavit made clear that the summons and plaint documents were served and were thereafter continuously in the possession of the Appellant and had been filed somewhere within the organization. The COVID-19 Pandemic cannot be blamed for the Appellant's failure to act accordingly when it was served with the suit documents; particularly when so many other litigants at the time were doing so.

9. On the second issue, I take the view that even if a defendant does not have a good excuse as to why it failed to enter appearance and defend a suit, if it presents the trial court with a good defence that raises triable issues then the trial court may nonetheless choose to set aside the default judgment and grant the defendant leave to defend the suit having been persuaded by the issues that the defendant proposes to ventilate. After all, the plaintiff can be mollified for the delay and elongated processes by way of costs. It is no strict obligation to set aside a default judgment where a court that has found that there was no good excuse for the failure to enter appearance and defend the suit but then has found there are triable issues; but if those triable issues are of such a weighty nature as to amount to an injustice if the defendant is allowed to defend itself then a trial court should allow such an application on such terms as it sees fit but awarding the costs to the plaintiff.

10. In the present case, I agree with the Trial Court's finding that the Appellant did not raise any triable issues and was merely a bare denial of the Respondent's claim. A triable issue is much more than just a denial of the claims made by a plaintiff. A triable issue is a point raised in a statement of defence that on the face of it rebuts a key plank of the plaint or claim in such a way that it raises a controversy that can only be resolved by way of trial and the adducing and testing of evidence.

11. The Trial Court's finding that the Appellant did not proffer a good reason that would compel it to exercise its discretion in favour of the Appellant, as well as the finding that the Appellant did not raise any triable issues in its proposed defence are both sustained. Consequently, this Appeal is without merit and I dismiss the matter with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JUNE, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Wambua Counsel for the Appellant

Ms. Mumbi h/b Mr. Waiganjo Counsel for the Respondent

Mr. Guyo, Court Assistant