



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 151 OF 2015

RISHI HAULIERS LTD.....APPELLANT

VERSUS

MUSTAFA WECHULI WANJALA....RESPONDENT

(Being an Appeal from ruling of Honourable N. Shitubi Chief Magistrate in Kakamega CMCC No. 416 of 2013 read and delivered on the 3rd day of December, 2014)

JUDGMENT

Introduction

[1] The appeal herein emanates from the ruling in Kakamega CMCC No. 416 of 2013 read and delivered on the 3rd day of December 2014. Briefly the appellant filed a notice of motion dated 8th July, 2014 seeking amongst other orders for stay of further proceedings in CMCC No. 416 of 2014, the setting aside of the ex-parte judgment entered for the plaintiff against the defendant on 2.7.2014 and for defendant to be granted unconditional leave to file its statement of defence. The said motion was opposed. It was then canvassed orally before the trial court. The trial court found no reasons to interfere with the plaintiff's execution and dismissed the defendant's said application for lack of merit.

The appeal

[2] Being aggrieved and dissatisfied with the said ruling the appellant filed this appeal on the following grounds:-

(1) That the learned trial magistrate erred in law and in fact in dismissing the defendant's Application dated 8.7.2014 whereas the Defendant had proved its case on a balance of probability.

(2) That the learned trial Magistrate erred in law and in fact in holding that the affidavit in support of the defendant's application was sworn by counsel contrary to law.

(3) That the learned trial Magistrate erred in law and in fact in disregarding the defendant's application and submissions thereof(sic) wholly in arriving at her decision contrary to law.

(4) That the learned trial magistrate erred in law and in fact in failing to take into consideration the issues before her which she ought to have considered in arriving at her decision and considering those that she ought not to have considered in arriving at her decision.

(5) That the learned trial magistrate erred in law and in fact in applying wrong principles while dismissing the defendant's application.

[3] The appellant prays that the ruling of the trial court be set aside and the defendant's application be allowed with costs.

Submissions and determination

[4] The appeal herein was canvassed by way of written submissions which were filed and exchanged between the parties. The appellant through the firm of Kigen & CO. Advocates maintained that their application had merit because it sought a constitutional right namely the right to be heard on merit which opportunity had been denied when the respondent proceeded with the suit ex-parte and judgment entered exparte. The appellant claims to have given the trial court sufficient reasons why the statement of defence was not filed in time. In this regard, reliance was placed on the case of **CMC Holdings Ltd – Vrs – Nzioki (2004) KLR 173 and the case of Yusuf Gitau Abdullah- Vs – Building Centre (K) LTD and 4 others NRB HCCC1394 of 1998 (unreported)** to emphasize that courts can set aside ex-parte orders so long as a litigant against whom the order is made will not suffer injustice or hardship as a result of excusable mistake or error. They claim that the trial court applied the wrong principles in arriving at its decision not to allow their application which amounted to them being driven out of the seat of justice empty handed. In response to the issue of the affidavit sworn by counsel, counsel submitted that the counsel who swore the affidavit was the one handling the matter and she had received full instructions from the client and therefore competent to swear on behalf of the client according to the requirements under Order 19 rule 3 of the Civil Procedure Rules 2010. It was also submitted that the issue of technicalities which led to the dismissal of the applicant's application was discussed at length and the appellant cited a number of authorities to show that courts should not shut out litigants merely on technicalities but should allow parties to resolve disputes by hearing both sides on merit.

[5] On his part the respondent submitted that there was nothing that could shake the evidence he presented because the three conditions for entering an exparte judgment were fulfilled namely proper service, regular judgment and the defence relied on by the appellant did not raise any triable issues. The respondent claimed further that there was delay on the part of the appellant to file its application and that this was meant to delay further the conclusion of the case. It was also submitted that the appellant was not keen on having the matter concluded and did not observe due diligence. Further that the appellant did not demonstrate and/or show the trial court the reasons why the exparte judgement should be set aside.

[6] In determining the issues raised by both the appellant and the respondent this court being a first appeal court has to reconsider and evaluate the evidence afresh and make its own findings, only remembering that it never heard the submissions by counsel, in the lower court.

[7] Further in determining this matter this court is duly guided by the principles governing the exercise of judicial discretion as to the setting aside of an exparte judgment obtained in default as laid out in the case of **Patel-vs- East African Cargo Handling Services Ltd.(1974) E.A. 75 as per DUFFUS P** who stated that. "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 to it by 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 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." See also the case of **Mbogo Vrs Shah(1968) E.A 93.**

[8] The appellant's application dated 8/07/2014 was filed timeously. It sought leave to stay any proceedings in the trial case as well as leave to file a defence out of time. The statement of defence was annexed together with the application. A look at the defence, reveals that it raises "triable issues" which should go to trial for consideration and determination. Without allowing the appellant a chance to be heard in defence will be going against the tenets of the Constitution 2010 which requires all parties to be given a chance to be heard before being condemned. These are rules of natural justice. Allowing the ex-parte judgment to stand means condemning the appellant without a hearing. The circumstances which led to the appellant not filing his defence on time were well explained in counsel's supporting affidavit. She had the opportunity of interacting and receiving instructions from the appellant and therefore there was no reason why counsel could not swear the affidavit on behalf of her client. It is also important to remember the provisions of Article 159(2)(d) where courts are encouraged not to give too much weight to technicalities in determining disputes.

[9] For all the above reasons the appeal herein is allowed in its entirety. The ruling of the trial court is set aside and the defendant's application dated 08/07/2014 is allowed with costs to the respondent. Parties to take hearing dates on priority basis for the expeditious determination of this suit by the trial Court.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 15th day of September 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Khayumbi for Miss Kigen for Appellant/Applicant

Miss. Maluni for Kiveu for Respondent

Mr. Lagat Court Assistant



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