



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.7 OF 2020**

**BETWEEN**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT**

**AND**

**CHRISTOPHER OMANYA OKOMBO ..... 1<sup>ST</sup> RESPONDENTRESPONDENT**

**ANNA ACHIENG OMANYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order in Homa Bay Principal Magistrate's PMCC No. 60 of 2016 by*

*Hon. T. Obutu- Senior Principal Magistrate).*

**JUDGMENT**

1. On the 23<sup>rd</sup> January, 2020 the learned trial magistrate delivered a ruling where the appellant was seeking to have the judgment entered be set aside and the appellant be allowed to defend the suit. The application was dismissed.
2. The appellant was aggrieved by the said ruling and filed this appeal. The appellant was represented by the firm of Okongó, Wandago & Company Advocates. The appellant raised the following grounds of appeal:
  - a) The learned trial magistrate erred in law when , in dismissing the appellant's application, he departed from a long line of judicial precedent set over many years, that courts are always reluctant to determine suits based on technicalities, thereby denying a litigant an opportunity to ventilate his or her grievances by leading evidence on his or her case, and that the power to deny a litigant a right of a hearing in a suit should only be exercised sparingly and in so departing from precedent, he visited an apparent injustice and a hardship upon the appellant.
  - b) The learned trial magistrate erred in fact and law when, in the circumstances of the matter before him, he exercised his inherent jurisdiction to deny the appellant, as a party, a hearing, in ways and in circumstances which do not protect the integrity of the court process from abuse, and amounts to injustice and on account of mistakes which the human nature and corporations are prone to, and which mistake could be and ought thus to have been cured by an application of the provisions of Order 12 rule 7 of the Civil procedures Rules 2010, to safeguard the entitlements of the parties to that application, by setting aside of that judgment.
  - c) The learned trial magistrate failed to appreciate that a mistake and/or an inadvertence is just that, a mistake and/or an inadvertence, and as long as a sufficient explanation for the failure to attend court, which was given showing good faith, like the application which was before him, it should be excused and, a party given an opportunity to be heard on their grievances on merit, subject only to appropriate terms being imposed, like an order for throw-away costs.

- d) The learned magistrate erred in fact and in law, and exercised his discretion wrongly, when he failed to consider and appreciate that in dismissing the appellant's application and declining to set aside the judgment of the trial court, the appellant stood condemned unheard.
- e) The learned trial magistrate erred in fact and in law, when he failed to appreciate that in so declining to set aside the judgment and to hear the appellants evidence, he went against the spirit of the overriding objective under sections 1A, IB, IC, 3A, 3B and 63(e) of the Civil Procedure Act, Cap.21 Laws of Kenya and section 4 of the Magistrate's Courts Act, 2015, Article 159 of the Constitution of Kenya, 2010 and thus, he fettered his discretion unduly.
- f) The learned trial magistrate, in refusing to aside the judgment upon the application by the appellant, he clearly and unjustifiably abrogated the appellant's rights of hearing protected by the constitution, which is a cornerstone of the rule of law, thereby visiting an apparent injustice on the appellant, in circumstance which warranted setting aside of the judgment.
- g) The learned trial magistrate erred in law and fact in failing to consider and to make and give due allowance for/to the grounds on which the appellant had applied for setting aside of the judgment of the subordinate court and in so doing, he thereby reached an unjust decision.
- h) The learned trial magistrate was manifestly biased and prejudiced against the appellant.
- i) The learned trial magistrate erred in fact and in law in failing to take into account and give due allowance for the fact that an appropriate order in costs would have compensated the respondent for any prejudice which the respondent would have suffered, if the judgment of the subordinate court were set aside, which prejudice, in any event, was never proven at all.
- j) The learned trial magistrate erred in fact and in law in failing to consider and determine all issues which the appellant had raised in the appellant's Notice of Motion dated and/or filed on 23<sup>rd</sup> October, 2019, notwithstanding that such issues were specifically pleaded, evidence was led on those issues, submissions were filed on those issue and reliefs were sought based on those issues, and in consequence thereof, the court reached erroneous and unjust findings.

3. The respondent was represented by the firm of Okenye & Company, Advocates who opposed the appeal.

4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. In the application before the learned magistrate by the appellant the main issue in contest was that when the firm of Owiti, Otieno & Ragot Advocates were allowed by the court to cease acting for the appellant herein on 23<sup>rd</sup> May, 2019 they did not notify the appellant that they had ceased to act for them and the matter therefore proceeded in their absence. Before the trial court proceeded to hear the application by counsel on record, it was informed that the appellant had been served. The learned trial magistrate satisfied himself that the appellant was served with the application. My perusal of the record confirmed the same. The appellant cannot be allowed to turn around and feign non-involvement.

6. From the foregoing, I find that the appeal has no merits. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF MARCH, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**



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