Interways Works Limited v M & J Holdings Limited (Civil Appeal E138 of 2023) [2024] KEHC 9818 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E138 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

INTERWAYS WORKS LIMITED ..... APPELLANT

AND

M & J HOLDINGS LIMITED ..... RESPONDENT

(An appeal from against ruling and orders in the Chief Magistrates Court at Thika (Hon. S. Atambo CM) dated 25-10-2022 in her civil case number 313 of 2022)

JUDGMENT

1. The respondent filed civil suit number 313 of 2022 in the Thika Chief Magistrate's court on 17-06-2022 claiming Kshs 1,465,840.00 being balance of costs of hiring its grader KHMA 538R to the appellant. The summons to enter appearance in the suit were issued on 17th June 2022 and were served upon the appellant through email on 20-06-2022. The appellant entered appearance on 28-06-2022 and allegedly served the same upon the respondent on 6-07-2022. The respondent filed a request for judgment in default on 12-07-2022 and on 15-07-2022 the court entered judgment as prayed in the plaint.

2. The appellant apparently learned of the entry of judgement when it attempted to file its defence on 18-07-2022 following which it filed application dated 25-07-2022. The application was seeking that the interlocutory judgment entered on 15-07-2022 be set aside and the appellant be granted leave to defended the suit. The application was opposed vide replying affidavit sworn by Mr. Francis Mulu on 12th August 2022. After going through the hearing process, the honourable magistrate dismissed the said application with costs on 25-10-2022. In dismissing the application, the magistrate held that the appellant had not given good reasons for failure to file defence in time and that the draft defence consisted of mere denials. This is the ruling which is the subject of this appeal.

3. It has been held in many authorities that a court has discretion to set aside a default judgment on several grounds. The court would set aside a default judgment as a matter of right if the same is found to be irregular. The court may also set aside a regular judgement if the defendant gives good reasons or explanations which convinces the court that failure to enter appearance and/or file defence in time is excusable. The third ground a court would look at is whether the defendant has a good defence even though the judgment was regular.

4. Based on the above stated principles, I hold the view that where the interlocutory judgment is found to be irregular, the court would not even have to look at the other grounds. This is predicated on the cardinal constitutional principle that no party should be condemned unheard. A party would be presumed condemned unheard where it has not been given an opportunity to defend itself. In my considered view, denial of such opportunity may come in form of locking a party out of the proceedings unprocedurally.

5. I have read the ruling of the honourable magistrate under attack, the application dated 25-07-2022 and affidavit in support thereof, the replying affidavit of Francis Mulu dated 12-08-2022 and the typed proceedings of the lower court. From the file I understand the sequence of events and proceedings leading to the entry of judgment to be as follows;

    a. Summons to enter appearance were taken out on 17-06-2022 and served upon the appellant on 20-06-2022. The summons gave the appellant 15 days within which to enter appearance. This service is acknowledged by the appellant in its application in the lower court.

    b. The appellant filed a memorandum of appearance dated 23-06-2022 on 28-06-2022. This was within the 15 days given in the summons.

    c. On 12-07-2022 the plaintiff filed a request for judgement.

    d. The court entered judgment in default of appearance and defence on 15-07-2022.

6. The appellant contents that judgment was irregular because it was entered before the period given by law for filing defence had lapsed. According to the appellant, it had fourteen days from the date of service of the memorandum of appearance to file defence and since it served the memorandum on 6-07-2022, the entry of judgement on 15-07-2022 was premature. Order 7 Rule 1 of the *Civil Procedure Rules* provides as follows;

    > 'Where the defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service'.

7. The language in the above Rule is quite clear. It needs no explanation other than that, after the defendant enters appearance, he has fourteen days to file his defence. The consequences of failure to file defence can only kick in after the fourteenth day. As indicated above, the appellant filed his memorandum of appearance on 28-06-2022. A simple calculation would show that the appellant had up to 12th July 2022 to file defence and serve the same. The respondent filed its request for judgment on the last day and judgment entered three days later.

8. The appellant's averments that it had fourteen days from the date of service of the memorandum of appearance to file defence has no basis. The time starts running from the date the defendant files memorandum of appearance and not from the date the memorandum of appearance is served. In that

regard, I hold that although the request for judgment was filed a day before its maturity, the judgment was regular the same having been entered on 15-07-2022.

9. Has the appellant sufficiently explained the reasons for failure to file defence in time to warrant the court exercise its discretion in its favour? I do not think so. The appellant maintained and still does so in this court that the judgment was irregularly. It is in mistaken believe that it had 14 days from the date of service of the memorandum of appearance to file defence. That was a misapprehension of the law. Can misapprehension of the law be termed as an excusable mistake or error? In my view that is not an excuse. There is an old adage that says that ignorance of the law is no defence. The defendant was amply represented by an advocate of the High Court and I believe that the argument that they held the view that defence was due fourteen days upon service of memorandum of appearance is a deliberate misdirection meant to avoid the consequences. They should have been sincere and told the court that there was an oversight on their part and plead for the court's mercy. We all make mistakes and are prone to oversights and parties especially advocates should not shy from admitting when they make mistakes. Trying to twist the clear provision of the law to cover up our mistakes is a dishonest conduct which the courts of law should discourage.

10. I now turn to the issue of whether or not the appellant had a good defence. On this issue, the honourable magistrate held that having gone through the draft defence, she held the view that the same consisted of mere denials. I have looked at the draft defence and I respectfully disagree with the honourable magistrate. At this stage of the proceedings, the court is not supposed to look for evidence in support of the pleadings. Even if it appears to the court that the defence is a weak one, as long as the same raises a point which may need to call for court's interrogation, it should be generous to allow the defendant to ventilate its case on merit.

11. The appellant denied existence of contract between it and the respondent. It also denied that there was a balance of Kshs 1,465,840.00. This was an issue for determination especially noting that the respondent had pleaded that some of the contract price had been paid through third parties. More importantly, the appellant denied the jurisdiction of the court. It is my finding that the draft defence raised triable issues.

12. For the reasons that the appellant's defence raised triable issues and noting that the judgment was entered just three days after expiry of the time limited by law for filing defence and the fact that the appellant filed its application immediately it learned of the entry of judgment, I am minded to exercise my discretion in favour of the appellant but of course with penalties. I share the view expressed by Honourable Justice W.A. Okwany in *International Air Transport Association & Another vs Roskar Travel Limited & 3 Others* (2022) KEHC 200 (KLR) thus;

> 'The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice'.

13. I proceed to allow this appeal on condition that the appellant pays the respondent throw away costs of Kshs 40,000.00 (forty thousand) within the next seven (7) days upon delivery of this ruling. For avoidance of doubt, if the appellant fails to pay the said costs within the stipulated period, this appeal shall stand dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.