



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT MISC. CIVIL CAUSE NO. (JR) 402 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHUNA COOPERATIVE SOCIETY.....RESPONDENT**

**EX PARTE APPLICANT: PROF. GLADYS OPINYA & JANE ACHIENG**

**JUDGEMENT**

1. By an Notice of Motion dated 5<sup>th</sup> day of October, 2016, the applicants herein, **Jane Achieng** and **Prof Gladys Opinya** seek an order of certiorari, directed to the Co-operative Tribunal (hereinafter referred to as “the Tribunal”), to bring up the ruling of the Cooperative Tribunal which set aside the earlier judgment before this honourable court and be quashed. Although the Tribunal was not a party to these proceedings, service was directed to be effected upon it by this Court.

2. The applicants’ grievances arose from the ruling of the Tribunal delivered on 19<sup>th</sup> August, 2013 in Co-op Tribunal Case No. 515 of 2011 in which the said Tribunal set aside the default judgement entered by it on 5<sup>th</sup> September, 2012.

3. The said decision arose from an application made by the Respondent before the Tribunal, dated 12<sup>th</sup> March, 2013 which was based on the ground that though the Respondent herein, **Chuna Co-operative Society** (hereinafter referred to as “the Society”) was served with summons to enter appearance, the person who received the same on behalf of the said Society forgot to forward the same to the Society’s advocates.

4. This application is based on the fact that the default judgement having been entered by the Tribunal, the Tribunal was *functus officio* in so far as the matter was concerned. In **Aneriko M Simiyu vs. Redempta Simati Civil Appeal No. 227 of 2004**, the Court of Appeal held that it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the Court invoking its inherent powers to do so, the nature of the proceedings in question notwithstanding.

5. Rule 17 of the ***Co-operative Tribunal (Practice and Procedure) Rules, 2009***, provides as follows:

*A judgement, order or award made ex parte under this Rules may, on application, be set aside on such terms as may be just.*

6. It is therefore clear that the Respondent was properly clothed with jurisdiction to entertain an application seeking to set aside the default judgement and the mere fact that such a judgement had been entered did not render the Respondent *functus officio* in the matter. As was held by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173:

**“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such 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 be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant’s input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant’s appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed”.**

7. In Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC stated:

**“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to**

**rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.**

8. Therefore the Respondent had a discretion to set aside a default judgement. I therefore agree with the position adopted in **Puhlofer & Anor. vs. Hillingdon London Borough Council [1986] 1 AC 484** that:

**“It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely.”**

9. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

10. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

11. In this case I am not satisfied that based on the material placed before me, this Court, sitting as a judicial review Court, as opposed to an appellate Court ought to interfere with the Respondent’s decision. Whereas on appeal the decision may well be found to be in correct, this Court does not quash decisions simply because the decisions are unmerited.

12. It therefore follows that the Notice of Motion dated 5<sup>th</sup> October, 2016 fails and the same is dismissed but with no order as to costs.

13. It is so ordered.

**Dated at Nairobi this 27<sup>th</sup> day of February, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Prof Gladys Opinya and Ms Jane Achieng, the ex parte applicants**

**CA Mwangi**