REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.22 OF 2014

NYAKOYA KABA..1ST APPELLANT

MELLEN MORAA NYARANGO t/a

NYONGORA WHOLESALERS.........................2ND APPELLANT

AND

RASHMIKANT MEGHJI SHAR t/a

RAHA WHOLESALERS..RESPONDENT

(Appeal from the Ruling in CM CC No.328 of 2013 by Hon. S. M. Soita, Ag. Chief Magistrate Kericho)

JUDGMENT

1. The appellants were defendants in Chief Magistrate's Court at Kericho Civil Case No. 328 of 2013. Judgment in default of appearance and defence was entered against them in the matter, and they applied for orders setting aside the said ex parte judgment, which the court proceeded to set aside but imposed conditions. The appellants are aggrieved by the decision of the court with regard to the condition that the appellants deposit the amount of the judgment amount in court. They have filed the present appeal in which they set out in their Memorandum of Appeal dated 12th August, 2014 the following grounds:

> ***1. The Learned Trial magistrate erred in law having set aside the ex-parte judgment to refer again to a judgment sum.***
>
> **2** ***The Learned Trial Magistrate erred in law to rely on prior attempts to settle this matter as a basis for issuing the said order.***
>
> **3** ***The Learned Trial Magistrate ruling and/or order is against the principles of natural justice.***
>
> **4** ***The Learned Trial Magistrate having found that the ex-parte judgment was irregular as against the 1st defendant the same ought to have been set aside ex-debito justitiae.***

2. In their submissions, the appellants state that the respondent/plaintiff filed suit in CMCC No.328 of 2013. Service was not effected on them, and judgment was entered against them on 23rd July 2014 and execution commenced against them.

3. They therefore filed an application dated 7th April 2014 in which they sought, inter alia, an order that

the ex-parte judgment upon a liquidated claim entered on 21st October 2013 be set aside and the defendants be allowed to defend the same.

4. The application was based on the grounds that the judgment was irregular as no service was effected upon them; that the affidavit of service contained falsehoods and amounted to perjury; and that the notice of entry of judgment required under Order 22 rule 6 was never served upon them.

5. Upon hearing their application, the trial magistrate set aside the *ex-parte* judgment on condition that the statement of defence be filed and served on the plaintiff within 14 days and that the entire judgment sum be deposited in court within 30 days.

5. The appellants are aggrieved by the second limb of the ruling of the trial court. They have filed submissions dated 9th June, 2016 which they asked the Court to rely on in rendering its judgment.

6. The appellants have relied in their submissions on the decision of Ringera J in **Charles Mwalia vs. The Kenya Bureau of Standards Civil Suit No. 1058 of 2000,** and submit that in that case, the Learned Judge set out the principles to be considered by the court in setting aside an ex-parte judgment. They observe that the trial court found that the 2nd defendant had been served, and so judgment against her was regular, but the 1st defendant was not served, so judgment against him was irregular. They submit therefore that the judgment should have been set aside *ex debitio justitiae.*

7. It is also their submission that having found that it was not clear how the notice and entry of judgment was served on the appellants, the court erred by imposing the condition that the entire judgment sum be deposited in court. They further argue that by basing the said condition on the prior attempt to settle the matter, the court attempted to impose conditions on itself to fetter the wide discretion given under the rules.

8. It is their case that the condition was harsh and does not serve justice to the parties; that the entry of judgment was irregular since the reliefs sought required formal proof; that the plaintiff had informed the court at paragraph 9 of the plaint that there was a criminal case in Nyamira in which the 2nd appellant was charged with the offence of obtaining by false pretences, contrary to section 313 of the Criminal Procedure Code (sic) and that the reference to the entire judgment was erroneous and irregular. They argue, further, that the court failed to take into account the nature of the cause of action and the fact that the defence even raised issues of jurisdiction.

9. In response, the respondent filed submissions also dated 9th June 2016. He draws attention to the provisions of Order 10 rule 11 of the Civil Procedure Rules on which the appellants had based their application to set aside the ex-parte judgment to submit that the order sought is a discretionary order and may or may not be granted. 10 10. He further submitted that in exercising discretion under the order, the court is duty bound to do so judiciously, and to consider all the facts and circumstances of the case, and further, to look at the pleadings which include the plaint and draft defence.

11. In his view, the draft defence did not raise any triable issue but was based on mere denials. Further, that the court has a duty under the order to set aside judgment on terms that are just, and it is only the court that determines what such terms are.

12. According to the respondent, the trial court had found that the judgment against the appellants was a regular one, and it was only the process of execution that was not regular. The respondent cited the principles called from various decisions which a court should consider in determining whether to set aside an *ex parte* judgment in a particular case. The respondent asked the Court not to interfere with the order of the trial court as it was right and within the law in issuing the conditions that it did.

Determination

13. I have considered the appellant’s Memorandum of Appeal and the respective submissions of the parties. I have also read the decision of the court out of which this appeal arises. I believe the issue before

me is fairly straightforward; did the court properly exercise its discretion when it set aside the ex parte judgment against the appellants.

14. In considering this issue, I take into account the principles that should guide a court in determining whether to set aside an *ex parte* judgment on an application under order 10 rule 11, which provides that:

> ***11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.***

15. There have been various decisions of this Court and the Court of Appeal which have dealt with the application of Order 10 rule 11. Both the appellant and respondent have referred the Court to some of these decisions, among them being the decisions in **Mbogo vs Shah (1968) E.A 93, Patel vs EA Cargo Handling Services (1974) EA 75**, and **Pithon Waweru Maina vs Thuku Mugiria (1982-1988) 1 KAR 171.**

16. In his decision in **Yamko Yadpaz Industries Limited vs Kalka Flowers Limited Milimani High Court Civil Case 591 of 2012,** Havelock J (as he then was) expressed the following view:

> ***10. To my mind, in determining this matter I needed to be guided by the principles governing the exercise of judicial discretion as to the setting aside of an ex parte judgment obtained in default which were clearly set out in the judgment of the Court of Appeal in the Maina v Mugiria case as follows:***
>
> ***"2. The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:***
>
> ***a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.***
>
> ***b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.***
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> ***c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93.***
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> ***d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji (1954) 21 EACA 20).***
>
> ***e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically.(Smith v Middleton [1972] SC 30)".***

17. The Court went on to state as follows:

> **I also accept the holding in the Kimani v McConnel case referred to in the Maina v Mugiria case as follows:**
>
> ***"4. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment,***

which would not or might not have been present had the judgment not been exparte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel [1966] EA 547, 555F)". (Emphasis added)

18. I agree with the views expressed in the above matters, and the principles that emerge therefrom. In this case, I note that the trial court considered and found that the 2nd appellant had been served, and noted in particular the averments in the affidavit of service, which she had not disputed, that the process server had called her on her mobile phone. He also took into account the lack of clarity in the manner in which the Notice of Entry of Judgment had been served, and as a result, he granted conditional leave to the appellants to defend the claim.

19. The appellants have taken issue with the Court for taking into consideration the fact that there had been attempts to settle the matter when he imposed the condition for payment into court of the decretal amount. However, as the **Kimani vs McConnel** case illustrates, the court is entitled, in considering an application to set aside a judgment, to consider the facts and circumstances, both prior and subsequent, of each case, and the respective merits of the parties.

20. Having considered the appellants' appeal and the response thereto, as well as the record of the trial court in general and the ruling of the court in particular, I am satisfied that the court, in its ruling dated 23rd July 2014, properly exercised its discretion under Order 10 rule 11 of the Civil Procedure Rules in granting the appellants leave to defend on condition that they deposit the judgment sum in court.

21. I therefore find that the present appeal has no merit. It is hereby dismissed with costs to the respondent.

Dated, Delivered and Signed in Kericho this 28th day of July 2016.

MUMBI NGUGI

JUDGE