REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 708 OF 2007

BRAEBURN LIMITED.....APPELLANT

V E R S U S –

NIZAR HASSANALI KASSAM..... 1ST RESPONDENT

SHAMA NIZAR KASSAM.....2ND RESPONDENT

(An appeal from the ruling of the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi, Hon. Miss E. N. Maina, Ag SPM dated 19th July 2007 in CMCC no. 3718 of 2006)

JUDGEMENT

1. The Appellant, **Braeburn Limited** filed a suit against the Respondents **Nizar Hassan Kassam** and **Shama Nizar Kassam** praying for judgement in the sum of kshs.896,641/= being the total sum of school fees due and payable as at September 2003 to the Appellant. The Respondent despite being served with summons to enter appearance failed to file a defence. The trial court entered an exparte judgement against the Respondents who upon being served with the notice of judgement filed an application under Order IXA rule 10 and 11 and Order XXI rule 25 and 91 of the Civil Procedure Rules as well as under Section 3A and 63(e) of the Civil Procedure Act where they sought for an order for stay of execution of the decree and setting aside of the ex-parte judgement.

2.The Hon. E. N. Maina upon hearing the parties on the application delivered a ruling dated 19th July 2007 where he set aside the exparte judgement and granted the Respondents leave to defend the suit. The Appellant being aggrieved by the aforesaid decision filed this appeal to have the same impugned.

3. The Appellants field a memorandum of appeal on the grounds that:

> ***1. THAT the learned magistrate erred and misdirected herself in law and fact by not applying the correct law, tests and principles relating to setting aside of default judgments and exercise of judicial discretion.***
>
> ***2. THAT the learned magistrate erred in law and fact by failing to apply discretion judicially but applied the same whimsically and arbitrarily.***
>
> ***3. THAT the learned magistrate erred in law and fact and against the evidence on record in setting aside the default judgement and by not dismissing the defendants' application dated 4th June 2007.***
>
> ***4. THAT the learned magistrate erred in law and in fact by failing to find and state what triable***

issue(s) are disclosed by the defendants.

5. THAT the learned magistrate erred in law and fact and against the evidence on record in failing to appreciate and find that the defendants' affidavits on record do not disclose a valid triable issue(s) or at all.

4. When the matter came up for interpartes hearing on 6th March 2015, the court directed that the parties file their respective written submissions. Only the Appellant filed its submissions, which I have taken into consideration. I have also re-evaluated the case that was before the trial court.

5. The Appellant argued that the learned magistrate failed to apply the correct law, tests and principles relating to setting aside a regularly obtained default judgement. It contended that the magistrate having found that there was a proper service of the summons to enter appearance ought to have upheld the default judgment entered against the Respondents herein. The Appellant further averred that the court ought to consider if the default judgment was regularly obtained, whether valid reasons were advanced as to why the defence was not filed and whether the defence raises triable issues. It insisted that the Respondents were properly served on 18th May 2006 and 15th January 2007 respectively, but they failed to enter appearance and also failed to give reasons as to why they did not file a defence on time. It claimed that failure to file a defence was deliberate, inexcusable and was meant to obstruct or delay the cause of justice. It referred the court to the case of **Shah V Mbogo & another (1967) E.A 470,** where the Court of Appeal held that the discretion to set aside an ex-parte judgment should be exercised to avoid injustice or hardship but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice. The Appellant argued further that the defence does no raise triable issues since it only contains mere denials. It concluded that the Appellants evidence on record is clear that the Respondents are indebted to the Appellant and therefore there was no need to set aside the default judgment.

6. The question of determination in this appeal is whether the honourable magistrate judicially exercised her discretion by setting aside the default judgment. Essentially, whether she applied the correct tests and principles provided by the law. The principles to be applied in applications for setting aside of default judgments are well settled. The court of Appeal restted some of those principles in the case of **Pithon Waweru Maina Thuka Mugiria (1983)eKLR** *interalia* as follows:

> **"Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just.... 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 the rules. Patel vs EA cargo Handling Services Ltd (1974) EA 75 at 76C and E. B) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. Shah v Mbogo (1967)EA 116 at 12313, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48C). 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 matter 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 injustice Mbogo vs Shah (1968)EA 93."**

7. In exercising this discretion, the court is required to ensure it does justice for both parties while balancing the sales of justice. The court is required to establish whether the defaulting party defaulted with an aim of obstructing or delaying the course of justice. This court sitting as an appellate court can only interfere with the exercise of the discretion of the trial Magistrate if it is satisfied that she misdirected herself and arrived at a wrong decision.

8. The Appellant is of the view that the trial magistrate misdirected herself. It is argued that the court has no discretion where it appears there was no proper service. In the Court of Appeal case, the judges further

held that some of the matters to be considered when an application is made are the facts and circumstance, 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 judgement, which would not or might not have been present had the judgment not been ex-parte and whether or not it would be just and reasonable to set aside or vary the judgment. The nature of the action should be considered and defence filed.

9. In this case, the Respondents filed an application dated 4th July 2007 to set aside the ex parte judgment entered against the Respondents. In that application, the Respondents claimed that they were not served with the summons to enter appearance and they claimed that they came to know about the suit when they were served with an execution notice. The Appellants in response to the application insisted that the Respondents were served with the summons accompanying the plaint. In particular, that the 1st Respondent was served at his office and place of work being **M/s Karen Mosoti & Co. Advocates** situated at New Waumini House, Westlands, Nairobi where he accepted service on his own behalf and that of the 2nd Respondent. This it stated was the state of affairs as deponed by the process server, a **Mr. John Ochieng**. The Appellant further claimed that summons against the 2nd Respondent were re-issued again and served on her by **Jacob Mbae Meme**, a duly authorised process server.

10. The trial magistrate upon considering the evidence before her, concluded that the Respondents were served with the summons to enter appearance but allowed the application on grounds that the defence raised triable issues. On the matter of service, I have perused the application by the Respondents and the Appellants response as well as the evidence adduced during cross-examination by the process servers, one **John Ochieng** and that of **Jacob Mbae Meme**. I concur with the honourable magistrate that the Respondents were effected with service of the summons but they chose not to enter an appearance in the suit which was wrong and which conduct resulted in an exparte judgment against them.

11. Normally setting aside of a judgment is automatic and regular where service may not have been properly effected. In this case service was definitely effected. The court therefore under the circumstances had the discretion not to set aside the judgment but the Hon. Magistrate chose to exercise her discretion and set aside the defence on the basis that the same had merit.

12. The question arising therefore is, given the fact as established in this case that summons were filed, can the judgment be aside of grounds that the defence raised triable issues? I think not. The Respondents had a chance to file the defence before an exparte judgment was entered but they deliberately failed to do so. The court would only be interested with whether there existed sufficient reasons to set aside the exparte judgment or not in particular whether sermons were served. In my view, the Respondents did not advance any good reasons to compel the court to set aside the judgement. Lack of knowledge of the suit as pleaded by the respondent was not good enough since as I stated earlier evidence adduced that summons were served was sound.

13. For the court to set aside an exparte judgment, it must be satisfied that the Respondents have offered plausible explanation as to why they failed to enter appearance and file a defence within the prescribed period under the Civil Procedure Rules 2010 . If I uphold the trial courts decisions to set aside the judgment.

14. In the end, I find that the Respondents failed to advance plausible reasons for non appearance in the suit as filed in the lower court. I consequently hereby allow the appeal and set aside the ruling delivered on 19th July 2007. The Respondents application dated 4th June 2007 as filed in the trial court is dismissed with costs to the Appellant. The Appellant to also have costs of the appeal.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent