



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL CASE NO. 272 OF 2009

(Appeal arising from the ruling and order of Honourable Mr S.A.Okato, Principal Magistrate delivered on 26th May 2009 in Nairobi Milimani Chief Magistrate's court civil suit No. 6594 of 2008)

SHAKILA BANO AKRAMAPPELLANT

VERSUS

ISMAIL NOORANI.....RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order of Honourable Mr S.A.Okato, Principal Magistrate delivered on 26th May 2009 dismissing the appellant's application for setting aside of the judgment entered on 23rd January 2009 against the defendant/appellant in favour of the plaintiff/respondent in Nairobi Milimani Chief Magistrate's court Civil suit No. 6594 of 2008.
2. The facts of the case as presented in the lower court are that by a plaint dated 23rd September 2008 and filed in court on the same day, the plaintiff Ismail Noorani sued the defendant (appellant) herein Shakila Bano Akramid claiming for a liquidated sum of shs 170,000- being consideration for a motor vehicle registration No. KAN 22B which the plaintiff allegedly sold to the defendant at an agreed purchase price of shs 500,000/- out of which he paid shs 330,000/- leaving a balance of shs 170,000.He also claimed for costs of the suit and interest at court rates.
3. The plaintiff/respondent through the firm of Jackson Omwenga & Company advocates took out summons to enter appearance and on 31st October 2008 at 10.30 a.m. the process server, Mr Nathan Pala did serve to the defendant/appellant in person at her place of work at Mitsumi Computer Garage situated on Muthithi Road Nairobi. The affidavit of service sworn on 19th November 2008 was filed in court on 24th November 2008. On the same day of 24th November 2008 the respondent /plaintiff filed a request for judgment in default of appearance by the defendant/appellant. However when the request was placed before the magistrate for endorsement, the magistrate remarked on 27th November 2008 that:

"I have seen the affidavit of service. Date and time of service not indicated. Service not proper. Request refused.

AG PM

27th November 2008"

4. In the intervening period, on 18th December, 2008 the defendant/appellant entered an appearance through the firm of Mohamed Madhani & Company Advocates. The Memorandum of Appearance is dated the same day of 18th December 2008.
5. Later on 23rd January 2009, the court entered judgment against the defendant in default of filing defence, following the request made by the plaintiff dated 12th January 2009 and filed on 13th January 2009. It is that judgment of 23rd January 2008 that provoked an application by way of Chamber Summons dated 17th February 2009 and filed in court on 18th February 2009, seeking to set aside the exparte judgment and praying that the defence filed be deemed to be duly filed upon payment of the requisite court fees.
6. The defendant contended that the application by the plaintiff dated 12th January 2009 and filed on 13th January 2009 was premature. Secondly, that the plaintiff had breached an agreement with the defendant in that he did, through his advocates deny the defendant the opportunity of filing her defence and that it was only fair and just that the defendant be allowed to file her defence to enable the court do justice to the parties. The appellant's said application was supported by the affidavit of Shiraz Magan advocate sworn on 17th February 2009.
7. The advocate deposed that according to him, having filed an appearance on 18th December 2008, the defence was not due until 19th January, 2009 bearing in mind the old civil Procedure Rules. Further, that he had been in communication with Mr Jackson Omwenga advocate for the plaintiff and that on 15th January 2009 the two had met and agreed that the plaintiff's advocate would serve Mr Shiraz with a written notice giving fifteen (15) days to file the defence.
8. The record shows that a fresh request for judgment dated 12th January 2009 was made on 13th January 2009 after the first one dated 19th November 2008 was rejected for reasons that the affidavit of service did not disclose the date and time of service upon the defendant. Mr Shiraz also annexed copies of correspondences exchanged between his firm and the firm of Mr Jackson Omwenga on a without prejudice basis, contending that he only learnt of the judgment when on 9th February 2009 he took a precautionary measure and deputized his clerk to establish the status of the matter only to learn that judgment had been requested and entered and on writing to the plaintiff's advocates he received no response.
9. The plaintiff filed a replying affidavit on 27th May 2009 outlining the steps taken by his advocate before the judgment was entered. He conceded that there was an offer to settle the claimed sum of money by monthly installment of shs 7500 which had been rejected. Further, that a scheduled meeting between his advocate and the defendant's advocate did not materialize. He further deposed that the defence raised no triable issues. He denied ever authorizing his advocate to undertake to the defendant not to file a defence or any pleading. In addition, the plaintiff maintained that by the time the defendant was seeking to negotiate out of court, a request for judgment had already been made.
10. By a ruling delivered on 26th May 2009, Honourable Okato (Mr) Principal Magistrate dismissed the appellant's application for setting aside of exparte judgment entered on 23rd January 2009. In the trial magistrate's view, the defence which was on record did not raise any triable issues and that the reasons raised for not filing the defence within the stipulated period were not plausible. It is that ruling and order of Okato (Principal Magistrate) that provoked this appeal.
11. The appellant's Memorandum of Appeal raises 14 grounds of appeal, challenging the decision of the trial magistrate. The grounds are that:
 1. *The trial magistrate erred in law and in fact in returning a finding that the application dated 17th February 2009 lacked merit and dismissed the same accordingly.*
 2. *That the learned magistrate erred in fact and law in dismissing the application before it in spite of the clear provisions of Order 9A of the Civil Procedure Rules, in particular Rule 10.*
 3. *The learned magistrate erred in law and fact in dismissing the application dated 17th February 2009 in spite of the fact that the appellant was entitled to the setting aside of the exparte judgment ex-debito justitiae owing to the provisions of Order 49 Rule 3A of the Civil procedure Rules .*
 4. *The learned Magistrate failed to exercise his discretion judiciously in favour of the appellant in*

view of the nature of the application before him and the overall surrounding circumstances of the case.

5. The learned magistrate erred in placing undue weight to authorities produced by the respondent which had been distinguished by the appellant advocates and further, by failing to consider the decisions supplied by the appellant in support of the application.
6. The learned magistrate erred in fact and in law in failing to consider and apply the decision of *Patel Vs EA cargo Handling Services Ltd (1974) EA* for the guiding principles in an application for setting aside *ex parte* judgment.
7. The learned magistrate erred in fact and in law in relying heavily on “without prejudice” communication submitted by the respondent in opposition to the application contrary to the express provisions of the Evidence Act, Cap 75 (sic) of Laws of Kenya.
8. The learned magistrate erred in fact and in law in failing to address the issues raised by the appellant in support of the application.
9. The learned magistrate erred in fact and in law in holding that the appellant had failed to annex a copy of the draft defence and consequently, that such failure was fatal to the application in spite of the court confirming that there was a defence on record.
10. The learned magistrate erred in fact and in law in relying on the defence on record to return a finding that the applicant had admitted the claim and subsequently holding that the said defence was a sham, frivolous and vexatious while at the same time asserting that no defence had been exhibited.
11. The learned magistrate erred in fact and in law in failing to consider that the defence on record raised triable issues.
12. The learned magistrate erred in fact and in law in holding that the appellant failed to demonstrate wholly it failed to file a defence within the time required while there was ample explanation provided in support of the application.
13. The learned magistrate erred in law and in fact in condemning the appellant unheard in the matter thereby locking him from the seat of justice and further visiting the error of the advocate upon the client.
14. The learned magistrate erred in law and in fact in taking into account irrelevant considerations on determining the application before it, to the detriment of the appellant.

12. The appellant prayed that the ruling of 26th May 2009 be wholly overturned, the application dated 17th February 2009 be allowed, with costs of this appeal and of the lower court to the appellant. The appellant further prayed for such other order be made to meet the ends of justice as the Honourable court may please.

13. The appeal was admitted to hearing on 12th October 2012 by Honourable M. Angawa J. Directions on appeal were given on 18th September 2014 when parties agreed to have the appeal disposed of by way of written submissions filed and exchanged.

14. The appellant's submissions were filed on 20th September 2014 whereas the respondent filed hers on 19th November 2014, which I have considered in detail.

15. This being the first appeal, this court is enjoined to apply the provisions of Section 78 of the Civil Procedure Act to:

- a. Determine a case finally;
- b. Remand a case;
- c. To frame issues and refer them for trial
- d. Take additional evidence or to require the evidence to be taken.
- e. Order a new trial.

16. Thus, in determining this appeal, this court has the powers, and duties as those conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted therein.

17. From the record and submissions filed by the respondent's advocates, the issues for determination in this appeal are:

1. Whether the appeal is competent, as the same was prosecuted by counsel who was not on record

- and or who came on record after judgment and or without leave of court.
2. Whether there was admission of the claim by appellant.
 3. Whether the appellant has satisfied the conditions that warrant interference with the discretion of the subordinate court to refuse to set aside *ex parte* judgment in default of defence.
18. The commencement point is to determine the competence and merits of this appeal. It is submitted by the respondent that the appeal herein is incompetent because the claim in the lower court was instituted by the law firm of Jackson Omwenga & Company Advocates who are still on record for the plaintiff/respondent. On the other hand, that the firm of Mohamed Madhani & Company Advocates did enter appearance on behalf of the appellant/defendants on 18th December 2008. The said advocates for the defendant continued representing the appellant in the lower court, sought to have the *ex parte* judgment set aside in vain and proceeded to file Memorandum of Appeal on 2nd June 2009. Further, that it is the same law firm of Mohamed Madhani & Company Advocates that compiled, filed and served the record of appeal upon the respondent's counsel on 11th December 2009. From 25th January 2012, the firm of Njenga Mbugua & Nyanjua Advocates started featuring on record. That here is no semblance of the latter firm of advocates filing of any application seeking leave to act on behalf of the appellant in the place of Mohamed Madhani advocates.
19. This court has perused the record as a whole and I do not find any consent filed by the firm of Mohamed Madhani & Company Advocates and Njenga Mbugua & Nyanjua advocates seeking for an order to have the latter firm come on record in the place of the former. Neither is there any application by the firm of Njenga Mbugua & Nyanjua Advocates seeking to take over the conduct of this matter on behalf of the Appellant from their former advocates. Not even a notice of appointment or change of advocates, however irregular it may be, is on record to show how Njenga Mbugua & Nyanjua Advocates found their way to this file.
20. It is for those reasons that Mr Otieno holding brief for Mr Omwenga advocate for the respondent did on 18th September 2014 raise that point of law that the firm of Njenga Mbugua & Nyanjua Advocates were Improperly on record. Mr Njenga informed the court that they had filed their notice of change but they had not served upon the respondent's advocates, and this court did direct that the firm of Njenga, Mbugua and Nyanjua advocates do ensure the same is on record and served upon the respondent's advocates within 7 days,. The issue thereof was not revisited until the submissions by the respondent were filed. The appellant's counsel on record did not respond to that issue which this court must address, as it touched on the competence of the appeal herein.
21. Order 9 Rule 9 of the Civil Procedure Rules provides that:
- “ when there is change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-***
- a. ***Upon an application with notice to all parties ;or***
 - b. ***Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***
22. In the case of **David James Mbogo vs Alfred C Asikoyo & 3 Others, Bungoma HCC 71/2000** where the court was confronted with a similar situation, it was held that:
- “ such an advocate can only be competently on record after obtaining the order pursuant to Order 111 Rule 9A now Order 9 Rule 9 of the Civil Procedure Rules and after first filing the notice of change of advocates. Failure to comply with the above mentioned conditions renders any pleadings filed incompetent for being improperly on record.”***
23. The respondent urges this court, on the basis of the above holding and law, to strike out the appeal as it was being prosecuted by a stranger in the name of Njenga Mbugua & Nyanjua advocates.
24. Order 9 Rule 9 of the Civil Procedure Rules is clear that no new advocate can take over the

conduct of a suit which has been finally determined by any court while any proceedings or related proceedings are continuing before the same court or in continuation of the determined matter through notice of change of advocate without the leave and order of the court, through a formal application or by consent of the outgoing and the incoming advocates. In addition, even if there was such consent, the same has to be acknowledged and or ordered by the court whose leave is intended to be sought as was correctly held by Muchelule J in the case of **John Lagat vs Kipkemoi Terer & 2 Others (2013) e KLR** that:-

“There was no application made to change advocate....the appellant swore an affidavit that there was consent entered into between his previous advocates and his present advocate to effect changes. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more importantly, the consent could not effect the change of advocates, “without the order of the court”. No such order was sought or obtained. It follows That Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

25. In the instant appeal, the facts happen to be a little different though. The court file does not reflect that the firm of Njenga, Mbugua & Nyanjua and Company advocates ever filed a notice of change or even appointment of advocates to take over the conduct of this appeal on behalf of the appellant from the firm of Mohamed Madhani & Company Advocates, which latter advocates were on record right from the subordinate court up to the filing of this appeal.
26. Assuming that there was such notice of change or appointment of advocates as the case may be, filed by the firm of Njenga Mbugua & Nyanjua advocates, this court would be faced with the task of determining whether such change or appointment if any was validly on record.
27. However, as I have stated above, I have perused through the entire record both the lower court and this appeal and I have not seen any notice of change of advocates or even notice of appointment of advocates filed by the firm of Njenga, Mbugua & Nyanjua advocates, on behalf of the appellant. That being the case, the said firm of advocates are indeed not on record and even if they were, which is not the case here, I have not seen any application for leave to take over the conduct of the matter from the firm of Mohamed and Madhani advocates, who have been on record on behalf of the appellant/defendant since 18th December 2008 when they entered Appearance on behalf of the defendant appellant, and before judgment was entered in favour of the respondent. There is also no consent filed and endorsed by the court relating to the takeover of legal representation for the appellant.
28. There is also no notice of cessation of advocates filed by the firm of Mohamed & Madhani advocates ceasing to represent the appellant as required under Order 9 Rule 5 of the Civil Procedure Rules which provides that:

“ a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose , but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former advocate shall, subject to Rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter including any review of appeal.”

29. In addition, Order 9 Rule 6 of the Civil Procedure Rules obliges that :-

“ The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearances and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

30. In this case, there is not only lack of evidence of filing of such notice of change of advocates, but also there is no evidence that the advocates who were on record for the appellant Mohammed and Madhani advocates were served with a copy of notice of change of advocates. Further, the

- firm of Mohamed Madhani & Co advocates never filed any notice of cessation to act for the appellants. The only statement on record is by the respondent in his submissions to the effect that **“On 19th January 2012 the law firm of Njenga, Mbugua and Nyanjua advocates filed and served a notice of change of advocates purporting to replace the firm of Mohamed Madhani and Company advocates.”**
31. As earlier stated, there is no such notice of change of advocates filed on record. Filing of documents has to be proved by way of physical presence of the document, a court date stamp and official payment receipt where a fee is chargeable. None of the above is visible on the court file. With the above scenario in mind, and the court having directed that the notice of change be served but none was served up to the time of writing this judgment, it follows that this court considers the firm of Mohamed Madhani & Company advocates to be the advocates who are validly on record for the appellants, and therefore indeed, as submitted by the respondent’s advocates, the firm of Njenga, Mbugua and Nyanjua advocates are strangers to this appeal.
32. The net effect would therefore be that any participation by the said firm of Njenga, Mbugua and Nyanjua advocates, by way of submissions, whether oral or in writing by them is a nullity and the same are accordingly struck out and expunged from the record.
33. That leaves the appeal as filed by the appellant through the law firm of Mohamed Madhani & Company advocates competently on record though unprosecuted and vigorously opposed by the respondent’s advocate.
34. However, assuming that the above position as determined is erroneous due to some mistake or inadvertent error which is not apparent on the face of the record, I would then proceed to determine the merits of the appeal as filed and as vigorously opposed by the respondent by the submissions filed on 19th November 2014.
35. I would then consider the issue whether there was an admission by the appellant of the claim against her by the respondent, by virtue of the correspondence exchanged between the appellant’s and the respondent’s advocates when the suit was pending in the lower court, which correspondences were on a *“without prejudice”* basis.
36. The respondent submitted that at pages 22 line 2 of the record of appeal are letters of the appellant’s advocates stating that the appellant had authorized her advocates to offer the respondent the sum of kshs 150,000 in full and final settlement of the case. Further, that there are other letters contained on pages 30,31 and 32 of the record of appeal to show that the appellant even proposed to liquidate the claim in monthly installments of kshs 7,500 commencing 31st January 2009, which proposal was rejected by the respondent. All those correspondences referred to above took place while the case was pending in court.
37. The appellant resisted any reference to those correspondence maintaining that they are inadmissible since they were exchanged between the parties’ advocates in reply *“without prejudice”* basis.
38. Examining the *“defence”* filed by the appellant, which the learned trial magistrate by her judgment *“stumbled”* on as it was not annexed to the affidavit in support of an application for setting aside of *exparte* judgment but nonetheless filed on 18th February 2009, the appellant denied the respondent’s claim, and particulars, that the respondent either sold or delivered motor vehicle registration No. KAN 222B to the appellant. She also denied that there was any outstanding amount in respect of the balance of the purchase price as stated in the paragraphs 3 and 4 of the plaint or at all.
39. At paragraph 4, the ‘defence’ states that :-

“ In the event that the court holds that the plaintiff has sold to the defendant the said motor vehicle the defendant shall seek an order for the delivery to her of the said motor vehicle against which the defendant is prepared to pay to the plaintiff such sum as may be due from her to the plaintiff.”

40. At paragraph 6 of the said defence, the defendant/appellant unequivocally admits that there was a written agreement after the plaintiff persuaded her to sign and that she undertook to pay the plaintiff shs 170,000/- and the plaintiff verbally promised to pay her shs 50,000 upon completion of the agreement. She then proceeds at paragraph 7 to state that it was the plaintiff who had breached the said agreement by failing to pay shs 50,000/- and also failing to deliver

- the said motor vehicle to the plaintiff; and that she was prepared to abide by the said agreement in return for payment of the said shs 50,000/- and delivery of the motor vehicle with a duly executed transfer form of the said motor vehicle to the defendant. She also sought an order for the return of the registration book for motor vehicle No. KAH 985E then held by the plaintiff as security.
41. In the 'defence' as filed by the appellant, there was no counterclaim or a claim for a set off by the defendant in the aforesaid "defence" dated 17th February 2009 which 'defence' was filed after judgment had been entered against the defendant. In addition, the "defence" in question was not marked as one of the annexures to the defendant's supporting affidavit in support of her chamber summons dated 17th February 2009 and filed on 18th February 2009. It is also the said supporting affidavit sworn by the defendant/appellant that annexes the correspondences exchanged between Mohamed Madhani & company Advocates and Jackson Omwenga & Company Advocates, which correspondence were exchanged on a "**without prejudice**" basis.
 42. Among the correspondences is letter dated 2nd February 2009 wherein the appellant's advocate writes that he had persuaded his client to pay shs 150,000/- in full and final settlement in one lump sum on or about 16th February 2009. The appellant's advocate also asked for a consent letter to that effect and stated "**we would be happy to sign the same**" and that the log book pertaining to motor vehicle KAH 985E to be simultaneously released to their client.
 43. When Mr S.G. Magani advocate failed to hear from Jackson Mr Omwenga advocate on the annexed correspondence, he wrote another letter on 9th February 2009 inquiring whether Mr Omwenga had now heard from his client.
 44. By the same annexures filed by the appellant, she had earlier on 15th January 2009 through her counsel written to Mr Omwenga indicating that she had offered to pay shs 150,000/- in full and final settlement to be liquidated in monthly installment of shs 7,500/- commencing 30th January 2009 and that the plaintiff would retain possession of the log book for motor vehicle KAH 985 E as security for the decretal amount.
 45. Further, the letter of 30th January 2009 stated that should the defendant manage to sell this vehicle the plaintiff to release the log book to the defendant on condition that from the proceeds of sale, the balance of the decretal amount be paid in full to the plaintiff and the defendant was to retain the balance if any.
 46. From the above letters and others annexed to the **defendant/appellant's** supporting affidavit and marked "SGMJ" which affidavit was sworn on 17th February 2009, it is crystal clear that although the said letters were written on a "without prejudice" basis, **it is the defendant/appellant herself through her advocate who introduced the said privileged communication and disclosed them to the court.** The appellant cannot, therefore, turn around and blame the respondent for referring to the said communication on "without prejudice" bases as amounting to an admission. Nonetheless, I have found that the trial magistrate did not refer or rely on the said communication in her ruling but as an appellate court, I am entitled to examine the said letters and arrive at my own conclusion, and I find that the appellant did waive that privilege by relying on the said letters written by her advocate on a "without prejudice" basis by annexing them to her affidavit filed in court hence, they are admissible in evidence.
 47. I am fortified on this holding by many decisions of the court among them- **Millicent Wambui vs Nairobi Botanica Gardening Ltd cause No. 2512 of 2012** the court stated that:-

".....the application revolves around "without prejudice" communication. The use of the term "without prejudice" is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing law suit. The words "without prejudice" impose upon the communication an exclusion of the use against the party making the statement in subsequent court proceedings. It is a well established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a "without prejudice" offer does so on the basis that they reserve the right to assert

their original position, if the offer is rejected and litigation ensues. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties.”

48. In the case of **Re Dainty re ex Holt (1893) 2 QB 116**, the court per Vaughan Williams J, stated at page 119 thus:-

“In our opinion, the rule which excludes documents marked “without prejudice” has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiations, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which the rule applies, exist. The rule is a rule adopted to enable disputants without prejudices to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer, the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words “without prejudice” are intended to mean without prejudice to the writer if the offer is rejected’ but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed. If he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character.”

49. In another case of **Kawamambajo Ltd vs Chase Bank and Another C.C. 344/2013**, the court stated that:-

“.....the above notwithstanding in Halsbury’s Laws of England VOL 17 paragraph 213, it “without prejudice” letter.” As therefore been seen hereinabove contents of a communication made “without prejudice” are admissible when there has been a binding agreement between the parties and that once a contract is concluded: one can give evidence of the terms of that “without prejudice letter.....”

50. In yet another case **D. Light Design Incorporated vs PowerPoint Systems East Africa Ltd HCC NO. 93/2013** the court found that :

“.....As was correctly submitted by the plaintiff’s counsel, negotiations that are done out of court must be guarded jealously to allow parties to be free to explore all possibilities of an out of court settlement with a view to compromising a suit. However, there was nothing to jealously guarded in this matter as regards the correspondence that had been stated:- “the contents of communication made “without prejudice” are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible.....”(emphasis added).

51. Similarly as was held in the case of **Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd (1986) e KLR:-**

“...If an offer is made “without prejudice” evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of that was attached in the joint affidavit. The plaintiff does not tell this court how the letters and credit dates by the defendant to its clients were privileged. This is because as was also correctly stated by counsel for the defendant, the documents in the said joint affidavit were not privileged for the

reason that the plaintiff and the defendant did not intent them to be confidential. This was illustrated by the fact that the letter marked “without prejudice” basis was to be acted upon and it was copied to other persons other than to the advocates of both the plaintiff and the defendant.

52. From the above exposition of the law on admissibility or inadmissibility of communication exchanged on a “without prejudice” basis, it is apparently clear that the “without prejudice” communication, though largely protected, is not absolutely admissible. There are circumstances under which the court can hold such communication admissible, having regard to and upon examination of the communication in question. Once a judge has all the material placed before them, they are in a position to make a fair decision in the circumstances. In this instance case, albeit the appellant in his Memorandum of Appeal ground No. 7 faults the trial magistrate for relying heavily on “without prejudice “ communication submitted by the respondent in opposition to the application for setting aside *ex parte* judgment contrary to the express provisions of the Evidence Act (Cap 75 (sic) of the Laws of Kenya), my careful perusal of the ruling of the learned trial magistrate delivered on 26th May 2009 does not reveal any single reference or reliance on any of the letters submitted in evidence on a “**without prejudice**” basis to make her decision. The trial magistrate was clear in her ruling that in that application, “ **it was incumbent upon the defendant to demonstrate that she has a defence to the plaintiff’s claim and annex a draft defence which raises triable issues,**” and place before the court reasons why the defence was not filed in time. The trial magistrate further found that the applicant /appellant had not given any reasons why she did not file a defence. She nevertheless did not ignore the contents of the “defence” which she had stumbled upon while perusing the court file. She perused that “defence” and found that the paragraph 6 thereof admitted that there was an agreement signed by the defendant who undertook to pay the plaintiff shs 170,000 and the trial magistrate stated that assuming that the said defence had been annexed, then the same is an admission of the defendant’s indebtedness to the plaintiff and as such a sham, frivolous and vexatious and that it would be unjust to set aside the judgment entered *ex parte*.
53. Therefore, on whether or not there was an admission by the appellant of the respondent’s claim, the answer is in the affirmative. More evidence of admission of indebtedness for shs 170,000 by the appellant to the respondent is contained in the appellant’s annexure “SGM2” which is a bundle of letters as well as at paragraph 6 of the “defence” dated 17th February 2009 which the trial magistrate stumbled upon.
54. As I have stated above, the story that the plaintiff /respondent breached the agreement between the parties or that he never delivered to her the said motor vehicle does not arise as the appellant had already by her letter of 15th January 2009 made it clear that she had the motor vehicle and had intended to sell it. How could she sell it without possessing it in the first place and or without asking to take possession of it? In addition, it would not have taken the defendant/appellant all that time trying to persuade the plaintiff /respondent to accept payment of shs 150,000/- all inclusive or by installment without asking for release of the sold motor vehicle to her.
55. Although the appellant in her “defence” at paragraph 7 alleges that the plaintiff had not executed the transfer form of the said motor vehicle to her, the agreement in question as annexed to the replying affidavit by the respondent /plaintiff in opposition to an application for stay of execution pending appeal was clear that the respondent was just a beneficial owner and the motor vehicle was registered in the names of Pearl Developers Ltd from whom the respondent had bought, and transfer would therefore not be expected to come from one that had no legal title to the motor vehicle. Furthermore, the sale agreement was clear at paragraph 4) that “ **the official transfer of the said motor vehicle shall be effected upon final payment, and the purchaser shall pay the stamp duty and/or attendant thereto,**” which the appellant did not honour. Since there was no evidence of final payment having been made, the matter of transfer of the vehicle would not be issue at that time.
56. Further, the respondent did depose at paragraphs 3,5, of the replying affidavit sworn on 6th July 2009 that upon signing the agreement and receiving shs 330,000 the appellant took possession of the motor vehicle along with its transfer documents for purposes of registration. At

- paragraph 5 of the same affidavit of 6th July 2009 the respondent deposed that the appellant had already sold the motor vehicle and that the respondent surrendered the original transfer documents to the appellant to enable her receive the purchase price of the said vehicle from third parties. This affidavit evidence was never controverted or at all by the appellant during the proceedings for stay of execution pending this appeal. I therefore find that the trial magistrate was correct in finding that the defence which she stumbled upon did not raise any triable or arguable issues.
57. Accordingly, having found herein that the trial magistrate did not rely on the purported communication to arrive at her decision, I say no more than proceed to dismiss the ground No 7 of her Memorandum of Appeal.
58. In the same vein, I dismiss ground No 9 and 10, 11, 12 of the Memorandum of Appeal which allege that the trial magistrate erred in law and fact in holding that the appellant had failed to annex a copy of the draft defence and that such failure was fatal to the application in spite of the court confirming that there was a defence on record. In my view, the appellant's grounds of appeal, contained therein have no basis or at all and must be disregarded. As I have expressed above, the learned magistrate indeed found, which finding I hold to have been correct, as a matter of fact that the appellant had not annexed a draft defence to demonstrate that it had triable issues, to persuade the court to exercise its discretion and set aside the *exparte* judgment. I find that it was clear in the trial magistrate's mind that since there was judgment in default of defence, she no doubt expected that any semblance of defence would have been in a form of an annexure to the affidavit, but there was none. Instead, she indeed stumbled upon a defence filed on 17th February 2009 and she did examine that defence and found that it raised no triable issues hence she saw no need of exercising her discretion to set aside the *exparte* judgment as it would not have served any useful purpose. The trial magistrate then concluded that "*without a reasonable defence to the plaintiff's claim it would be unjust to set aside the judgment exparte...*"
59. Under those circumstances, it appeared as though the 'defence' as filed was irregular and therefore there was no need to examining it. However, I find that however irregular it was on record and the trial magistrate correctly exercised her discretion in examining it and arriving at a conclusion that the said defence was in any event, an admission of the plaintiff's claim.
60. I now move to the issue of whether the trial magistrate erred in law and fact in failing to exercise her discretion to set aside the *exparte* judgment in default of defence and whether it was clear that the said judgment was applied for prematurely contrary to the provisions of the then Order 9A of the Civil Procedure Rules and in particular Rule 10. This issue when answered, in essence settles grounds 2, 3,4,5,6,8,13 and 14 of the Memorandum of Appeal. The record shows that the suit in the lower court was filed on 23rd October 2008. Summons to enter appearance were issued on 28th October 2008 and served upon the defendant/appellant herein on 31st October 2008 at the Mitsumi Computer Garage situated on Muthithi Road. This is according to the affidavit of service sworn on 19th November 2008 by Nathan Pala a licensed process server and which is not rebutted or denied by the appellant.
61. On 18th December 2008, the appellant herein did enter appearance through the law firm of Mohamed Madhani & Company Advocates. Examining the summons to enter appearance, they were clear on the face thereof and as was required under Order 5 Rule 1 of the old Civil Procedure Rules, that the defendant was required within 15 days from the date of service thereof to enter an appearance in the said suit and in default the plaintiff may proceed with the suit and judgment may be given in her absence.
62. The defendant/appellant entered appearance over 1 ½ months from the date when she was served. She was expected to have entered an appearance on or before 16th November, 2008. As at 18th December 2008 when the defendant/appellant entered an appearance, the plaintiff/respondent had on 24th November 2008 by a request for judgment dated 19th November, 2008, requested for judgment in default of appearance. However, when that request for judgment was placed before Ag Principal Magistrate on 27th November 2007 it was rejected on the ground that the date and time of service was not indicated. Thus, the affidavit of service was considered improper. This prompted the respondent/plaintiff's advocates to wait and without filing a further affidavit of service to show that there was a further service of Summons effected on the

- appellant, they requested for judgment on 13th January 2009 in default of defence. The trial magistrate then on 16th January 2009 checked the record and on 23rd January 2009 accepted and endorsed the request for judgment for a liquidated sum of shs 170,000/- as pleaded and a decree was issued to that effect on 23rd January 2009.
63. During that period when judgment was entered and from the annexures on the affidavits filed by the appellant and respondent, the appellant had opened up a channel of negotiations with a view to settling the matter out of court, which negotiations were being held on a “without prejudice” basis. However, from the onset, it appears that the appellant was pushing her offers down the respondent’s throat as there is no positive communication from the respondent to show that there was willingness to resolve the dispute out of court. Although the appellant’s letter dated 15th January 2009 talks of discussions, the response by Mr Omwenga dated 26th January 2009 was non committal and only asked for the nature of the defendant’s proposed defence along with copy of the agreement, and rejecting the proposal to liquidate the principal sum by monthly installment of shs 7,500.
64. In other words, there is nothing on record to show that the plaintiff’s advocate undertook not to obtain judgment in default of defence. The defence counsel’s assertion that the parties were negotiating for a settlement was countered by the plaintiff’s own replying affidavit filed on 27th February 2009 denying ever authorizing his advocate to undertake not to file a defence or any court proceedings. Needless to say, it appears that by the time the appellant’s counsel was seeking for notice of 15 days from the respondent, the latter had already applied for judgment in default of defence, although the request had not been endorsed by the court.
65. The appellant claims that judgment was entered irregularly, contrary to the provisions of Order 49 Rule 3A of the Civil Procedure Rules which provide that the period between 21st December and 6th January are to be excluded in computing time for doing any act required under the Act. That is the law. However, it is clear from the record that judgment was requested on 13th January 2009 and it was not until 23rd January 2009 that the same was entered. Calculating the days from 18th December 2008 when the defendant/appellant entered an appearance however irregular, there were 18 clear days between 18th December 2008 and 23rd January 2009. The law applicable only required 15 days within which to file defence from the date of entering an appearance thus, by 18th January 2009, excluding 21st December to 6th January. In the premise, it matters not, that the request for judgment was made on 13th January 2009 as the said judgment was never entered before elapse of 15 days from the date of appearance; and neither was such judgment entered within the period that time legally stopped running.
66. Thus, assuming that the Memorandum of Appearance was entered regularly on 18th December 2008, then the defence was due on or before 18th January 2009, as 21st December 2008 to 6th January 2009 were excluded from computation of time for filing such defence. However, on record is a defence dated 17th February 2009 and filed on 18th February 2009, which defence in my view cannot be said to have been validly on record, having been filed two months from the date of appearance without leave of court.
67. Furthermore, albeit that defence was filed together with Chamber Summons seeking to set aside *ex parte* judgment, there is no evidence that the same was an annexure. It was therefore irregularly sneaked into the file. The appellant was only awakened by service upon her advocate of notice of entry of judgment dated 10th February 2009 and served on her 11th February 2009 that is when she filed chamber summons dated 17th February 2009 seeking to set aside *ex parte* judgment. Nothing prevented the appellant from making reference to a draft defence in her supporting affidavit and neither did she say that such omission was inadvertent. No reference was also made to that defence in the application to set aside *ex parte* judgment, not even in the submissions by the appellant.
68. In my view, therefore, the fact that the respondent requested for judgment on 13th January 2009, which judgment was not entered against the defendant/appellant until 23rd January 2009 does not render the judgment entered irregular. To hold otherwise would be to assist the appellant engage the court in theatrical procedural technical maneuvers to defeat justice.
69. Further, as at 12th February 2009 when the appellant’s advocate was writing to Mr Omwenga

advocate after being served with notice of entry of judgment, the appellant ought to have read the signs of the times that the respondent was not interested in settling the matter out of court, yet the advocate for the appellant was still commanding and issuing ultimatums to the respondent's counsel ***“ to confirm in writing by close of business on Friday the 13th February 2009 that you are prepared to set aside the judgment by consent”*** and threatening that ***“ should we fail to receive such written confirmation as aforesaid we have instructions to apply for setting aside the judgment whilst at the same time filing the defence as per our “agreement.”*** There is no such thing as an agreement between the two advocates demonstrated on record. Further, there is absolutely no reason why S.G.Maghani advocate could find himself considerably dismayed that judgment had been obtained, there being no evidence of an agreement that no judgment would be requisitioned, and without such agreement being brought to the attention of the court, the allegation only amounted to nothing that did not warrant the exercise of the court's judicial discretion.

70. Even the appellant's annexure letter dated 15th January 2009 only shows that her advocates had spoken to Mr Omwenga that morning of 15th January 2009 by which time no judgment had been entered. What the appellant is telling this court in her Memorandum of Appeal is that she could disregard the time frame for entering appearance and filing of defence to the claim but still insist that the respondent must abide by the rules that time stopped running from 21st December 2008 to 6th January 2009 and therefore the respondent should not have filed a request for judgment within that period of time otherwise it would have been premature. Further, that in any event, the appellant could not have filed her defence because time had stopped running but could still not file it after the time started running because there was an agreement between their advocates which agreement is not in sight.
71. I therefore find the ground of appeal challenging the time within which a request for judgment could be made unmerited and dismiss the same. I reiterate that the applicable provisions as at the time *exparte* judgment was entered are the old pre-2010 Civil Procedure Rules.
72. The last issue for determination flows from issue No. 3 as to whether this court having found that the judgment as entered against the appellant was regular, could have exercised its discretion in favour of the appellant and set aside the regular *exparte* judgment.
73. In dismissing the appellant's application for setting aside *exparte* judgment, the trial court was obviously exercising judicial discretion as was espoused in the case of **Mbogo vs Another vs Shah EA [1968] page 15** that :

“ an appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

74. The above principles further establish that a court's discretion to set aside an *exparte* judgment or order is intended to avoid injustice of hardship resulting from an accident, inadvertent or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the cause of justice. I am bound by the above principles for they espouse good law and I have no good reason to depart from them.
75. I have carefully examined the reasons for setting aside of *exparte* judgment as presented before the learned magistrate by the appellant, the opposition thereto and the decision by the trial magistrate. But first I have an observation that the sale agreement, subject matter of the dispute was never brought to the attention of the trial court. However, during the hearing of an application for stay pending appeal herein, the respondent swore an affidavit and annexed thereto exhibit IN1 on 6th July 2009. I have therefore, upon serious examination of the said agreement, anxiously asked myself whether this was indeed a case that deserved the exercise of judicial discretion in favour of the appellant and have come to the conclusion that it did not merit the discretion of the trial court for the following reasons;-

- a. That in the “defence” that was irregularly on record, the appellant admitted entering into an agreement with the respondent for purchase of the motor vehicle registration No. KAN 222B.
- b. Although the appellant maintains that possession of the said motor vehicle had not been given to her and that she expected the respondent to surrender the log book for motor vehicle KAH 985E which he held as security in lieu until she clears the balance of purchase price outstanding, the appellant never attempted to file a semblance of a counter claim to the respondent’s claim.
- c. It is also clear from the said sale agreement that the vendor was mandated to surrender the purchased motor vehicle upon the signing of the agreement. The agreement having been signed, and the appellant having acknowledged that agreement in her defence, no doubt, the motor vehicle subject matter of the sale must have been surrendered otherwise she could have demanded for it during the correspondence between the parties exchanged while the suit was pending and even filed a counterclaim for surrender of the purchased motor vehicle to her.
- d. That there was a clear admission by the appellant of the outstanding amount being balance of the purchase price of the subject motor vehicle.

76. For those reasons, I find that the trial magistrate correctly exercised his discretion in rejecting the application for setting aside the ex parte judgment which application, in my view, was intended to delay a fair trial of the suit and an over reach hence, delay justice for the respondent.

77. In the end, I find that the appeal herein as filed lacks merit and I proceed to dismiss it on all the grounds of appeal. I uphold the trial magistrate’s findings and find that he correctly exercised his discretion in rejecting the appellants’ application for setting aside ex parte judgment entered in favour of the respondent.

78. I award costs of this appeal, of the application and the suit in the court below to the respondent.

Dated, signed and delivered at Nairobi this 18th day of May 2015.

R.E. ABURILI

JUDGE

18.5.2015

Coram R.E. Aburili J

C.A. Kavata

Miss Muinde holding brief for Omwenga for respondent

No appearance for appellant

Court- Judgment was rescheduled from 26th March 2015 when the court was on recess. Judgment now read and pronounced in open court as notified to the parties and cause listed.

R.E. ABURILI

JUDGE

18/5/2015