REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 122 OF 2007

FEHMIDA BASHIR PEERA.....APPLICANT

VERSUS

1. MOHAMED MOHAMED M.M. HATIMY

2. NOOR MOHAMED M. M. HATIMY

3. AISHA MOHAMED M. HATIMY (as executors/trix of the Estate of

MOHAMED MOHAMED HATIMY).....RESPONDENTS

(Being an appeal from the Judgment of Resident Magistrate Mrs. J. B. Mdivo

in Civil Case No. 3255 of 2006 at Mombasa Law Courts dated 16th April, 2007)

JUDGMENT

This is an appeal against the lower court ruling whereby the lower court set aside an ex parte order striking the appellant's defence and entering judgment for the respondents. The respondents had sued the appellant in the lower court for judgment of Ksh. 230,000. That amount was stated to be rent arrears owed by the appellant. The appellant filed a defence alleging that she had paid the rent to the registered owner of the premises Mohamed Mohamed Hatimy (deceased). It is following the filing of that defence that the respondents filed the application for striking out that defence.

The application for striking out that defence was heard by the lower court on 28th February 2007 in the absence of the appellant's counsel who had been served. Thereafter the appellant filed an application in the lower court dated 16th April 2007 seeking to set aside judgment entered in favour of the respondents and for setting aside the order striking out her defence. The appellant sought that the application for striking out her defence be heard on merit. Her application dated 16th April 2007 was dismissed and that dismissal is the subject of this appeal.

Appellant has filed 12 grounds of appeal. It should be noted that the appellant's appeal is directed at the dismissal of her application to set aside the entry of judgment against her. I am in agreement with the respondent that the grounds of appeal No. 1 to 2 are misplaced because they are directed at the application by the respondent for judgment to be entered against the appellant which is not the subject of this appeal.

Grounds no. 3, 9 and 11 will be dealt together. In those grounds the appellant alleges that the learned

Magistrate Mrs. J. B. Mdivo R.M. was biased against the appellant. Appellant submitted that the language used by the learned magistrate exhibited bias against her and her advocate.

Grounds no. 4, 5, 6.8, 10 and 12 in the memorandum of appeal relate to the learned magistrate's use of her discretion. Appellant submitted that the learned magistrate wrongly exercised her discretion and thereby reached a wrong decision. It was further submitted that it was wrong for the learned magistrate to grant conditional order to set aside judgment. The condition was that the appellant would deposit the judgment amount into court.

The respondents in response to the appellant's submissions argued that the appellant should have moved her application for setting aside ex parte judgment under the correct provisions of the law. It was argued that the appellant should have invoked order L Rule 17 of the Now Repealed Civil Procedure Rules and not order IXD Rule 8. The respondent argued that the court should consider the case of **MBOGO VS SHAH [1968] EA 93** where the court of appeal as per Newbold P where he stated:

"A court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in exercise of his discretion and that as a result there has been misjustice."

The respondents faulted the appellant for having failed to canvass before the lower court why her defence should not have been struck out and why judgment should not have been entered against her. In this regard, the appellant relied on the case **PATEL VS E. A. CARGO HANDLING SERVICES [1974] EA 75** where the court considering an application to set aside judgment stated:

"…….I agree that where it is a regular judgment as in the case herein, the court will not usually set aside judgment unless it is satisfied that there is a defence on merit."

The respondent argued that since service of their application to strike out the appellant's defence and to enter judgment had been served on the appellant judgment was rightly entered against the appellant. On whether the learned magistrate was correct to have ordered the appellant to deposit the judgment amount in court, the respondents submitted that such an order was within the law. In that regard, they referred to the case **MBOGO VS SHAH** (*supra*) where it was stated:

"……..in light of all the facts and circumstances both prior to and subsequent and of respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be imposed."

The respondents submitted that the learned magistrate was not biased towards the appellant and sought for this court to find that even if the learned magistrate's language that was strong it did not show bias.

The learned magistrate in considering the appellant's application by her ruling now the subject of this appeal, set aside the ex parte judgment but made that setting aside conditional on the appellant depositing into court Ksh. 230,000. The appellant has argued that the condition that she deposit that amount in court was actuated by bias. It should be noted that the basis upon which the appellant sought to have the judgment set aside was that the appellant's counsel was unable to attend to the lower court's matter because he had other cases before the High court and other courts. The advocate who was having the conduct of this matter on behalf of the appellant, through the affidavit sworn by the appellant, stated that he was engaged in Nairobi High Court in HCCC No. 120 of 2007 on the day the lower court gave orders against the appellant. The other advocates in the firm were engaged in 10 other cases some of which were in Mombasa High Court and others that were in other lower courts. The appellant deponed in her affidavit as follows:

"that I am advised by the said advocates which I verily believe to be correct that Mr. Mabeya sent one of the clerks working for the said firm Mr. Maundu to get an advocate to hold his brief and adjourn all matters listed in the Chief Magistrate's Court, this case (the one now appealed against) included but

the clerk never informed him that this matter had been heard ex parte.

That the failure to attend court was not deliberate but due to there being so many cases on the same day my said advocates informed me which I believe to be true that as defending counsels most of the said cases had been fixed ex parte and hearing notices served on them."

It should be noted that the appellant had annexed copies of the cause lists of the different cases that her advocates were involved in on the material date. With those averments in mind, I will consider the ruling of the learned magistrate as follows:

"Secondly, the court has no control over counsel's diaries, and if counsel chooses to ever commit himself, that is his prerogative. How he decided this court was at the bottom of the haul for him to send his clerk, whom he knows very well has no right of audience, rather than fellow counsel to either place aside the file or seek an adjournment, is a mystery only the likes of Sherlock Holmes can solve. It does smirk of arrogance for counsel to tell the court he sent his clerk and that is an honest mistake, enough to warrant discretion to be exercised in his favour.

However, even though Mr. Mogaka hopelessly bungled this matter, with dire consequences to his client, it is his client who seeks justice from me. Mr. Mogaka is only his representative. The wisdom of the sages behooves me to look with favour not upon Mr. Mogaka, but upon his client.

The application for setting aside is allowed, on the condition that the decretal amount Kshs. 230,000/= and the interest thereon to date i.e. Kshs. 13,800/= to be deposited in court within the next 21 days. Failure to do this within the stipulated time would see today's order lapse and the order of 22.3.07 reinstated."

I will consider both whether the learned magistrate was biased and whether she correctly exercised her discretion together because in my view, the two grounds are inter-related. They are inter-related because if there was bias, then the learned magistrate wrongly exercised her discretion. On whether or not the court should visit the mistake of counsel on their client I will be guided by the words of Onyango Otieno J.A in the case **KISSI PETROLEUM PRODUCTS LTD VS KOBIL PETROLEUM LTD & OTHERS CIVIL APPL. NO. 218 OF 2005 NRB** where the judge was considering whether to grant a party leave to appeal out of time. The judge stated as follows:

"In my view, a party whose advocate makes genuine mistake should not suffer but to benefit a party whose advocate is clearly non-candid with the court would amount to a party benefiting from the 'proceeds' of what is close to contempt of court. That would be wrong."

The learned counsel for the appellant set out the numerous number of cases that were being handled by his firm on the particular day. His failure to attend the matter before the learned magistrate was clearly not deliberate. It does seem that the learned magistrate did find that there was reasonable ground or excuse for the absence of the appellant's counsel from court when the respondent's application was heard ex parte. I say so because, the learned magistrate did set aside the ex parte judgment. She however in doing so used very strong language criticizing the learned advocate for failing to appear before her. This is as can be seen from the quoted portion of her ruling above. The strong language would seem to have been personalized against the learned advocate Mr. Mogaka for the appellant. In using that strong language, the learned magistrate failed to consider what the appellant deponed in her affidavit reproduced above. The appellant deponed that her advocate's diaries were congested by many matters that were fixed for hearing ex parte and hearing notices had been served on her advocates. Those matters were for hearing on the same day the lower court matter was being entertained. The learned magistrate's view about the conduct of the learned advocate for the appellant seemed to have influenced her decision to grant the appellant conditional order of setting aside ex parte judgment. It is for that reason I find that the learned magistrate misdirected herself when she gave the conditional order of setting aside judgment. She therefore fell in error and was wrong in the exercise of her discretion. She was wrong for personalized criticism of the appellant's advocate and for having failed to note that those advocates were confronted by other court cases on that day. Those dates of those other matters had been obtained ex parte by other

parties. She also failed to appreciate that the reason why the appellant's advocates sent their court clerk to her court and other courts in the Chief Magistrate's court was to enable them to deal with the High Court matters. It was therefore incorrect for the learned magistrate to state that the appellant's advocate regarded her court as 'bottom of the haul'. That further goes to show that the learned magistrate failed to consider the evidence before her in respect of the application. The respondent argued that the appellant's appeal should fail because she had failed to show why a regular judgment should have been set aside. That submission in my view is in error because the learned magistrate seemed to have considered whether there was a basis of setting aside the judgment and did indeed proceed to set it aside albeit on condition. As I understand it, the appellant's appeal is centered on condition set by the learned magistrate that she should deposit the judgment amount into court.

On whether the appellant's application was based on the wrong provision of the law, I would state that it is not a subject of the appeal before me because that ex parte judgment was after all set aside. Even if it had been based on the wrong provision of the law, the respondents failed to show what prejudice they suffer. In that regard, I am guided by the case **SAMUEL K. NGUTI VS BROOKE BOND (K) LTD CIVIL APPEAL NO. 48 OF 2004 MSA** where the court of appeal stated as follows:

"We appreciate the difficulty the respondent's legal adviser must have been in when drafting the aforesaid application. Clearly Order XXXIX was not applicable as the order in question did not grant injunctive relief's. However, the respondent having invoked inherent jurisdiction under section 3A of the Civil Procedure Act in addition, the application cannot be said to have been incurably defective. That is the more so because from its contents the application clearly spelled out the breach the respondent was complaining about and the relief it was seeking. The appellant understood the nature of the application and fully responded to it. We are unable to discern any prejudice to the appellant arising from the improper inclusion of Order XXXIX in the application."

In the end, the appeal succeeds and the order made on 2nd August 2007 in the lower court is set aside and the court does hereby allow the appellant's application before Mombasa SRMCC No. 3255 of 2006 dated 16th April 2007. To that end, the ex parte judgment entered against the appellant on 22nd March 2007 is hereby set aside unconditionally. The respondents' application dated 28th November 2006 in the lower court may now be fixed for hearing on merit. The costs of the appellant's application dated 16th April 2007 in Mombasa SRMCC 3255 of 2006 and the costs of this appeal are awarded to the appellant.

DATED and **DELIVERED** at **MOMBASA** this ***29th*** day of ***March, 2012.***

MARY KASANGO
JUDGE