



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO. 15 OF 2003

DOMITILA KUBOKA MUKHONGO.....APPELLANT

VERSUS

**NOAH AUMA OKINA.....RESPONDENT
(From the decree and orders of B. Maloba SRM, in Busia SRMCC NO 56 of 2002)**

JUDGMENT

The appeal arises from the order of the honourable Senior Resident Magistrate at Busia dismissing an application to set aside an *ex parte* judgment entered against the appellant. The said application is dated 17/6/2002. And the targeted ruling or judgment, is dated 21/3/2003.

The appellant who had been properly served with a summons to Enter Appearance failed to enter appearance and defence within the time prescribed. This led to the impugned *ex-parte* judgment being entered.

In the application to set aside the *ex-parte* judgment, the appellant had admitted being properly served with the summons to enter appearance. She however swore that she immediately was taken ill and laid in an hospital ward due to an attack of Malaria which attack of Malaria kept her in hospital for 14 days. That thereafter she did not file the application for setting aside of the *ex-partes* judgment for about 80 days or thereabouts. She further swore that after the initial Malaria attack she did not get completely well to enable her to follow up on the case.

The appellant had filed with the application a draft defence and a supporting affidavit in which she dispute the actual amount properly due and payable under the contract upon which the suit was based. She had also raised the fact that she had paid some amount towards reduction of the total sum due

which sum was not acknowledged by the plaintiff in her plaint. There was also the issue as to who should have been the correct creditor of the sum due from the appellant on the face of existence of some evidence that the sum borrowed by the appellant under the agreement, belonged not to the plaintiff, but to a women group to which both parties belonged.

I have carefully considered the grounds upon which the honourable lower court refused to grant the application to set aside the *ex parte* judgment. It is trite that the court had, in exercise of its power, full discretion to grant or refuse the application, and the appellate court will not easily interfere with such decision except where the power of the court is not exercised properly for whatever reason.

In the case of Shah v Mbogo and Another {1967} E.A, 16, it was correctly stated that the jurisdiction to set aside a regular judgment given to the court should never be exercised to assist a party who has deliberately sought to obstruct or delay the cause of justice. The court will also properly consider any delay incurred by the applicant and whether such delay is justified or not justified and whether the delay is inordinate in the circumstances of the case. And finally, the court would consider whether or not the applicant has a possible defence which raises arguable issues.

In this case the appellant was seized with malaria and laid in hospital for two weeks within which she would have filed her appearance and later defence. The delay to apply for the setting aside of the *ex-parte* judgment is explained to have been extended to a period of about three months because of the poor health that followed the malaria.

In respect to other grounds, the appellant had filed a draft defence which showed that there might be a plausible grounds of defence which would at least alter the sum entered for judgment downwards. The defence also showed that although there was a written contract upon which the plaint was based, the figure quoted in the plaintiff's demand letter was less than the sum of the contract and that an opportunity to explain the difference should have been given by the lower court.

It is therefore the finding of this court, that the lower court which had full discretion to set aside the *ex-parte* judgment or not, failed to properly take into account all the relevant issues which would assist it exercise its powers properly and justly. The result is that it exercised its jurisdiction improperly which probably led into injustice being done.

In the above circumstances this court finds that this appeal has merit. It hereby sets aside the *ex-parte* judgment entered against the appellant dated 19.6.2003 and its consequential orders and authorizes her to file her defence within 15 days from the date hereof.

In respect to costs however, the court is of the view that the appellant has spent inordinate time to have this appeal heard since the year 2003. This is clearly unjustified and probably unfair to the respondent who might be entitled to the sum or part of the sum entered as a judgment in her favour. Costs of the appeal by each party are to be borne individually.

Orders accordingly.

Dated and delivered at Busia this 15th day of June 2011.

D.A. ONYANCHA

JUDGE.