



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NUMBER 54 OF 2009**

**DANSON MURIUKI KIHARA ..... APPELLANT**

**VERSUS**

**ISAAC GITARI G. GATIMU .....  
....RESPONDENT**

**JUDGMENT**

By a plaint filed on 22<sup>nd</sup> September, 2008, the appellant alleged that the respondent had breached terms of a Sale Agreement on land parcel No. L.R INOI/KAMONDO/1208 by failing to pay the entire amount. The appellant therefore, filed the plaint seeking payment of Ksh.52,000/- with accrued interest at 40% per annum with effect from 16<sup>th</sup> October, 2007, which was the date of the alleged Sale Agreement.

The plaint and summons to enter appearance were served on the respondent on 29<sup>th</sup> September, 2008. The respondent, however, neither entered appearance nor filed a defence. On 17<sup>th</sup> October, 2008 a request for judgment was filed and judgment was entered on 21<sup>st</sup> October, 2008. The ex parte judgment was served on the respondent on 31<sup>st</sup> October, 2008. On 21<sup>st</sup> November, 2008 the respondent made an application to set aside the interlocutory judgment. On 19<sup>th</sup> March 2009, the subordinate court made a ruling, setting aside the ex parte judgment. As a consequence of that ruling, the appellant filed the present appeal.

The memorandum of appeal has five grounds. The parties filed written submissions. The appellant's counsel Mr. Kahiga reduced the five grounds to two. He argued that the learned magistrate had in setting aside the ex parte judgment erred, as the application was not merited. The second ground was that the magistrate did not exercise his discretion judiciously.

Counsel argued that the respondent had admitted in writing that he was duly served on 29<sup>th</sup> September, 2008 but stated that he failed to enter appearance and file a defence as he believed that he did not owe the appellant any money. Counsel also argued that the respondent in his draft defence had claimed to have been advanced Ksh. 200,000/- as a friendly loan by the appellant on the security of the subject plot, while in fact there was a Sale Agreement on the subject plot. In the counsel's view, the respondent had not given good reasons for his failure to file defence as ignorance of the law was no defence. The learned magistrate therefore, had erred in allowing the application to set aside the ex parte judgment contrary to the principles laid down in the case of **Shah Versus Mbogo [1969] EA 116**.

The appellant's counsel also argued that the respondent's draft defence did not disclose reasonable grounds of defence. The respondent did not annex a copy of the alleged friendly loan agreement. Further,

it was clear from documents filed in the application for setting aside ex parte judgment, that the respondent was in breach of the Sale Agreement dated 16<sup>th</sup> October, 2007 when he paid Ksh. 198,000/- leaving an unpaid balance of Ksh. 2000/-. It was contended that, in terms of clause 4 of the Sale Agreement, the respondent had to pay Ksh.50,000/- being agreed liquidated damages making the total indebtedness to be Ksh. 52,000/-, which would accrue interest at 40% per annum. It was contended that the respondent had no arguable defence and that the learned magistrate had failed to consider the submissions and authorities of the appellant in the appellant in the lower court.

The appeal is opposed. The respondent filed written submissions. He submitted that the ex parte judgment was set aside on reasonable grounds. He also submitted that the learned magistrate had discretion to set aside the interlocutory judgment and exercised that discretion properly in order to avoid injustice and hardships that was likely to result from inadvertence. The respondent argued that he did not obstruct the course of justice.

The respondent also argued that the defence disclosed weighty triable issues which could only be addressed adequately at the substantive hearing of the suit.

On the hearing date, both sides adopted the written submissions filed.

I have considered the appeal, the submissions filed as well as authorities relied upon. Having perused the ruling of the learned magistrate, it cannot be said that he did not consider the authorities cited by the appellant. The learned magistrate at page 1 of his ruling specifically referred to the case of **Magunga General Stores Versus Pepco Distributors Ltd Nairobi Civil Appeal 24/86** as well as the case of **Ruaha Concrete co. Ltd Versus Rajni Patel Nairobi, HCCC No. 6493/91**. Therefore, the argument by the appellant's counsel that the magistrate did not consider authorities cited cannot stand.

The application to set aside the exparte judgment was brought under Order IXA rule 10 of the Civil Procedure Rules which provides as follows:-

***“10. 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.”***

It is clear from the above provisions of the rules that the court has unfettered discretion to set aside an ex parte judgment upon such terms as the court considers just. Of course that discretion has to be exercised judiciously. Several court cases have considered the exercise of that discretion. In **Shah Versus Mbogo** (supra) cited by the appellant's counsel, Haris J stated as follows:-

***‘I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistakes or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.’***

The above principles, in my view, apply to all parties in litigation. Indeed, the respondent was served with summons to enter appearance as well as the plaint. He did not file defence claiming that he thought that he did not owe the respondent any money. The appellant's counsel has stated even in this appeal that out of 200,000/- the respondent had repaid Ksh. 198,000/- this admission of payment in my view supports the respondent's argument that he might have thought that no amount was owing. Whether or not there are penalties and other amounts to be paid is a matter that can only be determined on merits by trial court. I have seen the defence and counterclaim of the respondent. In my view, the respondent has disclosed a reasonable defence. A reasonable defence is not necessary one that will succeed. In the present case, the respondent has annexed a defence that raises arguable issues.

Secondly, in my view, the respondent raised god reasons for the failure to file a defence. The said reasons might not be strictly legal reasons, but they are reasons that can persuade a court to exercise its discretion to set aside an ex parte judgment. Though the counsel for the appellant argues that ignorance of the law. In my view, the reason given that he thought that he had paid the entire amount, when the appellant

admits that a substantial amount was paid, are reasonable.

In addition to the above, the Civil Procedure Act (Cap 21) has now been amended (Act No. 6 of 2009) by including the Overriding Objective in Civil Cases under section 1A and 1B. under section 1A (1), courts are enjoined to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Shutting out a litigant from substantive justice will, in my view, be contrary to the provisions of the Overriding Objectives under the Civil Procedure Act.

The emphasis that courts shall avoid deciding cases on mere technicalities has also been captured under Article 159 (1) (d) of our Constitution 2010. The said Article provides that:-

***“159 (1) (d) Justice shall be administered without under regard to procedural technicalities.”***

There is no evidence that the respondent has deliberately evaded service or obstructed or delayed the course of justice.

Those are the only circumstances in which the court’s discretion to set aside an ex parte judgment would be inhibited. There being no such complaint, I find and hold that the learned magistrate exercised his discretion properly and judiciously by setting aside the ex parte judgment.

I find no merits in this appeal. I dismiss the same. However, costs will be in the cause as this is an appeal within the pending proceedings.

Dated this 15<sup>th</sup> day September 2011

GEORGE DULU  
JUDGE

Delivered at Embu this 15<sup>th</sup> day of September 2011

.....  
JUDGE

**In the presence of**

..... For the appellant  
..... for the respondent  
..... Court Clerk