REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 103 OF 2007.
KENYA TEA DEVELOPMENT AGENCY LTD…….....……APPELLANT
-VERSUS-
YUNIAH KEMUMA MACHUKA (suing as a personal representative of LINET KEMUNTO MACHUKA-minor deceased)…….....…….....
……RESPONDENT
JUDGMENT

(Being an appeal from the ruling and order of the Hon. Mr. Soita Principal Magistrate given on 13th June, 2007 at Kisii in Kisii CMCC.NO. 185 OF 2005)

This is an appeal from the ruling and order of the **Honourable Mr. Soita,** then Principal magistrate delivered on 13th June, 2007 in Kisii Chief Magistrate's court civil case number 18 of 2005. That ruling was pursuant to a chamber summons application dated 9th January, 2007. The application in the main prayed for the default judgment hitherto entered against the appellant be set aside, the appellant be granted leave to defend the suit and the annexed draft statement of defence by the appellant be deemed as duly filed subject only to the payment of court filing fees. The appellant also prayed that the warrants of attachment and sale issued by the court on 31st December, 2006 as well as the entire process of execution be set aside and costs of execution including auctioneer's costs if any, be met by the respondent. The application was expressed to have been brought under Order IXA rule 10 of the **Civil Procedure rules** and section **3 A** of the **Civil Procedure Act** and all other enabling provisions of the law.

The facts leading to the application were that the respondent sued the appellant in the Chief Magistrate's court at Kisii being **Kisii CMCCC. No. 185 of 2005** seeking general and special damages following a fatal road traffic accident on 3rd May, 2004 involving her daughter, **Linet Kemunto Machuka** and a motor vehicle Registration Number KAK 806F, a tractor belonging to the appellant. As a result of the accident, the deceased was fatally injured and subsequently passed on. Consequently, the respondent sued the appellant, summons were duly issued and served on the appellant. However the appellant failed to file an appearance and defence within the time prescribed by the rules. The respondent subsequently applied and had judgment in default of appearance entered against the appellant. The case was thereafter set down for assessment of damages and or about 21st October, 2005, the learned magistrate entered a final judgment and ordered the appellant to pay to the respondent in total a sum of Kshs. 990,000/= as general and special damages respectively. Pursuant to the said judgment, the respondent took out the execution proceedings and attached various items belonging to the appellant. Objections proceedings were unsuccessfully lodged by Nyamache Tea Factory Limited. Subsequent thereto the appellant filed the application whose ruling is the subject of this appeal.

In the application, the appellant essentially acknowledged that it had been duly served with the summons. However, in view of the fact that it is a large organization, it took sometime to conduct investigations to establish whether the tractor in question belonged to it and in the process it inadvertently forgot to instruct an advocate to come on record – a genuine and innocent mistake on its part. It thus sought to have the ex-parte judgment set aside so as to allow it defend the suit and annexed on the affidavit in support of the application, amongst other documents, its draft statement of intended defence. The appellant also deponed that the judgment having been delivered on 21st October, 2005, and execution taken out on 21st December, 2007 well over one year after the decree, then execution thereof by way of attachment was in contravention of Order 21 rule 18 (1) of the **Civil Procedure rules** and therefore a

nullity.

The application was opposed and a replying affidavit sworn by one **Albert Okumu Mudenyi** was filed. In the main he deponed that the application was hollow, and non-starter and devoid of any substantive value considering that the appellant was duly made aware of the filing of the suit, the resultant proceedings thereafter up to and including entry of ex-parte judgment vide the notice of entry of judgment dated 11th November, 2005. From the foregoing it was apparent that the appellant had not come to court with clean hands in seeking equitable remedy or to have the discretionary powers of the court exercised in its favour, having slept on its own laurels only waking up when there was execution.

The trial court upon considering the application and listening to counsels for the appellant and respondent respectively found the application unmerited and dismissed the same with costs holding thus :-

"It has been submitted that the defendant needed time to verify the ownership of the vehicle. This aspect has not been demonstrated to enable the court appreciate that it was time consuming and the delay was reasonable. In the absence of a clear demonstration I do not find there is no basis to interfere with a regular judgment…".

That ruling then triggered this appeal. Through a memorandum of appeal dated 15th June, 2007 and filed in court on 20th June, 2007 the appellant faulted the ruling on the following grounds:-

"1. The learned trial magistrate erred in fact and in law in failing to find that the appellant had a meritorious defence entitling it to leave to defend and in generally failing to appreciate the principles applicable to determine the application that was before him.

2. The learned trial magistrate erred in fact and in not appreciating sufficiently or at all that the appellant was being deprived an opportunity to be heard.

3. The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the appellant had raised matters of a fundamental nature to warrant the grant of orders sought in the application.

4. The learned trial magistrate erred in fact and in law in finding that the appellant's omission to enter an appearance and defend the suit was not excusable in the circumstances of the matter before him.

5. The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the process of execution commenced against the appellant was irregular and thus warranting the setting aside of the execution proceedings.".

When the appeal came up for directions on 13th May, 2010, parties agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

Order XLI rule 1A of the **Civil Procedure Rules** provide that where no certified copy of a decree or order appealed from is filed with the memorandum of appeal the appellant shall file such certified copy as soon as possible. Order XLI rule 8(b) (4) (f) provides that the judgment, order or decree appealed from must form part of the record of appeal.

I have carefully and meticulously perused the record of appeal filed herein. It is apparent to me that the order appealed from, certified or not is not included in the record. In view of the wording of the section of the law cited above, these omission is fatal to the entire appeal. The requirement that the order or decree appealed from must form part of the record of appeal is couched in mandatory terms. An appeal arises only from an order or decree and if neither is filed with the record of appeal then there is nothing being appealed from. This issue was raised by the respondent in her written submissions. As parties filed and exchanged written submissions, one would have expected that the appellant would react and or respond to it. It did not. Infact it gave it a wide berth in its written submissions. That in itself would seem to suggest that the appellant had no response to the issue which really is a point of law. Clearly therefore this appeal is incompetent and ought to be struck out.

However this is not the end of the appellant's problems. In the application the appellant sought to set aside the default judgment entered against it. However it does not state the date when the said interlocutory judgment was entered. It is however instructive that the interlocutory judgment was entered on 2nd June, 2005. Thereafter the case proceeded for assessment of damages on 11th October, 2005 and the resultant final judgment was delivered on 21st October, 2005. Pursuant to the said final judgment, a

decree ensued that led to the execution by the attachment of the appellant's asset. Thus there is on record interlocutory as well as a final judgment. Its however apparent that the appellant has not and did not pray in the subordinate court to set aside the final judgment aforesaid nor the proceedings of 11th October, 2005. Even in this appeal the final decree and or proceedings by way of assessment of damages aforesaid are not at all challenged. The manner in which the prayers were couched in the application there is nothing to defend unless the final decree aforesaid is also set aside and or varied. It would have been the height of judicial absurdity if the learned magistrate had granted the prayers in the application yet the proceedings of 11th October, 2005 and final decree of 21st October, 2005 had not been set aside. Had the appellant couched his prayers in such terms as ***"the default judgment and all the subsequent or consequential proceedings be set aside….."*.** Perhaps different considerations would have come into play. There was no prayer couched along those lines.

On the merits of the appeal, it is trite law that the discretion to set aside a judgment given ex-parte is unlimited. In the case of **Patel –vs- E.A Cargo Handling Services Limited (1974) E.A 74**, the court of appeal observed and appreciated that where the judgment is regular the court will usually not set aside such judgment unless its satisfied that there is a defence on the merits and a defence on merits does not really, mean a defence that must succeed but one that raises triable issues, that is an issue which raises a prima facie defence and which should go to trial for adjudication. The same views were expressed and reiterated in the case of **Ceneast Airlines Limited –v- Kenya Shell Limited, Civil appeal no. 174 of 1999 (UR)**. In this case, the court of appeal stated that where a judgment is regular, the court will normally not set aside the same unless it is satisfied that there is a defence as to the merits which means it raises a triable issue or issues such that raises a prima facie defence and which should go for trial.

It is common ground that the ex-parte judgment entered herein on 2nd June, 2005 was regular. The appellant concedes that much. Its only quarrel with the ruling is that the learned magistrate did not exercise his wide and unlimited discretion in its favour. Further that the learned magistrate did not consider the draft defence on record.

I agree that discretion to set aside a judgment under order IXA rule 10 is unlimited. Like every discretion however, it must be exercised on sound legal principles and not capriciously. In rejecting the application, the learned magistrate was not satisfied as to the reasons or grounds advanced in support of the application. In fact he was not satisfied that the appellant needed such long period of time to verify the ownership of the motor vehicle. He was further not satisfied that such an exercise was time consuming and that the delay was reasonable. I cannot fault the learned for taking into account the forgoing before arriving at his decision. He was perfectly entitled to consider the conduct of the appellant on being served with the summons to enter appearance before reaching his decision. The appellant submits that there is no requirement for sufficient cause to be shown before the exercise of discretion as that demanded by the learned magistrate in his ruling. Nothing can be further from the truth. Discretion cannot be exercised in the abstract or vacuum. There must be some form of explanation that lead to a party not filing his or her papers in time. In this case therefore the learned magistrate looked at the reasons advanced in support of the application and found them fanciful and wanting as he was perfectly entitled to.

Yes there is no limitation as to the time when an application to set aside should be filed. Indeed in the case of **Girado –vs- Alam & Sons (1971) EA 448**, the court of appeal appreciated in allowing an application to set aside an ex-parte judgment that much as the application had been brought after a long delay and after the suit limitation period had expired there was no limitation period within which the application itself needs to be brought. However if the delay in bringing the application is inordinate and there is no explanation for such delay, I would imagine that, that would be a consideration in deciding whether to exercise the discretion in favour of the applicant.

In this case the appellant according to the affidavit of service sworn by **Zachariah Fred Nyende** dated 2nd June, 2004 was served with summons to enter appearance on 14th March, 2005. The appellant concedes such service. Yet it was not until 10th January, 2007 that the appellant moved the court as appropriate. This was almost 2 years. It cannot be that for all these time, the appellant was verifying the ownership of the subject motor vehicle. That information was easily and readily available at the motor vehicle registry and certainly that cannot take almost 2 years to be availed. In any event what stopped the appellant from merely entering an appearance in the suit and therafter seek some indulgence from the plaintiff as it went about investigating ownership of the motor vehicle? That is what a prudent counsel or litigant would do. In my view, the appellant was guilty of gross indolence. It simply squandered opportunity to defend the case when accorded to the opportunity. First it was served with summons, secondly, following the entry of judgment, it was again served with notice of entry of judgment, thirdly

before filing the application, the same lawyers for the appellant had taken out objection proceedings on behalf of the objector, Nyamache Tea Factory Limited. Those objections were in 2006. It is after the objection proceedings were dismissed that the appellant lodged the application. The delay in mounting the application was inordinate and was never explained by the appellant. That delay must of necessity disentitle the appellant the exercise of the court's discretion its favour. In my view the learned magistrate exercised its discretion properly in refusing the appellant's application. It has always been held that the appellate court will not interfere with the trial court's exercise of discretion unless there has been a misdirection leading to a wrong decision or a manifestly wrong decision leading to injustice. **See Waweru –vs- Ndiga (1983) KLR 238**. I do not however discern such misgivings in the circumstances of this case.

The appellant complains too that in the exercise of his discretion, the learned magistrate did not look at and or consider if the draft defence contained a valid or reasonable defence to the respondent's claim yet it is trite law that where a draft defence is tendered with the application to set aside default judgment, the court is obliged to consider it and see if it raises a reasonable defence to the respondent's claim. That lamentation by the appellant is not born out by the record. The learned magistrate was categorical that in arriving at his decision, he had considered the affidavits and the annextures and also submissions by both sides. The draft defence was one of the annextures. In their submissions, both parties referred to the draft defence. It is therefore apparent that the draft defence was in his mind as he crafted the ruling much as he does not say so directly in the ruling. In any event, having come to the conclusion that the appellant was not being candid in the application and therefore not entitled to the exercise of discretion in its favour, the issue of defence became secondary.

This court is well aware of the overriding objective of civil litigation which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The import of ***"the oxygen principle"*** or ***"double O"*** Principle as occasionally referred to is that the approach of the courts now is not to automatically condemn parties on procedural lapses, but first examine whether such measures would be in conformity of the overriding objectives set out in litigation as correctly submitted by counsel for the appellant. If an alternative is available, the courts must consider such an alternative and see if the alternative is in consonant with the overriding objective. However, in my view the oxygen principle was not meant to aid the indolent and or throw to the dogs the rules of procedure. Nor was it meant to protract the civil proceedings endlessly. Public interest requires that litigation should come to an end. It cannot be for the just, expeditious, proportionate and affordable resolution of civil disputes for a party to be served with summons to enter appearance and sit or sleep on them for almost 2 years and when confronted with execution rush to court to set aside a judgment on very spurious and unbelievable grounds or reasons. If the court was to invoke ***"the oxygen principle"*** in the circumstances, of this case then the principle would in essence turn out to be a stumbling block in the just and expeditious resolution of civil disputes.

It is for all the foregoing reasons that I find this appeal unmerited. Accordingly it is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** in Kisii this 16th September 2010.

ASIKE-MAKHANDIA

JUDGE