REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 102 of 2008

ALI HUSSEIN SUGULE……..……....APPELLANT

VERSUS

B.A.T. KENYA LIMITED……..……..…..RESPONDENT

JUDGMENT

This is an appeal by Ali Hussein Sugule (hereinafter "the appellant"- the plaintiff in the original action), from the ruling of Mombasa Resident Magistrate, Hon. M. Obiero, whereby the Learned Resident Magistrate dismissed the appellant's application to set aside an order dismissing the appellant's suit for non-attendance. The said application was brought under the provisions of Order IXB Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The former empowers the court to set aside or vary a judgment entered or suit dismissed for non-attendance. The appellant's application clearly fell for determination under the purview of the said rule and it was not necessary to invoke the inherent powers of the court.

The appellant's application arose from the dismissal of his suit for non-attendance. The appellant's suit had come up for hearing on the morning of 17th October 2007 when the appellant through his counsel informed the court that he was ready to proceed with one witness and opposed an application for adjournment which had been made on behalf of the defendant. The Learned Resident Magistrate refused the application for adjournment and set the suit for hearing later that day at 12.00 noon. At 12.00 p.m., the Learned Resident Magistrate called out the case for hearing in the absence of counsel for the plaintiff. Counsel for the defendant urged that the suit be dismissed as counsel for the plaintiff was not in court whereupon the appellant's suit was dismissed with costs for non-attendance. That dismissal provoked the appellant's application to set aside the dismissal which, as already stated, was declined by the Learned Resident Magistrate. Counsel for the appellant argued before the Learned Resident Magistrate that at the time the plaintiff's suit was called for hearing at 12.09 p.m., he was appearing before another magistrate, Hon. Makungu. He regretted the inconvenience he had caused the court and the respondent. It is significant that the proceedings before the Learned Resident Magistrate were ex parte as the application to set aside the order of dismissal was not opposed.

In a reserved ruling delivered on 6th November 2007, the Learned Resident Magistrate dismissed the appellant's application on the grounds that he had not demonstrated that the suit was dismissed when the appellant was in court and further that counsel had not demonstrated that he indeed was engaged before Hon. Makungu when the appellant's suit was called out for hearing at 12.09 p.m. on 17th October 2007.

With regard to the argument that the dismissal of the appellant's case was due to counsel's mistake which

should not be visited upon the appellant, the Learned Resident Magistrate was not impressed. He found that counsel for the appellant had been negligent and the appellant could seek redress elsewhere against his counsel. The Learned Resident Magistrate then dismissed the appellant's application to set aside the order dismissing the appellant's suit. That is the decision against which the appellant has appealed and has set out three (3) grounds of appeal expressed as follows:-

1) That the Learned Magistrate erred in Law in dismissing the application to set aside the order dismissing the suit for non-attendance.

2) That the Learned Magistrate erred in Law in going into issues which were never argued at the hearing of the application.

3) That the Learned Magistrate erred in Law in failing to consider the principles applicable to a setting aside application.

When the appeal came up for hearing before me on 12th March 2009, counsel agreed to file written submissions which were in place by 2nd April 2009. In his written submissions counsel for the appellant mainly contended that the Learned Resident Magistrate had not properly exercised his discretion in dismissing the appellant's application to set aside the dismissal of the suit and as a result the appellant had been denied justice. Reliance was placed upon the decision of Harris J in Shah – v – Mbogo and Another [1967] EA 116 and cited the following passage:-

"The discretion is intended so to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake 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."

Counsel for the respondent on his part contended that the appeal is incompetent as it was filed outside the prescribed period. Counsel for the respondent did not otherwise challenge the merits of the appeal.

I have considered the appeal, the submissions of counsel and the authorities cited. Having done so, I think I should first consider the respondent's contention that the appeal was lodged outside the prescribed period without the leave of the court. Section 79 G reads as follows:-

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the Lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

The decision appealed from was delivered on 6th November 2007. On 8th November 2007 counsel for the appellant, by his letter of even date, applied for copies of proceedings and ruling. The Certificate of Delay exhibited by the appellant is in the following terms:-

"CERTIFICTE OF DELAY

This is to certify that the firm of M/S Khatib & Company Advocates applied to this court for certified copies of proceedings and ruling on 8th November 2007 and the same were delivered to them on 14th day of May 2008. The period aforementioned was required for preparation and delivery of the said copies."

Counsel for the respondent contends that that certificate is not the type envisaged under Section 79 G of the Civil Procedure Act which mentions a copy of the order appealed against. In counsel's view the appellant did not extract the order appealed against and the Certificate of Delay exhibited cannot explain the period covered by the certificate. With all due respect to counsel for the respondent, his argument

flies in the face of the proviso to the definition of decree given in Section 21 of the Civil Procedure Act. The proviso is in the following terms:-

"Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up."

Although that definition relates to a "decree", there is no reason why the logic cannot be applied where an appeal is against an order. In the premises, I find and hold that the order of the Learned Resident Magistrate was appealable notwithstanding that a formal order in pursuance of the ruling was not drawn up. In any event, the failure to formerly extract the order dismissing the appellant's application to set aside the dismissal of his suit has not caused any prejudice to the respondent.

Under the same Section 2 of the Civil Procedure Act, "Order" means the formal expression of any decision of a court which is not a decree and includes a rule nisi. It is significant that the definition is not exclusive. The appellant has exhibited the entire ruling appealed against. In the ruling, the Learned Resident Magistrate dismissed the appellant's application to set aside the dismissal of his suit. The ruling contains the formal decision of the court. The ruling in my view clearly contains the order of the Magistrate appealed against. In the premises I find and hold that the Certificate of Delay issued by the Learned Resident Magistrate satisfies the requirements of Section 79 G of the Civil Procedure Act.

The upshot is that the technical objections raised by the respondent are clearly without merit and are dismissed.

Turning to the merits of the appeal, I must state from the outset that this appeal is against the decision of the Learned Resident Magistrate who, no doubt, was exercising his discretion given him by Order IXB Rule 8 of the Civil Procedure Rules. Such exercise of discretion may only be interfered with if it is shown that the Learned Resident Magistrate's exercise of such discretion was wrong in principle or that his decision is plainly wrong otherwise that discretion is unfettered, the main concern of the court being to do justice to the parties. (See Patel – v – E.A. Cargo Handling Services Limited [1974] EA 75).

In considering an application to set aside an ex-parte judgment the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question, as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. (See Sebei District Administration – v – Gasyali and Others [1968] EA 300 which was cited with approval in Keys Investments Limited – v – Thrift Homes Limited (Nairobi CA No. 210 of 2002) (UR).

In Shah – v – Mbogo supra, it was held that the discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake 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.

Although the above cases considered setting aside default judgments, the principles enunciated therein apply with equal force when considering dismissal of a suit for non-attendance as in this case. I have carefully read the record of the Learned Resident Magistrate. With all due respect to him, he does not appear to have fully appreciated the principles discussed above. On 17th October 2007 when the appellant's suit came up for hearing before the Learned Resident Magistrate, the appellant was ready to present his case. Indeed his counsel successfully opposed an application for adjournment which was made on behalf of the respondent. When the suit was called for hearing later on in the day, the appellant's counsel was not in court. In his application to set aside the dismissal, Learned counsel explained that at the time when the suit was called for hearing, he had been engaged before another Magistrate, Ms Makungu. Learned counsel swore an affidavit to that effect. He even deponed that his client the appellant was setting in court when his case was dismissed. It is illustrative that the respondent had not challenged the factual position presented before the Learned Resident Magistrate by way of a

replying affidavit. Indeed not even his counsel was present when the application was argued before the Learned Resident Magistrate. Yet the Learned Resident Magistrate discredited the appellant's reasons for failure to prosecute his suit on 17th October 2007. With all due respect to the Learned Resident Magistrate, I get the impression that he may have descended into the arena of dispute on behalf of the respondent. The appellant had been ready to proceed with his case in the morning of 17th October 2007. He was informed that his case would proceed at 12.00 noon. On what basis would the Learned Resident Magistrate doubt that the appellant was infact in court at 12.09 p.m. when his case was dismissed. Counsel for the appellant had sworn an affidavit that he was at the time of dismissal before Ms Makungu. There was no challenge to that factual statement of counsel from the respondent. So, on what basis did the Learned Resident Magistrate disbelieve the statement under oath?

In my view, the appellant's counsel clearly explained why he did not attend the Learned Resident Magistrate's court when the appellant's case was called for hearing at 12.09 p.m. on 17th October 2009. The explanation was in my judgment not unreasonable. In those premises, it cannot be said that the appellant had deliberately sought to obstruct or delay the course of justice. Further, the record does not show that the Learned Resident Magistrate even remotely considered the nature of the appellant's claim or whether the respondent could be reasonably compensated by costs for any delay that would be occasioned by setting aside the order dismissing the appellant's suit. It is clear to me that the Learned Resident Magistrate was not alive to the principle that to deny a subject a hearing should be the last resort of a court. A distinguished Judge of Appeal, who also once served as our Chief Justice, once stated that the courts do not exist for the purpose of instilling discipline among advocates.

I am therefore of the opinion that the Learned Resident Magistrate appears to have exercised his discretion improperly. Had he been alive to the principles discussed above, I have no doubt that, he would have come to a different conclusion. I find that the Learned Resident Magistrate erred in principle and arrived at a decision which I find manifestly wrong. I therefore allow this appeal and set aside the order dismissing the appellant's application to set aside the order dismissing his suit for non-attendance and I substitute that order with an order allowing the appellant's application dated 18th October 2007.

Costs of that application will be borne by the appellant.

The appellant shall however have the costs of this appeal.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Adhoch holding brief for Ndegwa for the Respondent.

F. AZANGALALA

JUDGE

18TH MAY 2009