REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 202 of 2007

LEENA APPARELS LIMITED……..…...…..APPELLANT

VERSUS

MWATHA MULWA…….....RESPONDENT

JUDGMENT

I have before me an appeal by Leena Apparels Limited (hereinafter "the appellant") the defendant in the original action from the ruling of Ag. Principal Magistrate, Hon. Kirui, whereby the Learned Ag. Principal Magistrate dismissed the appellant's application to set aside the ex-parte judgment entered against it for non-attendance. The said application was lodged under the provisions of Order IXB Rule 8 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all other enabling Provisions of the Law. Order IXB Rule 8 empowers the court to set aside or vary a judgment entered or suit dismissed for non-attendance. The appellant's application therefore clearly fell for determination under the purview of the said rule and it was unnecessary to invoke the inherent powers of the court codified in section 3A of the Civil Procedure Act.

The record of appeal shows that the appellant's application arose from the decision of the Learned Ag. Principal Magistrate to hear the plaintiff ex-parte, on 17th May 2007. The respondent had previously obtained a default judgment for failure to enter appearance and file defence which default judgment was on the appellant's application, set aside on 15th April 2007. The respondent then, after due notice upon the appellant's advocates, fixed the case for hearing on 17th May 2007. On that date, neither counsel nor the appellant attended and the respondent was allowed to put forward her case. In a reserved judgment delivered on 14th June 2007, the Learned Ag. Principal Magistrate entered judgment for Kshs. 324,000/=. It is that judgment which the appellant unsuccessfully sought to set aside.

Counsel for the appellant argued before the Learned Ag. Principal Magistrate in the main that he had not diarised the case for 17th May 2007, with the result that, neither him nor his client's representative attended. He pleaded that his client should not be punished for his mistake especially as the appellant had a strong defence. In dismissing the appellant's application, the Learned Ag. Principal Magistrate held that a regular judgment had been entered against the appellant and saw no reason to interfere since, in his view, the non-attendance of the appellant was inexcusable having been given an adequate and proper opportunity to be heard. That is the decision which provoked this appeal.

The appellant has set out some 8 grounds of appeal which in my view can all be considered under grounds 4, 5 and 7 which read as follows:-

4. That the Learned trial Magistrate grossly misdirected himself in failing to address himself to the defence already filed by the defendant and thus consequently coming to a wrong conclusion of the same.

5. That the Learned trial Magistrate misdirected himself in failing to address himself to the defendant's supporting affidavits setting out the reasons for failure to attend court when the matter was set for hearing.

7. That the Learned Magistrate erred in Law and fact in failing to appreciate the principles applicable in setting aside the ex parte judgment and hence denying the defendant an opportunity to be heard in defence.

When the appeal came up for hearing on 18th June 2009, counsel for the appellant recited the arguments presented before the Learned Ag. Principal Magistrate and urged that the appeal be allowed. On her part, the respondent, who appeared in person, contended that the appeal was intended to delay recovery of what was properly due to her given that the appellant had previously successfully applied to set aside a previous default judgment.

I have considered the appeal, submissions of counsel and the respondent and the authorities cited. Having done so, I take the following view of the matter. This appeal is against the decision of the Learned Ag. Principal Magistrate in exercise of his wide discretion given 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 Ag. Principal Magistrate's exercise of such discretion was wrong in principle or that his decision is plainly wrong otherwise the 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 919740 EA 75).

In considering an application to set aside an ex parte judgment, the nature of the action should be considered, the defence if any 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 it should be remembered that to deny a litigant 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 and Another [1967] EA 116, 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.

Having carefully read the record of the Ag. Principal Magistrate, I do not, with respect, get the impression that the Learned Ag. Principal Magistrate fully appreciated the principles discussed above. What was before the Learned Magistrate was not simply whether or not the judgment he had entered against the appellant was regular or proper and whether the appellant had been given an adequate opportunity to be heard. Of course those considerations were to be taken into account in deciding whether to set aside a default judgment. But, with respect, they are not the only considerations. The record does not show that the Learned Ag. Principal Magistrate considered whether the defence put forward by the appellant raised bona fide triable issues. There is further no evidence that the Learned Ag. Principal Magistrate considered whether the respondent could reasonably be compensated by costs for any delay that would be occasioned if the ex parte judgment would have been set aside. The record does not also show whether the Learned Ag. Principal Magistrate appreciated that the consequence of declining to set aside the ex parte judgment was to punish the appellant for the mistake of his advocate. The Learned Ag. Principal Magistrate discredited the reason for counsel's failure to attend his court when the suit came up for hearing before him. He indeed considered the non-attendance inexcusable. But was it? Apaloo J.A as he then was in Philip Chemwolo & Another – v – Augustine Kubende [1982 – 88] KAR 103 provided the parameter to guide the court. The distinguished Judge stated as follows:-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits…….

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there

is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

In view of those observations, it cannot be said that the failure to diarize the case by counsel for the appellant was unreasonable or inexcusable. In the premises, it cannot also be said that the appellant had deliberately sought to obstruct or delay the course of justice.

I am therefore of the opinion that the Learned Ag. Principal Magistrate seems to have exercised his discretion improperly. Had the above principles been brought to his attention, I have no doubt that he would have come to a different conclusion. The Learned Ag. Principal Magistrate therefore erred in principle and arrived at a decision which I find manifestly wrong. I am therefore entitled to interfere. I allow this appeal and set aside the order dismissing the appellant's application to set aside the ex parte judgment entered against it in favour of the respondent on 14th June 2007 and I substitute that order with an order allowing the appellant's application dated 28th June 2007.

Costs of that application will be borne by the appellant.

Each party shall however pay its/her own costs of this appeal.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2009.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Nyaberi holding brief for Mr. Kamau for the Appellant and the Respondent in person.

F. AZANGALALA

JUDGE

28TH JULY 2009