REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.138 OF 2018

ROSE JERONO TIREN……...……...…APPELLANT

VERSUS

ISAAC K. TALLAM……..…. RESPONDENT

(Being an Appeal against the Ruling of Hon. Charles Obulutsa Chief Magistrate delivered on 2nd day of November 2018 in Eldoret CMCC 321 of 2018)

JUDGMENT

Introduction & Background

1. A brief background giving rise to this appeal is that the respondent herein filed a suit against the appellant in the lower Court through a plaint dated 19th March, 2019. The respondent claimed a liquidated sum of Kshs 7,500,000 that was advanced to the appellant vide loan agreement dated the 16th of February 2017 and an addendum dated the 18th of April 2017. The appellant is the registered owner of property wit Eldoret Municipality/Block 13/318 (suit property) whose title was surrendered to the respondent by the appellant as security for the said loan.

2. The respondent through an authorized process server, served the appellant with summons to enter appearance on the 24th of March 2018 and affidavit of service dated the 20th of April 2018 filed was in court. On the same day, that is, the 20th April 2018, the respondent herein filed a request for judgement pursuant to Order 10 rule 6 of the Civil Procedure Rules citing the failure of the appellant to enter appearance and file defence within the requisite time. Once again, the authorized court process server served the appellant by placing the documents (notice of entry of Judgement dated the 26th April 2018) as instructed by the appellant. There is no indication that the appellant entered appearance nor filed defence.

3. The lower court on the 25th of April 2018 entered judgement against the appellant herein for failure to enter appearance and defend the respondent's claim. Consequently, the court issued a prohibitory order on 17th of May 2018 against the appellant as pertains to the suit property, prohibiting her from charging part or whole of the said property. Subsequently, a Notification of sale was issued on the 25th of May 2018. The sale was to be by public auction and was to be held on a Monday, the 23rd of July 2018 commencing 11.00 a.m. According to the notification, the sale was to be held by Eshikhoni Auctioneers in front of post office Eldoret along Uganda Road.

4. On the 16th of July 2018, the appellant herein filed a memorandum of appearance and notice of appointment of advocates. On the same day, the appellant filed an application vide a notice of motion dated even date seeking stay of execution restraining the respondent from selling the suit property. Furthermore, the appellant sought an order setting aside the ex-parte judgement obtained by the respondent arguing that there was lack of service. She further argued that she had fully repaid the loan advanced to her by the respondent and filed a draft defence to the same together with a counter claim seeking court to fix the reserve price for the suit property.

5. The court on the 17th of July 2018 granted stay pending the hearing and determination of the application. In response to the application, the respondent filed a replying affidavit dated the 31st of July 2018 and reiterated the content of his plaint and further averred that the appellant had been duly served but decided to delay and only moved court when she realized that the execution of the judgement had begun. In response to the replying affidavit, the appellant filed a supplementary affidavit dated the 8th of August 2018 reiterating that she was not served, that the loan agreement was fatally defective and that she should be granted an opportunity to defend the suit. She also attached a valuation report on the suit property dated 18th July 2018 showing the value of the property as Kshs 11,555,000.

6. On the 14th of August 2018, the appellant filed a notice of preliminary objection arguing that the respondent's replying affidavit was fatally defective as it had been sworn by a stranger and prayed that the entire suit be struck out.

7. On the 15th of August 2018, the process server Eliud Makokha took the stand and testified that he did not do permanent service on the appellant and that he did not apply for substituted service. However, he testified that he attempted to serve the appellant and in fact called her at which point the appellant told him to drop the documents inside the compound and confirmed that she received the documents.

8. The application for stay and Preliminary Objection were canvassed by way of written submissions and the court via ruling delivered and dated the 2nd of November 2018 dismissed the appellant's applications and vacated the temporary order of stay. The court in particular held that there was valid personal service and that the draft defence did not establish any credible defence.

9. The appellant being dissatisfied with the above ruling filed a Memorandum of Appeal dated the 6th of October 2018 raising the following 10 grounds of appeal:

> **(i) That the Learned Trial Magistrate erred in holding that there was valid personal service when the process server admitted that no personal service had been effected by the 25th of March 2018 as required at law; and no order for substituted service attempted or obtained.**
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> **(ii) The learned trial Magistrate erred in dismissing the application when he had acknowledged that there was an error apparent on the face of the record M/s Terer Kibii having sworn the Verifying Affidavit and filed the submission when in fact they were not on record; and which amounts to an error on record.**
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> **(iii) The Learned Trial Magistrate erred in law in fact and stating there is no credible defence when the appellant had a credible draft defence on record capable of sustaining a trial.**
>
> **iv) That Learned Trial Magistrate erred in confusing the conditions for grant of an injunction for conditions for setting aside an ex-parte judgement thereby arriving at an erroneous finding based on irrelevant conditions.**
>
> **v) The Learned trial Magistrate erred in upholding that there was effective personal service when the process server admitted that no such service had been effected as on 25th March 2018.**
>
> **vi) The Learned trial Magistrate erred in law in not realizing that the appellant had issued a notice of Preliminary Objection on the defect of the Verifying Affidavit which could only be cured by setting aside the judgement as any allowed amendment would attract opposing pleadings, after an application is preferred; which cannot be done with an ex-parte judgement on record.**
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> **vii) The Learned trial Magistrate erred in rejecting the plea for fixing a reserve price for selling the security when the valuation report had been filed and the process provided for at law.**
>
> **viii) That the Learned trial Magistrate has demonstrated open bias and failure to determine the application and preliminary objection fully, thereby prompting the appeal herein.**
>
> **ix) The Learned trial Magistrate erred in making a finding that the defendant had not made up a prima facie case but failed to discuss the other limbs of Giella vs Cassman Brown as the appellant had pleased that she would suffer irreparable loss were the only matrimonial home be sold without fixing a reserve price.**
>
> **x) The Learned trial Magistrate erred in failing to set aside the ex-parte orders, the Appellant having issued notices to discount the averment that the respondent was transacting financial business without a licence contrary to Section 3(1)(a) and (2) of the Banking Act.**

10. The appellant prays for this Court to set aside the ruling delivered by the Chief Magistrate dated the 2nd of November 2018. She also prays that the court does reconsider the evidence on merit and substitute the ruling with a suitable finding. Finally, the appellant prays that the draft defence be admitted and the file be referred to another magistrate for hearing and determination.

11. The Appeal was canvassed by way of written submissions. On the 28th of July 2021, the law firm of M/s Angu Kitigin & Co. Advocates filed written submissions on behalf of the appellant. The respondent's written submissions were filed on the 30th of August 2021 by the firm of Mburu Maina & Co. Advocates.

Appellant's Submissions

12. The appellant's counsel submitted that there was no proper service as contemplated under Order 5 rule 6 of the Civil Procedure Rules. In particular, counsel made reference to the testimony of the process server Eliud Makhakha who admitted in cross examination that he did not effect personal service on the appellant. Consequently, the appellant submitted that the summons in the suit were not served to the standard set at law and hence defective.

13. Secondly, the appellant submitted that she be granted leave to unconditionally defend the suit since there is an imperative on court to do justice without regard to technicalities. In particular, since the draft defence pleaded that the loan had been fully repaid, it was incumbent upon the trial court to consider this evidence and give a fair judgement rather than risk the appellant's property being disposed off without the appellant being heard.

14. As a corollary to the above, the appellant submitted that she was not granted due process for the reason that the Court fell into error by ruling that the application for stay and setting aside of the judgement was res-judicata before considering the terms upon which the dismissal was made. Further, it was appellant's view that the trial court usurped the jurisdiction of the High Court by ruling that litigation has to come to an end when a competent appeal was pending. The appellant also disputed the eviction order obtained arguing that the same was fraudulent and abuse of the court since due process envisaged under Article 50 of the Constitution.

15. The appellant further submitted that the court erred in discussing the conditions of injunction while addressing the question of setting aside of the ex-parte judgment. It was appellant's view that should the court have considered the grounds for setting aside judgement, then the court would have come to a contrary and correct finding. In the alternative, the appellant submitted that the court having considered the grounds of injunction, the court should have discussed the other two conditions in **Giella vs Cassman Brown** and not just address prima facie condition.

Respondent Submissions

16. On his part, counsel for the respondent submitted under three headings namely: competency of the appeal, merits of the grounds of appeal and finally, the competency of submissions made on grounds not set forth in the memorandum of appeal.

17. On the first heading, competency of the appeal – the respondent submitted that the appellant's record of appeal is a strange one and offends a wide range of rules and principles. First, the respondent submitted that the record of appeal and the supplementary record are indicated to have been made in accordance with the Court of Appeal Rules. Secondly, it was submitted that the Record of Appeal is itself an application for stay pending appeal. Third, it was submitted that the record of appeal has no index as to the documents contained therein. Finally, and fundamentally as submitted by the respondent's counsel, neither the Supplementary record nor the record of appeal contains a copy of the Order appealed against. In particular, it was submitted that Order 42 rule 13 (4) is clear on what a Record of Appeal ought to contain and an order appealed against is a primary mandatory document that cannot be overlooked and renders the appeal incompetent.

18. It was submitted that the appeal being incompetent, the provisions of Article 159(2)(d) of the Constitution cannot come to the rescue of the appellant. Reliance was placed in the Supreme Court case of ***Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others [2015] Eklr.***

19. It was further submitted that the record of appeal does not have the final submissions made by the respondent in court in respect to her preliminary objection and the application dated 16th July 2018 and that it is not for the appellant to choose which documents to include as that offends the law thus the appeal is incompetent.

20. On the second heading, that is, the merits of the grounds of appeal, the respondent submitted that the court was right in holding that there was proper service and as such, the ex-parte judgement was regular. Counsels' submission was therefore that the court was right in upholding the default judgement as regular since the power to set aside an ex-parte judgement is at the discretion of court. Reliance was placed on the case of ***Esther Wamaitha Njihia & 2 others vs Safaricom Ltd [2014] eKLR*** with counsel submitting that for the appellant to succeed in her application, she ought to have demonstrated that the said discretion was exercised injudiciously. Further, counsel submitted that the trial court did consider the affidavit of service and testimony of the process server and satisfied itself that the service was proper since the appellant deliberately evaded service in order to delay and or obstruct the cause of justice. In this regard, Counsel submitted that the discretion to set aside an ex-parte judgment is not meant to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.

21. It was further submitted that the trial magistrate was right in rejecting the averments in the proposed draft defence since the court subjected the draft defence to analysis and found that the evidence in support did not explain how the appellant paid the sum that she claimed she indeed paid nor was there any proof of payment of the sum advanced by the respondent.

22. Counsel further submitted that the was no bias on the part of the trial magistrate in dismissing the appellant's Notice of motion and Preliminary Objection since the appellant did not demonstrate the extent and nature of the bias that she plead. Reliance was placed in the case of ***Accredo AG & 3 others vs Steffano Ucceli & another [2018] eKLR*** with counsel submitting that the appellant has always complained about all judicial officers who have handled the matter. Further, counsel submitted that the issue of verifying affidavit was considered by the trial magistrate who held that the mistake on the affidavit was not fatal to the suit.

23. As regards the issue of injunction, counsel submitted that the trial magistrate did not err in law while exercising his discretion on whether or not to grant injunction. In particular, it was submitted that the submission by the appellant suggesting that the trial magistrate should have considered not just prima facie case but the other two limbs of **Giella vs Cassman Brown**, is without any legal foundation since an applicant seeking injunctive reliefs must satisfy the three principles cumulatively. In this regard, reliance was placed in the ***Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR***.

24. On the issue of reserve price, the respondent submitted that the appellant despite arguing that the respondent was not entitled to any claim against her argument that she had fully settled the loan, still seeks to have court set a reserve price for sale of the suit property and is thus contradicting herself. In any event, the respondent submitted that the property has already been sold and the appellant has not lodged any complaint as regards the auction process and that the only remedy that the appellant has is damages under Section 26 of the Auctioneers Act.

25. On the competency of submissions made on grounds not set forth in the memorandum of appeal, counsel submitted that Order 42 rule 4 of the Civil Procedure Rules prohibits the taking by an appellant of any grounds not set forth in a memorandum of appeal without the leave of court. Accordingly, counsel submitted that the appellant's submissions that go beyond the ruling subject to this appeal, are irregular and prejudicial to the appellant and the court ought to ignore them in their entirety. Counsel urged court to find that the appeal lacks merit and to dismiss the same with costs.

Determination

26. It is clear that the suit property has already been auctioned, in which case, the very substratum of the appeal has been severally frustrated.

27. Having carefully considered the written submissions filed by both Counsel on record alongside the grounds of appeal contained in the memorandum of appeal, the ruling by the lower court, which forms the subject of this appeal and the legal precedents cited by each Counsel, it is my opinion that the following issues arise for determination

i. Whether the appeal is competent

ii. Whether there was valid personal service

iii. Whether the trial court erred in failing to set aside the ex-parte Orders and upholding the default judgement.

i. <u>Whether the appeal is competent</u>

28. The respondent submitted that the appeal is incompetent since the order appealed from has been omitted in the record of appeal. It was the respondent's submission that an order or decree appealed from is a primary mandatory document that must form part of the record of appeal. He further submitted that where an order or decree it has been omitted, then the appeal must fail for failure to meet the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules.

29. ***Order 42 rule 13(4) of the Civil Procedure Rules*** provides:

> ***'Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—***
>
> ***(a) the memorandum of appeal;***
>
> ***(b) the pleadings;***
>
> ***(c) the notes of the trial magistrate made at the hearing;***
>
> ***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
>
> ***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
>
> ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***
>
> ***Provided that—***
>
> ***(i) a translation into English shall be provided of any document not in that language;***
>
> ***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).'***

30. The above provision unambiguously lists the documents that must be on record before an appeal is allowed to proceed to hearing.

31. In particular, Order 42 Rule 13(4)(f) of the Civil Procedure Rules, is specific that what is required at the appellate stage is the ***Judgment, order or decree appealed from***. It is my view that the use of the conjunction "or" is both deliberate and intentional so that an appellant is not mandatorily obligated to attach both the Judgment and the decree. A judgement in my opinion suffices.

32. In ***Elizanya Investments Limited v Lean Energy Solutions [2021] eKLR***, the court citing the case of ***Nyota Tissue Products v Charles Wanga Wanga & 4 Others [2020] eKLR,*** when addressing the issue of failure by an appellant to file a decree, stated thus;

> ***"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."***

33. In the present case, the appellant has attached a copy of the lower court Judgment in compliance with the said provisions. It is discernible from a reading of the above provisions that it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal.

34. In the circumstances, it is my opinion that the appeal is competent.

ii. Whether there was valid personal service

35. At the heart of the appeal is the appellant's contention that she was not served with summons resulting in the ex-parte judgement. It was her contention that the process server did not serve her as envisaged under Order 5 rules 6 of the Civil Procedure Rules and as such the service was defective. In the alternative, she submitted that if indeed she was avoiding service, then there were alternative modes of service that were not utilized.

36. The record indicates that the process server Mr. Eliud Makhakha via an affidavit of service dated the 20th of April 2018 detailed his attempts to serve the appellant herein. The said affidavit indicates that the process server went to the appellant's house in Elgon View Eldoret with the intention to effect service but found that the appellant was not at home. He thus called her and introduced himself at which point the appellant informed him that she was in Moiben. The process server travelled to Moiben on the 25th of March 2018 to the home of the appellant's parents and found a family member and introduced himself but did not find the appellant. He averred that the appellant informed him to drop the documents in Eldoret at her home and that she, the appellant, would send someone to collect the documents for her. Mr. Makhakha further averred that on the same day at about 5.00pm he called the appellant who confirmed that she had received the documents.

37. The record further indicates that on the 15th of August 2018, the process server Eliud Makokha took the stand and testified that he did not do permanent service on the appellant and that he did not apply for substituted service. However, he testified that he attempted to serve the appellant and in fact called her at which point the appellant told him to drop the documents inside the compound and confirmed that she received the documents.

38. The trial court considered the evidence above and was satisfied that the appellant informed the process server to drop the summons to enter appearance at her home and as such, she was well aware of the case.

39. ***Order 5 Rule (1) (5) (6) of Civil Procedure Rules*** provides: -

> **1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**
>
> **(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.**
>
> **(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.**

40. In the instant case summons to enter appearance were issued on the 21st of March 2018 and served on 25th March 2018. The date of collection of summons for service is not disclosed by the respondent but the process server indicated he received them for the respondent's counsel for service on 24th of March 2018.

41. The respondent through an affidavit of service by Mr. Makhakha, a licensed and authorized court process server has proved that summons were served upon the appellant on the 25th of March 2018. It is clear from the above and also the testimony of Mr. Makhakha that he indeed received instructions from the appellant to drop the documents at her home in Eldoret. Furthermore, there is no evidence to suggest that the process server was lying on stand. In any case, the appellant has not disputed that she has a home in Eldoret and neither has she controverted that she was called by the process server on the 25th of March 2018 for purposes of service.

42. The Court of Appeal in ***Shadrack arap Baiywo vs. Bodi Bach [1987] eKLR***, held that:

> ***"There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."***

43. Taking into account the process server's affidavit of service and testimony, it is my considered opinion that the appellant was duly served, and that was determined to delay and or frustrate the respondent's case.

44. Further, I am satisfied that the appellant was served because a few days to the intended auction of the property, she filed a memorandum of appearance and notice of appointment of advocate together with draft defence. She however did not explain how she became aware that there was a claim/case against her that led her to hurriedly piece together draft defence and the documents she attached. This leads me to one conclusion- that she was well aware that there was a case against her and she only responded to the suit when she became aware that her property was about to be auctioned.

45. Taken altogether, it is my opinion that the appellant was duly served.

iii. Whether the trial court erred in failing to set aside the ex-parte Orders and upholding the default judgement.

46. The appellant submitted that the court erred in failing to set aside the ex-parte orders and in turn upholding the default judgement. Via an application dated the 16th of July 2018 made at the lower court, the appellant sought stay of execution of the ex-parte judgement, setting

aside of the ex-parte judgement, unconditional leave to defend the suit and in the alternative, the court to fix a reserve price for the suit property.

47. The appellant's main contention in the current appeal however, is that the trial court erred by considering the wrong principles by relying on grounds of injunction rather than those for setting aside of judgement while determining the application dated the 16th of July 2018.

48. Secondly, the appellant raised a preliminary objection as to the validity of the verifying affidavit noting that the affidavit indicated the advocate as Terer Kibii & Co yet the suit had been filled by the firm of Mburu Maina & Co. She thus wanted the suit struck out and the ex-parte orders be vacated.

49. Lastly, the appellant argued that the court should have considered her draft defence and admit the same.

50. This was opposed by the respondent who submitted that there was an error on the verifying affidavit which could be corrected through an amendment.

51. The trial court considered the evidence and, in its ruling dated the 2nd November 2018 held that the errors could be corrected via amendment and dismissed the preliminary objection and noted that the draft defence did not disclose how the loan amount had been settled in full. Consequently, the learned trial magistrate dismissed the application and upheld the default judgement.

52. ***Order 10 rule 11 of the Civil Procedure Rules*** clothes court with unfettered discretion to set aside judgment on such terms as it deems fit and just. This position was affirmed in ***Shah vs Mbogo and Another [1967] EA 116***. The said discretion must however be exercised judiciously and with extreme caution.

53. The discretion of the court to set aside ex parte default judgment was considered by the Court of Appeal in ***Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR***, where Kneller JA observed as follows:

> ***"The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.***
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> ***This discretion 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: Shah v Mbogo [1969] EA 116,123 BC Harris J.***
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> ***The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F.***
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> ***There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "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." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..."***

54. In addition, the principles for the setting aside of ex parte judgment were considered by the predecessor Court of Appeal for East Africa in **Mbogo v. Shah (1968) EA 93**, where the court held that:

> ***"Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.***
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> ***Dealing with the first question, it is quite clear that the Judge has discretion under O. 9, r. 10, but of course he has to exercise that discretion judicially. In Kimani v. McConnell [1966] E.A. 547), HARRIS, J., dealing with the question as to the circumstances to be borne in mind by a judge on an application under that rule, said this (ibid. at 555G):***
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> ***"…in the light of all the facts and circumstances both prior and sub-sequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."***

55. From the above precedents, it is clear that the object of the discretion to set aside is 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. However, in exercising this discretion, the court is obliged to consider any defence put forward by the applicant who seeks leave to defend, whether such defence is disclosed in a draft defence filed with the application for setting aside, even where the defence is irregularly brought to its notice. See ***Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR.*** After all, the main concern of court is to do justice to the parties before it.

56. I agree with the respondent's submissions that for a party to succeed in challenging the exercise by a trial court of the discretion vested in it regarding the power to set aside an ex-parte judgement, that party must demonstrate that the said discretion was exercised injudiciously or on wrong principles. Furthermore, it is trite law that an appellate court will only interfere with a trial court's decision if it is established that the court proceeded on wrong principles or that it applied extraneous factors so as to arrive at an erroneous decision.

57. In the instant appeal, the appellant has submitted that the trial court proceeded on wrong principles. That is, the court considered principles for grant of injunction as opposed to those of setting aside ex-parte judgement.

58. I am however not persuaded that the learned trial magistrate proceeded on wrong principles. This is so because both prayer for injunction and for setting aside of ex-parte orders are in the discretion of the Court. Both discretion however, must be exercised judiciously and not capriciously. In addition, the court did consider all other factors including the fact that at the time of advertisement for sale of the suit property, the appellant was in default, that she had not been coerced to sign the agreement or that the same was signed under duress, that requisite notices had been issued by the respondent but the defendant did not comply with them and further, that the agreement was explicit that in default of payment, the respondent was at liberty to sell the suit property.

59. The impugned judgment does indicate that the trial court considered the appellant's draft defence and came to the conclusion that it raises no triable issues. In particular at page 189-191 of the Record of Appeal under heading analysis and determination, the court held that:

> *"From what is presented, it is not in dispute the defendant was advanced money by the plaintiff who depones that she paid the loan in full. It is noted in the supporting affidavit the defendant did annex some documents to show what she paid. Copies of her bank statements shows payment to the plaintiff of 1,300,300/=. There are cash deposits into the plaintiff's account by the defendant of 1,500,000/= and 650,000/=. The payment of cash of 25,000/= was into her account not the plaintiff's. She mentions two cash payment of 1,700,000/= which is not supported with any acknowledgement.*
>
> *In the supporting affidavit, the defendant has annexed an agreement indicating she borrowed 1,300,000/= in November 2013. The payment she made is more than the amount. She has not explained why. The explanation is found in the plaintiff's affidavit in which is annexed another agreement in which the defendant borrowed another 7,100,000/= on 16th February 2017. The amount was to be paid in two installments the last being on 1st June 201 of 5,300,000/=. As security, it is indicated that the defendant had surrendered her original title deed and executed transfer forms in favor of the plaintiff and if there was default under clause 3, the plaintiff was at liberty to sell the land by private treaty or public auction.*
>
> *An addendum was subsequently made on 18th April 2017 increasing the loan amount to 7,500,000/=. The repayment period remained the same as in the earlier agreement. Whereas she says the full amount was paid, she has not shown how. It is also curious that she asks the court to fix a reserve price for the sale of her land which counsel for the plaintiff says is shooting herself on the foot. It would be taken that is an admission and she is worried her land maybe sold at a lower price to her detriment."*

60. It is clear that the trial court did consider the appellant's draft defence before arriving at its conclusion. There is therefore no indication that the learned magistrate acted capriciously.

61. In the circumstances, I see no reason to depart from the holding of the learned trial magistrate.

Conclusion

62. From the foregoing paragraphs of this judgment, I find and hold that the appeal herein lacks merit. The same is dismissed with costs.

Dated, Signed and Delivered at Eldoret this 6th day of December 2021.

E. K. OGOLA

JUDGE