REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 376 OF 2003

FRANATO ENTERPRISES……APPELLANT

VERSUS

ANTHONY MAINA WACHIRA…….RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order of the Senior Resident Magistrate Mrs N.A. Owino (as she then was) given on 19th June 2003 in Milimani CMCC No. 5380 of 2001.

2. The impugned ruling determined and dismissed the appellant's application by way of chamber summons brought under the provisions of Section 3, 3A,34 (1) of the Civil Procedure Act and the then Order IXA Rule 10, 11, Order XX1 Rule 21 of the old Civil Procedure Rules, seeking for setting aside of the exparte proceedings, judgment and decree entered against the defendant/appellant herein in favour of the plaintiff/respondent and all consequential orders, and that the defendant/appellant/applicant in that application be granted leave to defend the suit; and that the suit be heard by another magistrate other than Honourable N.A. Owino (Mrs) (as she then was).

3. The application also sought for stay of execution of the judgment and decree pending hearing and determination of the application.

4. After hearing the application which was not defended, the trial magistrate dismissed the application with costs to the respondent/plaintiff vide her ruling of 19th June 2003.

5. Being dissatisfied with that order of dismissal, the appellant herein who was the applicant/defendant in the trial court filed this appeal vide a Memorandum of Appeal dated 20th June 2003 setting out 7 grounds of appeal namely.

1. That the Learned Magistrate erred in law and in fact in dismissing the appellant's application dated 19th May 2003 when the respondent had not in law opposed the said application.

2. The Learned Magistrate erred in law and seriously misdirected herself when she dismissed the appellant's application without regarding or considering at all the appellant's affidavit of Francis Thaiya, sworn and dated 19th May 2003 and the contents of that affidavit in support of the application.

3. The Learned Magistrate erred in law and seriously misdirected herself when she failed to appreciate

that in dismissing the appellant's application dated May 19,2008 she denied the appellant the opportunity to defend the suit, violating its natural justice right to be heard in the suit.

4. The Learned Magistrate erred in law and in fact when she stated as her reasons in exercise of the discretion to dismiss the appellant's application dated 19th May 2003, that the defendant was not keen on having the suit in Nairobi CMCC 5389/2001 heard when infact the defendant had always desired the suit to be heard on merit.

5. The Learned Magistrate erred and misdirected herself, in law and in fact when she found that the appellant had not justified setting aside the exparte judgment as prayed in the application dated May 19th, 2003, yet there were sufficient grounds to set aside the said proceedings.

6. The Learned Magistrate erred in law and fact in dismissing the appellant's unopposed application dated 19th May 2003, and she thereby exhibited bias and prejudice against the appellant, as she alleged that the defendant/appellant has not done anything to amend its defence yet it had done so and the defence amended by consent of the parties.

7. The Learned Magistrate erred in law and in fact when she refused the appellant's application dated May 19th, 2003 when in fact the appellant had justified its pleas in the said application.

6. The appellant prayed that the court do set aside the order of Honourable Mrs N.A. Owino in Nairobi CMCC 5380 of 2001 delivered in 19th June 2003 against the appellant be entirely set aside, that the respondent's suit in the lower court which is Nairobi CMCC 5380/2001 be set down for hearing *denovo* before any other magistrate other tan Mrs N.A. Owino, that alternatively, the respondent's suit Nairobi CM CC 5380 of 2001 be dismissed with costs to the appellant; that costs of Nairobi CMCC 5380 of 2001 be awarded to the appellant.

7. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act which empowers the court to:

a) Determine a case finally;

b) Remand a case;

c) Frame issues and refer them for trial;

d) Take additional evidence or require the evidence to be taken; or

e) Order a new trial.

8. And subject to the aforesaid provisions on powers of the appellate and, Subsection 2 of Section 78 of the Civil Procedure Act provides that the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Act on courts or original jurisdiction in respect of suits instituted therein. The above provisions were the subject of interpretation by the Court of Appeal in **SelleVs Associated Motor Boat Company Ltd. [1968] EA 123.**

9. From the onset, I must first clarify that the orders from which the appeal herein arises are appealable as of right pursuant to the old Order 42 of the Civil Procedure Rules which are now Order 43 of the Civil Procedure Rules.

10. The ruling and order arose from an application for setting aside exparte proceedings and judgment entered in default of attendance by the defendant and its counsel at the time when the case was called out for hearing.

11. The appeal was heard by Honourable Onyancha J 18th June 2015 before he was transferred to

Kabarnet High Court and owing to issues relating to his retirement age, the learned Judge was unable to write the judgment which he had reserved for delivery on 16th September 2015. Accordingly, the record was returned to the Presiding Judge of the Civil Division Honourable Msagha Mbogholi J who directed that I write the judgment in this matter after proceedings were typed.

12. Both parties' advocates were in agreement that the matter was old and that they did not wish to start the hearing denovo. That is how this court came to be seized of this age old appeal and my humble task now is to examine the record, reassess the affidavit evidence placed before the lower court, the submissions and decision by the trial court and arrive at my own independent conclusion, bearing in mind that I did not have the advantage of seeing and or hearing the parties as they canvassed the issues before the trial court. Neither did I have the advantage of hearing submissions by counsels for the parties so I must consider the record as it is.

13. In the submissions on behalf of the appellant, Mr Harrison Kinyanjui advocate in support of this appeal, counsel submitted that the plaintiff/respondent's suit in the lower court relates to compensation in general and special damages arising from alleged injuries while in the course of duty. That the defendant/appellant herein filed a defence denying the claim and that the suit was fixed for hearing before the trial magistrate on 25th September 2002.

14. it was submitted that meanwhile the plaintiff/respondent wrote a letter dated 26th September 2001 addressed to the defendant denying any injuries or knowledge of the suit against the defendant/employer/appellant. That it was that letter that provoked the appellant herein to request the trial court to allow the defendant/appellant to amend its defence on record. That the letter by the respondent/plaintiff denied the facts leading to filing of suit.

15. That the court allowed the defendant/appellant to file an application to amend the defence and on 17th October 2002, the application for leave to amend the defence was filed and fixed for hearing on 18th November 2002.

16. that However, on 18th November 2002 counsel for plaintiff/respondent herein submitted before the trial court that the defendant had failed to amend the defence and that he was ready to proceed with the trial that day yet the application for leave to amend the defence was before the court for hearing. That Mr Kinyanjui indicated to the court that he had served the application for leave to amend the defence upon the plaintiff's counsel and that he was ready to prosecute the said application but that the trial court took the view that on 25th September the court had given a last adjournment and that the appellant herein had presumably not amended the defence, and the that the trial court concluded that the defendant was delaying the trial upon which she fixed the hearing for 10.20 a.m. the same day.

17. That despite protests by the defence counsel that there was on record an application for leave to amend the defence and that even despite the respondent's counsel's indication that he was not opposed to the application for amendment of the defence, the court neither recorded that consent nor an order allowing the application for amendment.

18. That when counsel realized that the court was determined to hear the case without considering the pending application for leave to amend the defence, he informed the court that in that case, therefore, he was not prepared to proceed with the trial , in view of the pending application to amend the defence, which application had not been prosecuted.

19. That the court adjourned the matter to 28th November 2002 , while penalizing the defendant to pay costs of shs 5,000/- That nonetheless, the court did not record the disposal of the application for amendment in favour of the defendant.

20. That on 28th November 2002 both parties agreed to have the matter heard at 2.30 pm the same day but that the court did not record that agreement and that when Mr Kinyanjui went to court at 2.0 pm he realized that the suit had been heard and judgment reserved for 5th December 2002 after the

trial magistrate re fixing the hearing for 10 a.m. and taking it up for hearing at 11.15 a.m., while recording that Coram was as before yet there were no advocates before her earlier on that day.

21. Further, that the record showed that Mr Tiego held Mr Wamalwa's brief.

22. That following those developments, the defendant's counsel expeditiously went to his chambers and prepared an application to set aside the exparte proceedings of 28th November 2002. That the application was filed on 19th May 2003 because the file was not available as the trial magistrate had taken it away for writing of the judgment.

23. That even the plaintiff's counsel could not trace the file for filing of submissions and that on 6th February 2003 judgment was delivered without submissions from either side and without notice to the defence.

24. That execution proceedings were put in motion but the defence managed to file an application for stay and obtained a temporary reprieve while seeking to set aside the exparte judgment which application was heard exparte after the respondent's replying affidavit filed late was struck out.

25. That nonetheless, the trial court dismissed the appellant's application to set aside the exparte judgment although the application was prosecuted unopposed.

26. Mr Kinyanjui prayed for that this court should order for a retrial after setting aside exparte judgment, to allow the defence to file its amended defence. He also mentioned to the court that the trial magistrate was vetted out for corruption and concluded that the defendant was seeking for justice and not for a favour.

27. In opposition to the appeal, Mr Wasonga counsel for the respondent submitted that the record shows that on 28th February 2001 the defendant filed an application dated 29th October 2001 seeking for dismissal of the plaintiff's case on the basis that the plaintiff had denied being an employee of the defendant company and that on 13th March 2002 the trial court dismissed that application and directed that the suit proceeds to hearing. That on 25th September 2002 when the suit came up for hearing the defendant sought leave to amend the defence and Mr Wasonga conceded but that indeed the record of the court does not show that concession but that nonetheless, the fact that the defendant actually filed the application would suggest that the court must have responded.

28. That on 17th October 2002 the defence counsel filed an application and fixed it for hearing on 18th November 2002 but that Mr Mwaniki holding brief for Mr Kinyanjui advocate sought for an adjournment.

29. Further, that on 28th November 2002 the court started its business at 9.00 am but re fixed the matter at 10.00 a.m. Although the record does not show what transpired at 10.00a.m. And that the record shows that at 11.00 a.m. the matter proceeded and Coram is recorded as before.

30. Referring to the letters dated 29th November 2002 addressed to the Chief Magistrate by Mr Kinyanjui, it was submitted that counsel had explained what happened on 18th November 2002 and 28th November 2002 hence he must have been aware that the suit was scheduled for hearing between 9-11 a.m.

31. In addition, that the defendant's counsel never filed the amended defence for which leave had been granted.

32. It was submitted that the conduct of the defendant showed lack of keenness to have the suit prosecuted which conduct does not deserve any further favourable discretion.

33. It was also submitted that what befell the trial magistrate was irrelevant and that the impugned ruling confirms that the court was firmly convinced that the defendant was aware of the time for hearing to be 9,10 and 11.30 a.m. not 2.30 pm.

34. Mr Wasonga urged the court to take into account all relevant issues and come to a proper conclusion and further submitted that the delay in prosecuting this appeal is consistent with the defendant's conduct all along hence the appeal should be dismissed to allow the plaintiff/ respondent to enjoy fruits of his judgment. Finally, that too much time had passed and that a retrial would disrupt lives since documents are lost. Counsel submitted that a retrial is not suitable and that an end to litigation is necessary.

35. In a brief rejoinder, Mr Kinyanjui counsel for the appellant submitted that the trial court did not deal with all the issues. Further, that when counsel sought for the file to lodge the application for setting aside proceedings, the trial court replied confirming non availability of the court file until judgment would be delivered which was done in February 2003. He submitted that he was diligent in handling the matter on behalf of his client.

Determination

36. I have considered the submissions by both parties' advocates, which submissions essentially provide a detailed exposition of the trial record and what exactly transpired.

37. As earlier stated, this being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that,

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

38. And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

Applying the principles set out in the Sielle v Associated Motor Boat Company Ltd (supra) re examination of the trial record is necessary.

39. Vide a plaint dated 26th January 2001 and filed in court on 1st August 2001, the plaintiff/respondent herein Antony Maina Wachira sued the appellant/defendant claiming that he was the appellant's employee and that while he was so engaged upon his employment with the appellant, he was injured. He attributed his injuries to the negligence of his employer the appellant herein. He claimed for general damages and costs of the suit.

40. The appellant entered an appearance on 26th September 2001 through the law firm of J Harrison Kinyanjui & Company Advocates and filed defence on 11th October 2001 denying the plaintiff's claim and maintaining that if at all the respondent was injured which was denied, then he was the

author of his own misfortune hence the doctrine of *Volenti non fit injuria* applied. The defendant at paragraph 10 of its defence further pleaded that the plaintiff had by letter dated 26th September 2001 addressed to the defendants repudiated and totally denied instructing the advocates on record to sue the defendant and that the defendant would therefore seek to have the proceedings struck out for being scandalous and amounting to an abuse of the court process it prayed for dismissal of the plaintiff's suit against him with costs.

41. The letter dated 26th September 2001 became subject of the defendant seeking to dismiss or strike out the plaintiff's suit against the defendant for being an abuse of court process, and or that the plaintiff do furnish security for costs s of shs 48,000.

42. To counter that application and letter the plaintiff swore an affidavit on 13th February 2002 denying that he or at all voluntarily wrote such a letter disowning his claim or instructing his advocate to file suit on his behalf and contending that the letter had been written by one Francis Ndichu Thaiya of the defendant company who asked the plaintiff to copy it in the latter's handwriting promising to pay the plaintiff for his injury and that the letter was used to mislead the plaintiff hence he disowned it.

43. The court Honourable M.A. Murage Mrs (SRM) after considering that application dismissed it vide a ruling delivered on 14th March 2002. This was before Honourable N.A. Owino Mrs SRM took over the conduct of the matter. In dismissing that application the trial magistrate held that the issue of whether or not the plaintiff wrote that letter voluntarily was a triable issue hence the matter should proceed to a full trial.

44. This court notes that the said application was filed at the first instance before the suit was set down for hearing.

45. On 26th March 2001 the parties advocates appeared in the registry and fixed the suit for hearing on 25th September 2001 at 9.30 a.m. which was the first time that the suit was being set down for hearing. Come 29th September 2001, Mr Kinyanjui counsel for the defendant is recorded as indicating to court that he was not ready to proceed as he needed time to amend the defence. He sought for limited time to make the application. Mr Wamalwa counsel for the plaintiff opposed Mr Kinyanjui application on the ground that the defendants were served with a hearing notice and that they had sufficient time to amend their defence. The court recorded as follows: ***"last adjournment"*** and set the suit for hearing on 18th November 2002, while condemning the defendant to pay costs of shs 5,000/- and the plaintiff's costs.

46. On 18th November 2002 Mr Mwaniki held brief for Mr Kinyanjui for the defendant and sought for adjournment because Mr Kinyanjui was engaged before Mwera J in HCC 2176/01 which matter a hearing notice was served upon him under certificate of urgency.

47. Mr Wamalwa opposed an adjournment on the ground that the date was taken by consent, Counsel for the defendant had not informed him of the problem and that witnesses were in court hence he was ready to proceed. Mr Wamalwa also stated that the defendants were given a chance to amend the defence which they had not hence they were delaying the case.

48. On behalf of Mr Kinyanjui, Mr Mwaniki replied that the application was already served. The court remarked that ***" on 25th September 2002 the defendant were given the last adjournment. They have not even amended the defence. This is a ploy to delay the hearing of the case which this court will not succumb to. Case to proceed at 10.20 a.m."***

49. Later on the same day at 11.15 a.m. Mr Kinyanjui was present and pointed out to the court that his application was on record but that the registry was not able to give him a date for the hearing of the application earlier he sought for an adjournment.

50. Mr Wamalwa indicated that he was ready to proceed but that he had no objection to the application. The record shows that the court only noted the date of the application as 17th October 2002 and adjourned the matter to 28th November 2002 for hearing.

51. On 28th November 2002 Mr Achoki advocate appeared on behalf of Mr Wamalwa and requested for a hearing for 10.00 a.m. and the court set the matter for hearing for 11.15 a.m.

52. At 11.00 am the court recorded Coram as before and with Mr Tiego for Wamalwa for plaintiff being present. The trial magistrate proceeded with the hearing of the matter exparte. Two witnesses including the plaintiff and his doctor testified and closed his case. The trial magistrate then ordered for submissions to be filed by 2nd December 2002 and judgment to be delivered on 5th December 2002 at 2.30 p.m.

53. The trial magistrate explains that Judgment was delivered on 6th February 2003 in favour of the plaintiff for shs 280,000 general damages plus costs in the presence of Ngugi for Wamalwa for the plaintiff and in the absence of the defendant.

54. The above process led to serious issues of impropriety being raised in the form of a complaint by Mr Kinyanjui against the trial magistrate besides him filing an application seeking for setting aside of the exparte proceedings before judgment could be delivered but by letter dated 5th December 2002 Honourable H.A. Omondi SPM wrote to Mr Kinyanjui communicating the trial magistrate's decision not release the trial file until after he judgment was written and delivered.

55. The trial magistrate also wrote an explanatory letter to the SPM giving a chronology of events leading to the complaint by Mr Kinyanjui and asking that Mr Kinyanjui waits until the judgment is delivered then he can apply to set it aside.

56. It was therefore after the judgment was delivered on 6th February 2003 that Mr Kinyanjui filed his application for stay of execution and for setting aside of exparte judgment, which application is dated 19th May 2003 and which was heard unopposed but the trial magistrate dismissed it with costs on 19th June 2003, while bitterly complaining against Mr Kinyanjui as having intimidated him while affirming that she would stand firm against such intimidations and denying ever being biased against any party in that case and stating that she had no reason to. The trial magistrate in her ruling maintained that the defendant had more than his share of the adjournments; that he did not validate his defence despite too much time having been given to him and that therefore indulgence ought to be given to the plaintiff too.

57. The learned trial magistrate accordingly dismissed the appellant's application for setting aside exparte judgment with costs, thereby provoking this appeal as set out in the 7 grounds of the Memorandum of Appeal reproduced earlier on.

58. From the above detailed chronology of events leading to this appeal, the main issues for determination are whether, on the material placed before the trial court in the appellant's application for setting aside of the exparte proceedings and judgment, the trial magistrate erred in declining to grant to the appellant the orders sought; what orders should this court make; and who should bear the costs of this appeal?

59. In determining the first issue above, it is important to lay down the established principles for setting aside exparte judgment.

60. In considering whether or not to set aside exparte judgment, the trial court was exercising judicial discretion vested in the court pursuant to the provisions of Order IXA Rules 10,11 of the old Civil Procedure Rules. That discretion, being judicial discretion, had to be exercised judiciously and not capriciously or arbitrarily.

61. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment

obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are clearly set out in the case of **Python Waweru Maina V Thuka Mugiria [1983] e KLR** as follows:

a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48. c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93

3. The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji [1954] 21 EACA 20). Dgment (sic) does not cease to apply because a decree has been extracted (Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118).

5. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear 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 (Jesse Kimani v McConnell [1966] EA 547, 555 F).

6. 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, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7)

7. a discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith v Middleton [1972] SC 30)

8. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. (Shabir Din v Ram Parkash Anand (1955) 22 EACA 48,51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company Nairobi HCCC 1547 of 1969).

9. That the dispute between the parties was not a trivial one, that a defence had been filed in time, that the respondent could have been compensated with costs and that the appellant should not have been denied the hearing because of the mistake of his advocate, were all matters which the magistrate failed to take into consideration in exercising his discretion and this entitled the judge to interfere with the decision, which he didn't. (The El -Amria [1981] 2 Lloyds Rep 119, 123 CA).

10. The judge had misdirected himself in stating that the appellant had not been present in person at the hearing of the summons to set aside the ex parte judgment while the record showed that he had been present and had stated the essence of his defence. The judge had made an error of fact which, if he had not made, he would have considered the decision of the magistrate in a

different light.

11. If the magistrate had not felt able to examine the justice of the appellant's application and whether there was a triable issue by questioning him and examining his pleadings, he should have at least offered him an adjournment, subject to being penalized for costs, so that the matter could be properly reviewed.

12. The appropriate way to deal with an objection to the appearance of counsel for a respondent on an appeal on the ground that he had not lodged or served a notice of an address for service would be to allow him an extension of time in which to comply with the requirement, subject to a penalty in costs where appropriate. (Per Kneller JA) The failure of the respondent's advocate to give a full and sufficient address for service caused the appellant no prejudice and the point should not have been taken by his advocate.

13. (Per Chesoni Ag JA in obiter) It is unfortunate that advocates' sins and omissions are sometimes visited on their clients, who are left without the remedy they sought, but to sue the advocate for professional negligence, but where the litigant shows that his default has been due to the advocate's mistake, in an application of this nature unless injustice would be occasioned the other party the court should consider the applicant's case with broad understanding."

62. Applying the above elaborate principles of law which have stood the test of times as applied in many other subsequent decisions of this court and of the Court of Appeal both pre and post the 2010 constitutional period, and in answering the first question, and as earlier stated, the setting aside of exparte judgment is an exercise of judicial discretion which exercise must therefore be judicious and not capricious or arbitrary and should not be exercised to assist a party who is hell bent to delay and derail the cause of justice for the adverse party.

63. Therefore, did the trial magistrate exercise her discretion judiciously in declining to set aside her judgment to allow the defendant defend the suit?

64. In **Mbogo v Shah the Court of Appeal** rendered itself thus on the subject, as per **Sir Clement De Lestang VP**:-

"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

65. The Court of Appeal also held in **Caroline Elsa Anne Sturdy v John Greaves Hilder [1984] eKLR**") per **Nyarangi, AG. J. A.** (as he then was) that:-

"It would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision would have been different."

66. I observe that the first time the suit came up for hearing Mr Kinyanjui intimated to court that he needed to file an application for leave to amend the defence and the court grudgingly granted him a ***"last adjournment"*** and fixed a hearing date.

67. This court takes judicial notice that this suit was being prosecuted at a time when technicalities were the norm rather than the exception and that parties to suits endured so much delay of their cases being heard but from the record, the court gathers that the trial magistrate Mrs N.A. Owino impressively, was extremely keen to have the matter heard expeditiously which is the hall mark of justice, that justice shall not be delayed and that is why she granted last adjournment on the first hearing. From the way the trial magistrate was keen to have the matter heard on the first day, no doubt, she considered expeditious disposal of the suit as essential to the dispensation of justice. Therefore, the fact

that she was vetted out of the judiciary, for whatever reasons, it has not been shown that the reason was related to complacence or delayed hearing of matters or in the delivery or judgments which is not the same as being corrupt.

68. The above position notwithstanding, cases belong to parties, who must be given opportunities to put forth the best of their sides of the cases. Where a party seeks at the first hearing for leave to amend their pleadings, I do not see any prejudice that would have been occasioned to the plaintiff if the defendant had been allowed to amend its pleadings before the suit was set down for hearing. By granting last adjournment on the first date of hearing of the case, Justice, in this case, was being sacrificed at the altar of expedition, which should never have been the case, especially where that would occasion prejudice to the other party.

69. I note that when Mr Kinyanjui sought for an adjournment to enable him file an application for leave to amend since it appears that as at that time, pleadings had closed, the court grudgingly, and granted him the adjournment proceeded to fix a hearing date, without paying regard to the question of whether, upon the filing of the application for leave for amendment of the defence, the plaintiff would have wished to file a reply or whether the plaintiff, upon being served with a draft amended defence, would have wished to file an amended plaint.

70. Those are factors which, in my humble view, the learned trial magistrate ought to have taken into consideration and which she did not, at the time she made her decision the adjourn the first hearing to another definite date yet the application for leave to amend the defence had not been filed.

71. This court further observes that the application for setting aside the exparte judgment was prosecuted unopposed. This is not to say that the trial court should have automatically granted the application as prayed, as the onus of proving that the orders of setting aside the exparte judgment were merited lay with the party applying to satisfy the court, as the power to grant or refuse to grant the orders sought are discretionary in nature.

72. The manner of exercise of that discretion is as espoused in Order 1XA Rules 10 and 11 of the Old Civil Procedure Rules and as expounded in the **Maina Vs Mugiria** (supra) case, which case laid down several principles applicable for the grant of the order for setting aside of exparte judgment, and which principles I have laid bare in this judgment.

73. Regrettably, what this court finds on record in the ruling of the learned trial magistrate are lamentations of how she had indulged the advocate for the defendant, who appeared hell bent to delay and derail the hearing of the case, and who also allegedly appeared to be intimidating her with incessant requests for indulgence to enable him amend his client's defence before the hearing could commence.

74. As I have stated earlier, where there is a request for amendment of pleadings as was the case in this case, and the court is inclined to grant leave to amend the pleadings, it was important that the court, while giving timelines, considers or exercises patience to allow the amendments to take effect before setting down the suit for hearing. Expedition should never override the ultimate goal of achieving justice for the parties; particularly where the delay is not inordinate.

75. The trial record shows that there was absolutely no delay occasioned by the defendant's counsel in that he sought for leave to amend the defence on his first appearance for hearing on 25th September 2002 and upon being granted an adjournment, on 17th October 2002 he filed the said application annexing a draft amended defence, which application was, as per the record, given a hearing date for 18th November 2002. The latter date is the same date on which the main suit was scheduled for hearing. It appears that on the said latter date, Mr Kinyanjui- from his affidavit, was engaged before the Honourable Mwera J in HCC 2176/01 as explained by Mr Mwaniki hence he instructed Mr Mwaniki to hold his brief. Mr Mwaniki did not indicate whether he had instructions to proceed with the matter.

76. The record also shows that Mr Wamalwa counsel for the plaintiff stated that he was ready to proceed and complained that the defendant was given a chance to amend the defence but that they had not. The court remarked that the defence were given the last adjournment and that they had not even amended the defence hence that adjournment being sought was a ploy to delay the hearing of the case and that therefore the matter would proceed at 1.20 a.m. On that very day Mr Kinyanjui appeared at 11.15 a.m. and notified the court that there was an application on record and that the registry was not able to give an earlier date. Mr Wamalwa indicated that he was not opposed to the application for amendment. The court granted adjournment with costs.

77. With due respect to the proceedings of that day 18th November 2002, this court is perturbed by the fact that it is clear that the appellant herein had filed an application for leave to amend the defence and the said application had been given that very date for the hearing of the application which had been served upon the respondent.

78. There is also evidence that the respondent's counsel was not even opposed to the said leave to amend being granted. The question therefore is, did the court and the respondent/plaintiff's counsel expect the defendant to amend and file the amended defence before leave being granted? That may have been their expectation. However, that would be jumping the gun and putting the horse before the cart. This court does not understand what amendments the court and Mr Wamalwa advocate were talking about since the amendments to the defence could only have been effected after leave was granted.

79. In addition, the plaintiff's counsel having indicated that he was not opposed to that application, what was left for the trial magistrate was to grant the orders for leave to amend and or order that the draft amended defence to be deemed to be duly filed. She then had the option of either proceeding with the hearing of the suit on that day of 18th November 2002, in the event that the plaintiff's counsel intimated that he did not wish to file any reply to the amended defence or to amend the plaint following amendments to the defence; or adjourn the matter to enable the plaintiff to act as appropriate.

80. Instead, the record does not show any order allowing the application for leave to amend, the defence, which order would have expedited the hearing of the suit.

81. The trial magistrate again fixed a hearing date for 28th November 2002 and it is on the latter date that the matter proceeded in the absence of Mr Kinyanjui who deposed in his affidavit in support of the application for setting aside the exparte judgment that he had agreed with Mr Wamalwa to proceed at 2.20 pm and that by the trial court proceeding to hear the suit at 10.00 a.m. or 11.20 am, the court and the plaintiff were stealing a match on him and therefore his client who was denied a hearing.

82. Mr Kinyanjui then embarked on an endless expedition of trying to arrest the judgment by filing an application to vacate the proceedings of 28th November 2002 but was repulsed back even after writing to the Senior Principal Magistrate in charge of the court station, and the Executive Officer. He was advised that the trial magistrate had refused to release the court file which was with her for purposes of writing a judgment and that she had even written an explanatory letter which was given to Mr Kinyanjui, advising him to wait for judgment to be delivered before he could apply to set it aside.

83. Anybody reading that explanatory note by the trial magistrate gets the impression that it was obvious that she was going to determine the matter in favour of the respondent anyway and therefore the appellant had to wait until that predetermined decision is out before seeking to set it aside.

84. Bias is never real. It is perceived and inferred from the conduct of a judicial officer in exercise of his or her judicial authority and power.

85. Although the trial magistrate's comments that she did not comprehend the defence counsel's sentiments in view of her elaborate explanation, this court does comprehend the concerns raised by Mr Kinyanjui, whose efforts to make the court understand his predicament came to naught.

86. This is what the trial magistrate stated:……..***"However the proper procedure is for counsels to wait for the judgment to be delivered and proceed to make an application to set aside."***

87. And when the judgment was finally delivered it was in favour of the plaintiff. But when Mr Kinyanjui applied to set it aside, his client's application was dismissed with costs, with the trial magistrate's outpouring frustrations and lamentations of how she had over indulged the defendant's counsel.

88. Albeit the trial court observed in that impugned ruling observed that it had given the defence counsel a chance to validate his defence and that he had failed to do so, the record does not even reveal that she granted the application for leave to amend the defence or at all. It is therefore not clear what "***validation"*** the trial magistrate was referring to in her ruling and which the defence counsel had abdicated.

89. In my humble view, the trial magistrate did not exercise her discretion judiciously when she dismissed the defendant/appellant's application for setting aside the exparte judgment. I also find that the conduct of the proceedings did not accord the defendant a fair sense of justice and fairness before the trial court.

90. I further find that the trial court wrongly exercised her discretion in dismissing the appellant's application. She did not exercise that discretion based on any of the established legal principles which I have enumerated in this judgment.

91. What this appeal called for is indeed, interrogation of the exercise if judicial discretion by the trial court and in such interrogation, this court has been fortified and guided by the principles enunciated in **Shah V Mbogo** (supra) and **Sielle Vs Associated Motor Boat Company Ltd** (supra) cases as well as well as in the **Pil Kenya Ltd Vs Oppong [2009] KLR 442** where the Court of Appeal made it clear that the appellate court should not interfere with judicial discretion exercised by the trial court unless it is satisfied that the trial judge/court misdirected himself/itself in some material respect by either failing to take into account relevant matters or taking into account extraneous matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

92. In the instant case, and upon assessment of the case as a whole, I have come to an inescapable conclusion that the trial magistrate misdirected herself in failing to take into account relevant matters which I have set out including the procedure to be applied where there is an application for leave to amend pleadings; she failed to appreciate the fact that there was an application for leave to amend the defence pleading which application had to be disposed of before hearing the main suit; she failed to consider the legal principles applicable in application for setting aside exparte judgment and only concentrated on the *" intimidations"* allegedly exhibited by the defence counsel which in essence clouded her sense of justice for the defendant litigant.

93. This is not to say that this court's decision would have been different, but as was held in **Equity Bank Limited Vs West Link MBO Ltd, Civil App No. 78/2011:**

> ***"courts of law exist to administer justice and in so doing they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the Constitution or statute."***

94. From the trial record as analyzed herein, I am persuaded, and it is manifest that the trial magistrate was clearly wrong in the exercise of her discretion and which wrong exercise occasioned a miscarriage of justice to the appellant. And if there had been any delay then that delay cannot be attributed to the defendant appellant herein as the respondent's counsel wished this court to believe.

95. The delay is because of wrong exercise of discretion by the trial court with the aid of the respondent's counsel who did not appreciate the necessity to accord d the defendant an opportunity to adequately prepare its pleadings before a hearing of the case could commence; and as concerns this appeal, which has taken nearly 13 years to be determined, I have not seen from the record, how the appellant caused the delay as the matter has been active throughout and during the lapse, no application to dismiss the appeal for want of prosecution was ever filed by the respondent to demonstrate his vigilance.

96. In addition, and as earlier stated, for the last one year when this judgment ought to have been delivered after the hearing of the appeal by Onyancha J(as he then was), the learned judge retired necessitating the typing of the proceedings and the files reassigned to judges in the Civil Division of the High Court for writing and delivering of the judgment. Again, after I was assigned the file herein, among other files, in June, 2016 I was deployed to the Judicial Review Division, an equally busy Division.

97. In the end, I find that this court would be justified in the circumstances of this case to interfere with the discretion of the trial court.

98. All the above factors have contributed to the delay. Needless to say that all documents/exhibits which the respondent produced in the lower court are insitu the original record. Therefore, a retrial would in no way prejudice the respondent, who will have his day in court and let the appellant too have his day in court to defend the suit.

99. For the aforestated reasons, I find this appeal highly meritorious on all fours and proceed to allow it and make the following orders:

1. That this appeal be and is hereby allowed.

2. The order of the trial magistrate dismissing the application for setting aside the exparte judgment delivered on 6th February 2003 is hereby vacated and set aside and substituted with an order allowing the application dated 19th May 2003.

3. The proceedings, Judgment and decree of N.A. Owino (Mrs) Senior Resident Magistrate (as she then was) in Nairobi CM CC 5380/2001 be and are hereby vacated and set aside.

4. The appellant's application to amend the defence be reconsidered and Nairobi CMCC 5380/2001 shall be reheard afresh before any other magistrate of competent jurisdiction as Mrs N.A. Owino has since left the judiciary.

5. That each party shall bear their own costs of this appeal and of the application dated 19th June 2003 in view of the fact that the respondent found himself in the legal intrigues and therefore he should not be prejudiced with an order of costs against him especially after such a long wait for justice.

6. As this matter is too old, I direct that the trial record shall be expeditiously resubmitted to the Chief Magistrate's Court at Milimani Law Courts for mention on 10/11/2016 for directions.

Dated, signed and delivered at Nairobi this 3rd day of November, 2016.

R.E.ABURILI

JUDGE

In the presence of:

Mr J.H. Kinyanjui for the appellant

N/A for the respondent

CA: Adline