REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 164 OF 1994

SALIM KHAN & MRS. NASREEN KHAN T/S KENHILL AGENCIES…….....
…….APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED..…….....….....…...
RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Kisumu (E.M. Githinji, J.) dated 4th July, 1994

IN

H C.C.C. NO. 266 OF 1993).

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JUDGMENT OF THE COURT

By a notice of motion dated 24th January, 1994 the appellants (the defendants in H.C.C.C. No. 266/93) sought orders that the superior court do review its orders made on 17th January, 1994 wherein the appellants' defence was struck-out and judgment entered for the respondent together with costs and interests; and, that the said orders be set aside and the application dated 1st November, 1993 be heard inter partes. In his ruling delivered on 4th July,1994 the learned judge observed, and correctly so in our view, that the supporting affidavit showed that what the applicants (and five others whose applications had been consolidated) were seeking was not a review on the grounds set out in Order 45 of the Civil Procedure Rules but the setting aside of the ex-parte judgment on the grounds of non-attendance at the hearing of the applications. The learned judge decided in the interest of justice to treat the applications as those for setting aside the summary judgments under Order 35 r 10 and not as applications for review under Order 44.

The learned judge held that the applicants have not attempted to show prima facie that there were mistakes, fraud, or wrong debits in their bank statements. They had not, in fact, denied that the statements of accounts filed by the respondent referred to their accounts. The several statements from the applicants' accounts were certified by the Bank Manager and they were held by the learned judge to be prima facie evidence of all the matters, accounts and transactions therein recorded. He thought it futile in the circumstances to set aside the summary judgment, and rehear the applications. He dismissed the applications.

Against that dismissal the appellants have preferred four grounds of appeal the main ground of appeal being that the learned judge erred in holding that the appellants ought to have sworn an affidavit setting out the mistakes, fraud and wrong debits.

Where the judgment is obtained as herein, the court has power under Order 9B r 8 to set it aside. This power is uncondition and discretionary and this Court will not interfere with the exercise of such a discretion unless clearly satisfied that the judge was wrong. See Mbogo and Another v. Shah (1968) E.A. 93. We can find no fault on the part of the learned judge in the exercise of his discretion.

It is not disputed that the judgment so entered was regular. In such circumstances, it is almost an inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits. We agree with the learned judge that the appellants did not at all attempt by affidavit or otherwise to show that they had a good defence on the Merits. Mere allegations of its existence was not sufficient. For these reasons we are of the opinion that this appeal fails and is dismissed with costs. It is so ordered.

Dated and delivered at Kisumu this 24th day of March, 1995.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR