IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo CJ & Gicheru & Gachuhi JJ A)

CIVIL APPEAL NO 155 OF 1989

K …….. APPELLANT

VERSUS

K……..……..RESPONDENT

(Appeal against the ruling order passed by the High Court of Kenya

at Nairobi (The honourable Mr Justice Rauf) dated 22nd May, 1989

in the High Court Divorce Cause No 51 of 1987)

JUDGMENTS

Apaloo CJ: The question for decision in this appeal, is whether the 1earned trial judge exercised his discretion judicially or not in refusing to set aside an *ex-parte* order for decree *nisi* which he made in the respondent's favour on the 8th March, 1989.

It is not suggested in this appeal that the learned judge did not have jurisdiction to hear the cross petition or that in hearing and disposing of it, he infringed any rule of procedure or any principle of justice. Clearly he has a discretion to set aside an *ex-parte* judgment just as he has power to refuse to do so. The appellant says, he was wrong in as much as he refused to set the judgment aside, the respondent says, he was perfectly in his refusal.

The principles on which this Court acts when invited to upset a trial court's exercise of discretion, are well known and it would be pedantic to produce the many cases which laid down the principle. For the purpose of this appeal, the most helpful enunciation of the principle is what Newbold P said in the oft cited case of *Mbogo vs Shah,* when agreeing on appeal with Harris J, formulation of it at the Court of first instance. The learned President concurring with the trial judge, said that that discretion must be exercised.

> "…… in the 1ight of all the facts and circumstances, both prior and subsequent and of the respective merits of the parties …….".

So it is necessary to look at the facts that precede the judgment and those that arose after it and consider as best as the available evidence portrays it, the relative merit or want of merit of either party. The parties

were married in 1960. The husband was then 39 and the wife 18 years his junior - she being 21. Both of them seem to be a well educated and cultivated couple. The husband held a comparatively responsible position in Government service and the wife was a teacher.

This marriage was blessed with three children; two girls and a boy. It is often said, that marriage is not a bed of roses. It is probable that there were differences between the couple at some point of time. But it is reasonable to suppose that they were the ordinary domestic differences between husband and wife. The first real rumpus appears to have occurred in 1964 when according to the husband, the wife refused to join him when he was posted to Nyeri as District Commissioner.

According to the evidence, the husband made up his mind to end the marriage by petition of divorce, but relented and thought the wife's attitude towards him would improve. So he withdrew his petition. He said it did not improve, so he offered her a separate house.

In 1979 or thereabouts, the husband retired from Government service. As he rose to a very high position - Provincial Commissioner, before his retirement, there were a number of official and unofficial ceremonies to bid him good-bye. The wife refused to join. On his retirement, he appeared to have returned to their home in Kiambu. The parties occupied premises known as C K K Estate which belonged to a limited liability company. It is a reasonable inference that the husband had the controlling interest in that company, and when the veil of incorporation is lifted, he would appear to be the human owner of that property on which a farm stands.

There are two houses on the farm. Both husband and wife shared the bigger of the two houses. But again the union did not work. In just over a year, they were obliged to live apart. According to the husband, he left the wife in the main house and joined his manager in the smaller house. So since February 1980, husband and wife lived separate and apart. But the great event which was to sound the death nail of marriage occurred on the 29th August 1980. This is how the husband relates it to the Court in evidence.

> "I went to bed at 8.30 pm she (meaning the wife) started shouting that I should open the bedroom. I refused as she was violent. I heard sound as if she was carrying a hard metallic object. I saw her cutting the door with a *panga*. To prevent further damage, I opened the door. My son and daughter came to my rescue. We struggled and I left the house …… She followed chasing me with the *panga*. I was saved by my cook. I passed the night in the dining room. The following day I reported to police."

This is an intrinsically probable story and it is unlikely that a husband of the respondent's standing and background would fabricate this story against his wife. If this story is believed as it was believed by the judge, it clearly constitutes cruelty in law. In *Meme vs Meme* Chesoni J citing *Russel vs Russel* [1895] P 315 defined the matrimonial offence of cruelty as wilful and unjustifiable character as to cause danger to life, limb or health, bodily or mental or as to give rise to a reasonable apprehension of such danger. There can be no gainsaying the fact that the wife's alleged conduct would give a reasonable person apprehension of danger. And the husband said his cook saved him.

The wife's response to this grave allegation was contained in paragraph 8 of her affidavit of the 24th July, 1987. She deponed as follows:-

"That on the 29th August 1980, after the respondent had been home for six months sleeping in the same bedroom, I desired to join him so as to conduct our mutual marital responsibilities, but the respondent refused to open his bedroom I tried to force the door open and the respondent opened. I told him that I wanted to share the bed with him but instantly he shot out and ran out of the building. There was no harm occasioned to any party …… The following morning the respondent reported to the police that I attempted to assault him."

The wife, in a large measure corroborated the husband's story. She admitted forcing the door open. She admitted that her husband fled. She agreed that he reported her to police the next morning on the charge of assault. But she excused her conduct with a rather quaint reason. She said she was desirous that they

"conduct our mutual marital responsibilities". In the context of this case it means she wanted her husband to make love to her. This is a very un1ikely story. Would a husband flee his bedroom because a loving wife entered it and sought to arouse him to have sex with her? Not only reason, but one's experience of the world, teaches one that the wife's story was a most improbable one. And would a husband report to the police because his wife was desirous of having intimacy with him? Having considered the husband's case and placed it in juxtaposition to the wife's and having considered the voluminous conflicting affidavits presented to the Court, the judge concluded that the truth lay with the husband. So on the merits which the *Mbogo vs Shah* authority obliges us to consider, the wife's case was wholly unmeriterious.

Mbogo vs Shah also requires us to consider the parties' conduct before and subsequent to the delivery of the judgment complained against. The christian marriage which the parties contracted, require them to share, what the Latin scholars call "*mensa et thoro*" namely, board and lodging. They must have done so at some point of time during the subsistence of the marriage but the evidence shows that that relationship ceased as long ago as 1980. Hence, the only bond which ostensibly kept them together in the eyes of the law, is the holy matrimony they entered into. Counsel for the husband described it, not inaccurately, as a shell of the marriage. The parties were clearly estranged and it is a fair inference that the wife decided to formalize this state, by recourse to a Court of law. So on July 10, 1987, she petitioned for "judicial separation". She obviously desired that the marriage be kept intact. This appears puzzling but her counsel gave us reason for this in argument. He said, "she (meaning the wife) sees her security in preserving her marriage". So the appellant's desire to have the matrimonial bond kept intact was not the love and affection of her husband or a desire to perform for him wifely duties, but for her own economic reasons.

This submission is revealing because it informed both her counsel and her own attitude to the legal proceeding which she initiated. The husband on the other hand, thought a spade should be called a spade. He cross-petitioned for dissolution of the marriage. Broadly speaking, the relief which the Court was invited to grant was either the judicial separation sought by the wife or the divorce prayed for by the husband. As economic consideration was the main motivation for the wife's petition, she moved with 1ightening speed. On the very day that she filed her petition, she sought under a certificate of urgency, interim reliefs. The main one was an injunction restraining the respondent from turning her and the children out of the home in the Njuno Estate and the delivery to her items of personal clothing, furniture and household goods. Just about a month after the lodging of the petition, she succeeded in obtaining practically all the interim reliefs she sought save that of maintenance, apparently because, the husband was making ample provision for her and the children on that score. The order by Mbaluto J granting her the interim reliefs was made on the 13th August1989.

Thereafter, the appellant and her legal advisers went to sleep. There is evidence that they made no attempt whatsoever to prosecute the petition for judicial separation. The evidence that the husband and his advocates took all the necessary steps to have the suti heard, was weighty and impressive. Dates fixed for hearing proved unsuitable for the appellant's advocates. They were content to plead for adjournment any time the petition came up for hearing. Even apparently serious warning to the appellant's counsel by his opposite number that any further pleas for adjournment would be opposed went unheeded.

It is a fair inference that the appel1ant and her counsel were deliberately avoiding a hearing. They wanted the *status quo* to remain and were apprehensive of a hearing which may result in a dissolution of the marriage. Meantime, the interim relief they obtained remained in force. There is also evidence that the appellant's counsel instructed his clerk not to accept any hearing date proposed by the husband's advisers. This clear delay tactics continued for the best part of 2 years.

On the 6th March, 1989, the suit came on the list of Rauf J for hearing. On that day, as was their habit, junior counsel for the appellant asked for adjournment. It was opposed by the respondent's counsel who informed the Court that he personally informed senior counsel that the hearing was definitely fixed for that day. In the end the Court fixed the petition for hearing on the 8th March having rejected the appellant's counsel's plea for it to be deferred for a day later, that is, to the 9th March. On the 8th March, neither the appellant nor any of her legal representatives appeared. Accordingly, as was to be expected, the respondent's advocate invited the learned judge to dismiss the prayer for judicial separation and asked to be permitted to prove the respondent's case by evidence in the conventional manner. The judge

concurred. Having dismissed the appellant's petition, he proceeded to hear evidence from the respondent. The latter admitted, quite frankly, that another woman had entered his life, six years previously in 1983. He said he was living with her as his wife. So he prayed for the exercise of the judge's discretion in his favour notwithstanding his own adultery. That woman was his late brother's widow by the name Njeri.

The learned judge was obviously impressed by the respondent's evidence and candour and observed that:-

> "The husband was very tolerant and patient. He did not file any litigation against her until the wife herself initiated these proceedings in 1987, when he cross – petitioned for divorce".

"The husband asked me to use my discretion in his favour which I hereby do in connection with the present liaison with his late brother's wife named Njeri",

The judge then concluded in these words:-

> "Upon the pleadings and evidence before me, I grant a decree *nisi* dissolving the aforesaid marriage between the parties",

Two days later, that is on the 10th March, 1989, the appellant bounced back with promptitude and invited the Court to set aside the judgment of divorce. She sought to support her claim for the vacation of the judgment with five affidavits. The respondent for his part, resisted the application with an equal number of affidavits. In the end, the learned judge exercised his discretion against setting aside the judgment. It is this ruling that the appellant contests before us.

One cannot help being struck by the vigilance the appellant showed seeking to have the *ex-parte* judgment set aside. It is remarkable that her counsel who for one reason or the other, was prepared to have the hearing of his client's petition for judicial separation put off for two years, was able to spring into action within two days to have the *ex-parte* judgment against his client set aside.

In this Court, the head and front of the appellant's counsel's plea to us, was that there was some confusion about the hearing date. He and his client genuinely mistook the hearing date as the 9th rather than the 8th March. Accordingly, he submitted, taking his stand on *Mbogo vs Shah*, that as there ws inadvertence or excusable error, the *ex-parte* judgment ought to have been set aside and that the learned judge was in error in declining to do so. That argument does not weigh with me. In my judgment, counsel was engaged in a well rehearsed tactics of delay and he and his client were unworthy of the exercise of the Court's equitable jurisdiction to set aside the judgment. In *Mbogo vs Shah* itself, the learned judge refused to set aside an *ex-parte* judgment because the appellant deliberately sought to obstruct or delay the course of justice. In my opinion, this is precisely what happened in his case. And the Court of Appeal sustained the learned judge's exercise of discretion and refused to disturb it in *Mbogo vs Shah.*

Counsel for the appellant then urged the now familiar plea, that even if he was found to be guilty of culpable dilatoriness, his client should not be penalized for it. But in this case, there is reason to believe that the appellant herself also wished for the delay. There is affidavit evidence that when she became aware that her petition was scheduled for hearing on the 6th March 1989, she tried to prevent the hearing taking place in two ways. First, she procured Rev Dr Gitari to persuade the respondent not to proceed with the cross-petition for divorce. Second, she tried to persuade the respondent himself not to proceed with the hearing of his cross-petition because their daughter was about to be married and it was not right that the cross-petition be heard at that time. The evidence is that the respondent remained unmoved by these two overtures.

In view of the state of affairs revealed in the evidence, the appellant seems to have some good reason for wishing to have the cross-petition remain unheard indefinitely. Although the marriage was plainly on the rocks, and although the parties were living separate and apart for nine years at the scheduled hearing of the petition, yet when the appellant went to Court to seek matrimonial relief, she only prayed for judicial separation. Thus, she only desired that the Court should rubber stamp, the state of affairs as it existed between them for nine good years.

Of course, we have been told the reason why she wished to preserve a marriage which existed only on paper. Her counsel said, it was to safeguard her economic status. In the circumstances, the argument that she should not be visited with the consequences of her counsel's culpable delay, rings hollow.

Accordingly, whether one looks at the respective merits of the parties or their conduct before or after the hearing, the appellant showed herself singularly undeserving of relief.

I really can find no escape from it, and must hold that the learned trial judge in declining to grant the appellant the relief she prayed for, was, as the respondent contends, perfectly right. I think therefore that this appeal fails and I would dismiss it without costs.

As Gachuhi and Gicheru JJ A, agree it is, ordered that the appeal do stand dismissed.

There is no order as to costs.

Gicheru JA: I have had the advantage of reading in draft the judgment of Apaloo, CJ I entirely agree with it and have nothing useful to add.

Gachuhi JA: I have had the advantage of reading in draft the judgment of my Lord the Chief Justice and I agree with it.

I would, however, state that the Court is asked to reverse the decision of the superior court judge in which he refused to exercise his discretion to set aside *exparte* judgment. The facts of the case and what transpired before the superior court is set out in the leading judgment of the Chief Justice.

What the appellant has to show to this Court is how the judge was wrong or the misdirection if any in failing to exercise his discretion to set aside the *exparte* judgment. The cardinal rule for setting aside an *exparte* judgment or order is expressed in *Mbogo and Another v Shah* [1968] EA 93. The only point advanced which the Court is asked to rely on is that it was the mistake of counsel advising the appellant in recording the date wrongly in the diary leading to the non-appearance of the appellant and her counsel during the hearing on 8th March, 1989 which date the appellant's petition for judciail separation was dismissed and the respondent's cross-petition for divorce proceed *ex parte* and the decree *nisi* pronounced. Counsel pleaded that his mistake be excused so that the appellant be saved from being penalized for the mistake of her counsel so that the petition for judicial separation could be restored on the hearing list. Since the respondent obtained his decree *nisi* on his cross-petition in the absence of the appellant, can it be said that he obtained it by mistake? If he made no mistake why should he be penalized by having the decree set aside!

It is not every mistake made by counsel that should be excused. If it was misinterpretation of certain provision in the law, it could be understandable. The date set down for the hearing of the petition was fixed in Court in presence of both counsel for the respondent and the appellant who was accompanied by two clerks. It is not clear how all of them missed the correct date.

In all circumstances, each case has to be considered on its own merit but it cannot be over-looked that the conduct of the appellant as portrayed in these proceedings indicate that the appellant has not been serious in prosecuting her petition for judicial separation. That being the position, when the Court is requested to vacate its earlier order which I have already stated the respondent validly obtained a decree *nisi* the dictum of Sir Clement de Lestang, VP in *Mbogo v Shah* at page 94 letter G is meritorious,

> "that while the Court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who had deliberately sought to obstruct or delay the cause of justice ……."

My view is that the appellant has not satisfied this Court that the trial judge was wrong or misdirected himself in refusing to set aside his *ex-parte* judgment. I would dismiss this appeal but I would make no order of costs.

Dated at Nairobi this 30th Day of April, 1993

F.K. APALOO

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CHIEF JUSTICE

J.E. GICHERU

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL