IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 275 OF 2017

BETWEEN

REUBEN WARUI MWANGI...................................... 1ST APPELLANT

MERCY WANJIRU WARUI...................................... 2ND APPELLANT

AND

GEOFFREY KURIA GITHAMBU..........................1STRESPONDENT

HOUSING FINANCE COMPANY LIMITED......2ND RESPONDENT

(Being an appeal from the Ruling and order of the High Court of Kenya at Nairobi, signed in Bungoma on 21st February 2014 by Mabeya, J. And delivered on his behalf by Havelock, J. on 5th March, 2014

in

Civil Case No. 34 of 2006)

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JUDGMENT OF THE COURT

1. This is an appeal against the ruling of the High Court dated 21st February, 2014, wherein the learned Judge (Mabeya, J.) declined to exercise his discretion in favour of the appellants, **Reuben Warui Mwangi** and **Mercy Wanjiru Warui** and dismissed their application seeking leave to file a defence in the suit and set aside an interlocutory judgment entered against them.

2. A brief background to this appeal is that the appellants purchased **Title L.R No. Number/1594** (the suit property) at a public auction on 11th August, 2006 from the 2nd respondent, **Housing Finance Company Limited** after the 1st respondent, **Geoffrey Kuria Githambu** defaulted on his loan repayments. The suit property was subsequently sold to a third party in 2010. The 1st respondent then filed Civil Case No. 34 of 2006 seeking *inter alia* that; the sale of the suit property to the appellants be nullified on the grounds that the 1st appellant was the legal officer and employee of the 2nd respondent.

3. It is clear that the 1st appellant was served with the pleadings in the High Court on 25th January, 2007 and instructed the firm of Oraro & Co. Advocates who entered appearance on 8th February, 2007. It is

the said firm that failed and/or neglected to file the requisite Statement of Defence within the required period, culminating in the delivery of an interlocutory judgment against the appellants on 13th March, 2007.

4. What followed thereafter is telling in the circumstances of whether this Court is to substitute its discretion with that of the trial Judge. In a letter dated 26th March, 2007, by the firm of Oraro & Co. Advocates addressed to the Advocates for the 1st respondent, confirmed that the failure to file the defence was an inadvertence or mistake on their part and requested to file the defence out of time. The said letter clearly demonstrates that the appellants were at all times interested in the determination of the dispute and their participation was mandatory. All the appellants were asking for, was an opportunity to participate in the proceedings.

5. Again, the appellants instructed the law firm of Issa & Co. Advocates, who also failed to execute the intention and desire of the appellants to file a defence and participate in the proceedings. That was not enough and in their tireless pursuit of justice, the appellants instructed the current law firm who filed an application to set aside the defence and leave to file a defence. These cannot be the actions/omission of a party who has deliberately sought to delay or obstruct the wheels of justice. The law, as we understand it, is that the purpose of discretionary power is not intended to lock out a diligent litigant whose only fault is the failure of indolent Advocates. (See ***Mbogo & Another vs. Shah* [1968] EA 93**and ***C.M.C. Holdings Ltd vs. Nzioki* (2004) I KLR 173).** The case and cries of the appellants are not hopeless, frivolous and vexatious but a genuine attempt to salvage a ship allegedly drowned by their Advocates.

6. Declining to grant the application, the learned Judge found that the 2nd respondent sold the property to its employee, the 1st appellant, casting doubt on the issue of *bonafides*; that the allegation of sale to a third party was inconclusive and that 6 years was a long time to seek justice and that such action/omission was prejudicial to the 1st respondent.

7. Dissatisfied with the ruling, the appellants lodged the instant appeal citing a total of 15 grounds which in summary fault the learned Judge for:

> ***i) Finding that there was a lawful judgment against the appellants whereas the judgment entered was irregular having been entered without formal proof.***
>
> ***ii) Condemning the third party unheard, despite being the bonafide owner of the suit property.***
>
> ***iii) Failing to find that the proposed defence did not raise triable issues.***
>
> ***iv) Condemning the appellants for mistake of their advocates.***

8. The question for our determination is whether the trial court exercised its discretion in accordance with the law. In addressing this primary and fundamental question, we must quote the classic case of ***C.M.C. Holdings Ltd vs. Nzioki* (2004) I KLR 173** where this Court stated:

> ***"the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle."***

9. Denying the appellants an opportunity to file their defence and be heard on merit would no doubt be an affront to justice in circumstances that clearly amount to mistakes visited upon the appellants by various advocates. The appellants have persistently demonstrated their intention to pursue the matter and the negligence or inaction by counsel should not drive them from the seat of justice.

10. Also, in reaching the decision to set aside the interlocutory judgment, the learned Judge stated thus:

> ***"I have considered the proposed defence. In the Replying Affidavit, it has been alleged that at the time the property was sold to the 2nd and 3rd Defendant, who are man and wife, the 2nd Defendant was the legal officer of the 1st Defendant. In effect, the 1st Defendant sold the property to its employee casting doubt on the issue of bonafides. On the alleged sale of the property to a 3rd party in 2010, apart from an inconclusive undated sale agreement was produced that there was no evidence to prove that fact. No search from the lands office was produced to show that the property had passed on to the alleged 3rdparty. In any event, the 2ndand 3rdDefendants purported to dispose off the property during the pendency (sic) of the suit whose notice and notice of judgment they had. Can the Applicants be allowed to benefit from their own wrong? I do not think so. Six (6) years is a long time to wait to seek justice. It will, in my view, prejudice the Plaintiff."***

11. From the above, it appears that the learned Judge considered the proposed defence, the averment in the 1st respondent's replying affidavit that the 1st appellant was an employee of the 2nd respondent therefore casting doubt on the issue of *bonafides* and lastly the prejudice to be suffered by the 1st respondent if the appellants were to be granted the prayers sought.

12. We have perused the proposed defence and the 1st appellant's replying affidavit dated 25th September, 2013. In our view, the issues raised in the proposed defence are triable and would require examination by the trial court. These include whether the appellants acted in good faith in purchasing the suit property, whether the appellants had acquired an indefeasible title upon purchase, whether there was any merit in the allegation of fraud, whether the 1st appellant was an employee of the 2nd respondent and the implication of the alleged sale of the suit property to a third party. Indeed, a triable issue is not one that must necessarily succeed, as long as it is arguable.

13. The learned Judge in coming to his decision resorted to dealing with the merits of the case at an interlocutory stage whereas the issues raised could not be determined on the face of the application or by way of untested affidavit evidence. They required a

careful analysis of evidence and for the matter to be determined on merit.

14. On the whole, we are satisfied that this matter warrants the interference with the learned Judge's exercise of discretion.

Consequently, we find that the appeal has merit and we hereby set aside the ruling dated 21st February, 2014 and substitute it with an order setting aside the interlocutory judgment dated 13th March, 2007. The appellants are granted leave to file and serve their defence within seven (7) days of delivery of this Judgment, we order that each party shall bear its own costs of this appeal.

Dated and delivered at Nairobi this 19th day of June, 2020.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR