IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, OKWENGU & ASIKE-MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 51 OF 2019

BETWEEN

KENYA INDUSTRIAL ESTATES LIMITED.....APPELLANT

AND

JOHN ODWORY KULOHOMA.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of the appeal

against the judgment of the High Court of Kenya at Busia (Kiarie W. Kiarie, J)

***dated 4th February, 2019* in HCCA No. 13 of 2017**)

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JUDGMENT OF THE COURT

[**1**] This is a second appeal originating from a ruling delivered by the Chief Magistrate's court at Busia. In the first appeal, the learned Judge of the High Court (**Kiarie, J**) dismissed the appeal as having no merit.

[**2**] It is necessary to recapitulate the background to this appeal. Litigation was commenced by the respondent **John Odwory Kulohoma (Kulohoma)**, who sued **Kenya Industrial Estates Limited** (**KIE**) for irregularly repossessing shade No. 4 at Busia Kenya Industrial Estate. Kulohoma claimed that shade No. 4 was sold to him and that he had paid a total sum of Kshs. 318,000 which was in excess of the agreed price of Kshs. 242, 000. Kulohoma sought, *inter alia*, to be put back in possession and to be awarded damages for loss of business. KIE through its amended defence admitted that Kulohoma accepted to purchase the shade but maintained that it was to be paid by way of instalments, and that Kulohoma defaulted in the repayment and has not cleared the mortgage arrears despite a notice being served upon him. KIE therefore claimed that Kulohoma's suit was frivolous and vexations and should be struck out for failure to show a reasonable cause of action.

[**3**] Hearing of the suit commenced *ex parte* on 2nd August, 2016 because KIE's advocate, though served did not attend court. Kulohoma testified but was stood down, so that certified copies of some documents could be produced. Before the matter came for hearing again, Kulohoma's plaint was amended. On 14th January 2017 the matter came up before the trial magistrate for further hearing and Kulohoma testified. Again there was no appearance by KIE's counsel.

[**4**] In his judgment delivered on 8th May, 2017, the trial magistrate found in favour of the respondent and ruled that the sum of Kshs.456,474 which Kulohoma overpaid to the KIE be refunded to the him by the KIE forthwith and that shade No. 4 at the Kenya Industrial estate Busia branch be returned and be transferred to the respondent forthwith. By a notice of motion filed on 31st May, 2017, the KIE moved the trial court for, *inter alia*, an order of review and/or setting aside of the judgment delivered on 8th May, 2017 on the grounds that the judgment was delivered without hearing both parties as the KIE was not given an opportunity to be heard. By a ruling delivered on 20th September, 2017, the trial magistrate dismissed KIE's motion as being frivolous, vexatious, without merit, bad in law, and calculated to delay justice to Kulohoma.

[**5**] KIE then moved to the High Court challenging the ruling of 20th September, 2017 on the ground that the trial magistrate erred in law and fact in failing to appreciate that the judgment sought to be set aside was a product of exparte proceedings and that the appellant's constitutional right to a fair hearing was violated as the respondent's advocate unilaterally fixed the hearing dates without any notice to the appellant's advocate and this prejudiced the appellant.

[**6**] In his judgment the learned Judge upheld the ruling of the trial court stating *inter alia* as follows:

> **"Upon my perusal of the record, I find that most of the time this matter came up hearing before the learned trial magistrate, Mr. Makoha was holding brief for the firm of Nyamweya for the defendant. There are instances where there was no appearance for the defendant but the court satisfied itself that there was service. The learned trial magistrate cannot be faulted for dismissing the application to have judgment entered reviewed. There was no merit to do so. I accordingly find that there is no merit in the present appeal. I dismiss it with costs to the respondent.**

[**7**] KIE is now before us with a memorandum of appeal in which it has faulted the learned Judge, contending that the Judge misdirected himself: in exercising the judicial discretion bestowed on him; in failing to find that the trial magistrate misdirected himself in punishing the appellant for the mistakes of its advocate; and in failing to find that the appellant's non appearance during the hearing of its suit was due to an inadvertent and excusable mistake.

[**8**] Hearing of the appeal proceeded by way of written submissions and authorities that were duly filed by the parties' advocates. For KIE, it was submitted that Kulohoma's advocate unilaterally fixed hearing dates, and that although KIE's advocate was served with hearing notices, the dates were not properly captured in the advocate's diary. KIE also maintained that Mr. Makhoha who was said to have held its advocate's brief on 14th February, 2017, denied holding any brief for KIE's counsel as he had no instructions to do so.

[**9**] It was submitted that in dismissing KIE's appeal, the learned Judge did not interrogate the exercise by the trial magistrate of the judicial discretion bestowed on him; that the learned Judge failed to appreciate that the power to set aside ex parte proceedings was meant to be exercised to avoid injustice or hardship resulting from accident, mistake or inadvertence; and that the mistake of a party's advocate is a matter that ought to be considered by the court in exercising its discretion. KIE called to its aid Article 159(2)(d) of the Constitution, and the Oxygen Principle, urging that both were intended to avoid unnecessary miscarriage of justice by allowing the court more discretion. Relying on **Patriotic Guards Limited vs James Kipchirchir Sambu [2018] eKLR**, KIE argued that there was nothing on record to show that the absence of its counsel was meant to delay Kulohoma's claim. The Court was therefore urged to allow the appeal. [**10**] In his submissions, Kulohoma reiterated that the appeal being a second appeal, it was confined to matters of law only, unless KIE could demonstrate that the court below considered matters they should not have considered, or failed to consider matters they should have considered, or that the entire finding of the court was perverse. The Court was urged to find that this had not been established, and therefore the appeal lacked merit and should be dismissed.

[**11**] It is clear that the appeal before us arises from the exercise of discretion by the trial court. The circumstances in which an appellate court can interfere with the exercise of discretion by the lower court were set out in **Mbogo & Anor. vs Shah [1968] E.A. 93,** where **Sir Charles Newbold**, **P.,** stated that:-

> ***"A 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."***

[**12**] The notice of motion filed by KIE on 31st May 2017 sought orders of review and/or setting aside the judgment of the trial magistrate dated 8th May 2017. That application was stated to be brought under Orders 9 rule 1, 12 rule 7, order 22 rule 25 of the Civil Procedure Rules, and Article 47 of the Constitution of Kenya. Order 45 of the Civil Procedure Rules that provides for applications for review of decree or order, was not cited. This means that essentially the application was not for review under Order 45 of the Civil Procedure Rules, but was for setting aside or varying the judgment under Order 12 rule 7 of the Civil Procedure Rules. This rule gave the trial court the discretion to set aside or vary the judgment upon such terms as may be just. The trial magistrate in the exercise of his discretion dismissed the application.

[**13**] The issue before us is whether there was sufficient justification for the learned Judge to interfere with the exercise of discretion by the trial magistrate. In other words, using the threshold in **Mbogo vs Shah** (supra), did the learned Judge properly consider whether the trial magistrate misdirected himself or was wrong in the exercise of his discretion, such as would have justified the setting aside or review of the judgment? It should be noted that the learned Judge of the first appellate court was not exercising any discretion, but merely reviewing the exercise of discretion by the trial court to establish whether the same was exercised judicially.

[**14**] The main ground upon which KIE relied for review/setting aside of the judgment of the trial court, was its allegation that it was not given an opportunity to be heard. The trial magistrate having considered the motion came to the conclusion that there was no justification for review of his orders as **Order 45(1)** of the Civil Procedure Rules was not applicable, and that KIE had indeed been served with the hearing notices, but had failed to attend court, and could not therefore claim not to have been given a hearing. The learned Judge found that the trial magistrate could not be faulted in coming to that conclusion.

[**15**] On our part, we have reconsidered the record of appeal and do find that KIE has not demonstrated that there was any misdirection, either on the part of the trial magistrate or on the part of the learned Judge. It is clear that the application limited the trial court into considering whether KIE was denied an opportunity to be heard such as to justify the setting aside of the judgment. Given the circumstances before the trial court, it was apparent that KIE's advocate was served with a hearing notice but failed to attend court.

KIE shifted the blame to its advocate and urged the court not to penalise it for the mistake of its counsel. However, the trial magistrate was not impressed. In the circumstances, the trial magistrate properly exercised his discretion and the learned Judge of the High Court had no reason to interfere with the exercise of that discretion. Likewise, we find no merit in this appeal and therefore dismiss it with costs.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR