IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & SICHALE JJ.A)

CIVIL APPEAL NO. 73 OF 2018

BETWEEN

JUJA COFFEE EXPORTERS LIMITED.....APPELLANT

AND

CHARLES OKUNGU ODHIAMBO & 28 OTHERS.....RESPONDENTS

(Appeal against the judgment of the Employment and Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 23rd November, 2017

in

ELRC Cause No.307 OF 2015

****

JUDGMENT OF THE COURT

The respondents herein, ***Charles Okungu Odhiambo, Elias Omondi Obuya, Gilbert Yaura Shivakale, Haji Chite Juma, James Muendo Mwetu, Onesmus Muoka Kitumbi, John Kimwili, Patrick, Sakwa Namakhabwa, Joseph Pudo Akeng'o, Daudi Odhiambo Oketch, Andrew Anyangu Angaya, Tom Nyongesa Mbanga, Joseck Okachi Alela, Mourice Otieno Winyo, Joseph Onyong'o Musambai, Thomas Ochieng' Odhiambo, Nzioka Maithya, Livingstone Makhoha Shiundu, Stephen Kanja Chiira, Livingstone Chiema Anjere, Kenedy Ochieng Awino, Felix Otieno Obade, Fredrick Odhiambo Hadulo, Dick Odhiambo Omolo, James Namenge Okongo, Emmanuel Odhiambo Ombuoro, Erick Otieno Omondi, Edward Okello Obiero*** and ***Kitheka Mboto*** were the claimants in a suit filed in the Employment and Labour Relations Court where the appellant herein, ***Juja Coffee Exporters Ltd.*** was named as the respondent. In the memorandum of claim, the gist of the respondents' claim was that on the 18th September 2014, the appellant unlawfully terminated them. Each one of them particularized his claim, the sum effect of which they sought orders for:-

> **"(a)** ***Order directing the respondent to pay the claimants' fornotice in lieu, year of service, leave pay and compensation for unfair termination amounting to Ksh.16,433,800.***
>
> ***(b) A declaration that the claimants' termination was unlawful and unfair.***
>
> ***(c) An order directing the respondent to issue the claimants with a certificate of service.***
>
> ***(d) Costs of this claim and interest at court rate.***
>
> ***(e) Any other relief that the honourable court may deem fit to grant.***

In a reply to the memorandum of claim, the appellant denied having employed the respondents' (save the 1st respondent). It was its case that not having employed the respondents (save the 1st respondent) it was not liable to pay the sums demanded by each of the respondents.

The dispute between the two parties was heard by ***Rika, J***. who in a judgment rendered on 16th June 2017 ordered as follows:

> ***"(a) It is declared termination of the claimants' contracts was unfair and unlawful.***

(b) The respondent shall pay to the claimants a total amount of Ksh.16,433,800 as detailed at paragraph 1 of this judgment, and paragraph 12 of the statement of claim.

(c) The respondent shall release to the claimants their certificates of service forthwith.

(d) Costs to the claimants.

(e)Interest granted to the claimants at 14% per annum from the date of judgment till the judgement is satisfied in full."

Following this judgment, the appellant filed a motion dated 25th July 2017 under a certificate of urgency and sought the following orders:

"1. Spent.

2. There be a stay of execution and/or of further proceedings arising from the judgment of the honourable court delivered on 16th June, 2017 pending the inter parties hearing and determination of this application.

3. The Honourable Court be pleased to set aside the judgment delivered on the 16th June, 2017 and to reopen the hearing of the defence case."

The application was supported by the affidavits of ***Osman Tahir Sheikh Said*** and ***Kongere Ferdinand Billy,*** both sworn on 25th July 2017. In the said affidavits and on the grounds on the face of the motion, it was contended that the appellant's counsel was served with a notice of entry of judgment on 5th July 2017; that enclosed therein was a copy of the judgment delivered on 16th June 2017; that the respondent's case was closed on 11th October 2016 in the appellant's absence on which date the court directed the respondents to file their submissions; that the matter was set down for mention on 7th November 2016, that thereafter, the court retired to write its judgment; that the appellants were neither served with the respondents' submissions nor the mention notice for 7th November 2016; that failure to attend court on 11th October 2016 was on account of misinformation from counsel holding brief on behalf of the appellant on 30th June 2016 and who communicated to the appellant's counsel that no hearing date would be taken until after adjournment fees of ksh.3,000/- was paid to the respondents.

The respondents resisted the Notice of Motion and filed grounds of opposition dated 3rd August 2017. It was the respondent's position that the appellant had been accorded "***numerous opportunities***" to prosecute its case but to no avail. Further, it was the respondent's contention that the appellant had failed to pay adjournment fees as directed on 30th June 2016.

On the same dated the motion was filed (25th July 2017), and in absence of the appellant's counsel, the court granted an ex-parte interim order of stay of execution on condition that the appellant deposits the total sum of Ksh.16,433,800 in court within 14 days failing which the respondents would be at liberty to execute. Aggrieved by the ex-parte order granting conditional stay, the appellants filed a motion dated 17th August 2017 (hereinafter the second motion). In the second motion, the appellants sought the following orders.

"1. Spent.

2. There be a stay of execution of the judgment of the honourable court delivered on 16th June, 2017 pending the hearing and determination of this application.

3. The honorable court be pleased to review or vary the conditional orders of stay of execution granted on 25th July, 2017 and to substitute order number 4 and 5 of the orders of 25th July, 2017 with an order of stay of execution pending the hearing and determination of the application dated 25th July, 2017."

The second motion was grounded on the assertion that the appellant was unable to raise **Ksh.16,433,800.00** as directed by ***Rika, J***. This motion (the second motion) came before ***Abuodha, J***. the then duty Judge on 18th August 2017, who granted an interim of stay order. He directed thus:

"I hereby grant temporary stay of execution of the orders made on 25th July, 2017 until 18th September, 2017 when the application dated 17th August, 2017 shall be placed before Hon. Rika J for his directions."

It is the motions of 25th July 2017 and 17th August 2017 that came before ***Rika, J.*** who in a ruling delivered on 23rd November 2017 ordered that:

"a) The applications filed on 25th July, 2017 and 17th August, 2017 are rejected.

b) Costs of both applications to the claimants.

c) Claimants are at liberty to execute."

The dismissal of the two motions precipitated the appeal before us. In a memorandum of appeal dated 9th May 2018, the appellant listed six

grounds of appeal. When the appeal came before us for plenary hearing on 6th November 2018).

Mr. Rongere learned counsel for the appellant relied wholly on the written submissions filed on 8th August 2018. In the written submissions grounds 1 and 6 were combined, ground 2 was argued on its own, grounds 3 & 4 were argued together and ground 5 was abandoned. In grounds 1 and 6 it was contended that in spite of the parties framing issues for consideration, the learned judge failed to consider the issues framed by the parties and in particular, whether the judgment of 16th June 2017 was an irregular (or regular) judgment. In ground 2, the learned judge was faulted for failing to consider the principles that guide the court in setting aside a judgment. As regards grounds 3 & 4, it was submitted that the learned judge considered irrelevant factors and that he improperly exercised his discretion. The irregular factors cited by the learned judge, according to the appellant, was the finding that the appellant was granted adequate opportunity to respond to the claim; in finding that the appellant had engaged in serial disobedience of court orders and in defending his judgment by stating that ***"… the employees who left employment 3 years ago after years of toil, have not been paid; their terminal dues".*** It was contended that the learned judge failed to appreciate that the appellant's counsel's absence in court on 11th October 2016, was because no mention notice had been served and neither had the respondent's submissions been served upon the appellant's counsel. Counsel relied on the decision of ***JAMES KANYIITA NDERITU 7 ANOTHER V. MARIOUS PHILOTAS GHIKAS & ANOTHER [2016] eKLR*** for the proposition that orders that are made without notice to the affected party are a nullity.

In opposing the appeal learned counsel ***Clarise Osore*** also wholly relied on their written submissions filed on 1st November 2018. The respondent contended that the judgment delivered by ***Rika, J***. was a regular judgment as the respondents testified and tendered evidence in support of their claim; that the appellant on the other hand squandered the opportunity by not tendering evidence; that the learned judge did not consider irrelevant factors and that no good reason/s were given for non-attendance on 11th October 2016 and that the appellant had failed to deposit the decretal sum as directed by the court. The respondents refuted the appellant's contention that the learned judge failed to determine the issues before him.

We have considered the record, the rival written submissions, the authorities cited and the law. In this appeal, we are being called upon to interfere with the Judge's discretion in dismissing the appellant's two motions. One was for setting aside the judgment of 16th June 2017 and the second motion was for stay of execution and variation of the order directing that the total sum of Ksh16,433,80 be deposited in court as a condition for stay of execution. As we embark on the determination of this appeal, we hasten to add that there are many decisions of this court that have set guidelines on when the discretion of a trial judge can be interfered with. In ***PITHON WAWERU MAINA V. THUKU MUGIRIA [1983] KLR 78*** it was held that:

> ***"2. The principles governing the exercise of the judicial discretion to set aside an ex-parte judgment obtained to in default of either party to attend the hearing are:***
>
> ***a) Firstly, there are no limits or restrictions on the Judge's discretion except that it should be based on such terms as may be just because the main concern is to do justice to the parties.***
>
> ***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 ParkashAnand [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 exercise of his discretion and that as a result there has been injustice. Mbogo v. Shah [1968] EA 93.***
>
> ***d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji [1954] 21 EACA 20).***
>
> ***e) A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically. (Smith v. Middleon (1970 SC 30)***
>
> ***e) A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically. (Smith v. Middleon (1970 SC 30***)

In line with the above position of the law, the single issue for our determination is whether we should interfere with the learned Judge's discretion.

The record shows that on 11th October 2016 there was no appearance for the appellant and the court ordered as follows:

> "**1**. ***Respondent's case marked as closed.***
>
> ***2. Claimant to file their submissions within 21 days.***
>
> ***3. Mention on 7th November, 2016***."

On 7th November 2016, the court recorded that there was "***no appearance for the respondent***" and it proceeded to set the date for judgment as 16th June 2017.

With due respect to the learned judge, having found out that there was no representation on behalf of the appellant on 7th November 2016, the court should have inquired whether the appellant's counsel was aware of the mention date. The court also failed to inquire whether the appellant had been served with the respondents' submissions. Besides, on 11th October 2016 when the court directed that the respondent's submissions are to be filed within 21 days the court should have directed that the submissions be served upon the appellant's counsel who would then be at liberty to file their submissions, should they deem it fit to do so. There was no reason to shut the appellant out, having filed a memorandum of appearance, a statement of defence and having taken part in the trial save only that they did not tender their defence. It is our view that the manner in which the court conducted the trial was irregular. In ***JAMES KANYIITA NDERITU & ANOTHER V. MARIOS PHILOTAS GHIKAS & ANOTHER [2016] eKLR*** this court stated:

> "***In an irregular default judgment, on the other hand judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment***."

Further, in the same decision of ***JAMES KANYIITA NDEIRITU & ANOTHER VS.MARIOUS PHILOTAS GHIKAS & ANOTHER*** **(**Supra) the court stated:

> "***The former Court of Appeal for Eastern Africa in Ali Bin Khamis v. Salim Bin Khamis Kirobe& Others [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA. with whom Worley P. and Sinclair, VP. Concurred stated thus:***
>
> > '***On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a personknown to be affected by it and having a statutory right to be served before its can be made the order is a nullity in the sense that it must be set aside ex debitojustitiae, and that in cases of nullity procedure is unimportant. Since the Court had inherent jurisdiction to set aside its own order. I accept these principles as laid down by Lord Greene MR.***"

We think that the learned judge misdirected himself in not ensuring that the appellant had prior notice of the mention date. He also misdirected himself in not ensuring that the appellant was served with the respondent's submissions. It is in view of the above, we find that we are justified in interfering with the judge's discretion.

Having come to the above conclusion, we do not consider it necessary to delve into the other issues raised in this appeal.

The upshot of the above is that we allow this appeal. The appellant's Notice of Motion dated 25th July 2017 is hereby allowed in terms of Prayer 3. Consequently, the judgment delivered on 16th June 2017 is hereby set aside and we direct that the appellant be given an opportunity to present its defence. Costs of this appeal to the appellant.

Dated and delivered at Mombasa this 14th day February, of 2019

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR