IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 232 OF 2010

BETWEEN

HILLARY ROTICH..APPELLANT

AND

DR. WILSON KIPKORE.....................................RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya (Koome, J.) dated 2nd July 2010

in

HCCC No. 108 of 2010)

****

JUDGMENT OF THE COURT

After ***the appellant, Hillary Rotich*** failed to file a defence to a suit instituted against him by ***the respondent, Dr. Wilson Kipkore***, the latter obtained judgment in default for ***Kshs 9,990,867.20***. A few days after the entry of the default judgment, the appellant applied to set the same aside and for leave to file his defence out of time. ***Koome, J***. (as she then was), was not persuaded that the appellant had presented any good grounds to justify setting aside the default judgment, which she found to be regular. Nevertheless, she granted him the orders he had sought, on condition that he deposits the sum of ***Kshs 9,990,867.20*** in an interest earning account in the joint names of the parties' advocates within 30 days from the date of the ruling (2nd July 2010), failing which the application would stand dismissed. In the event the appellant did not comply with the condition and his application ultimately stood dismissed. In this appeal the appellant is challenging the exercise of discretion by the learned judge in that ruling.

The background to the appeal is fairly straightforward. On 24th February 2010 the respondent lodged in the High Court a claim for ***US$ 134,102 (Kshs 9,990,867.20)*** for breach of contract against the appellant. He averred that in November 2004 he agreed with the appellant that the latter would import for him a 4-wheel drive motor vehicle from Dubai for the said amount, which he duly paid, but in breach of the agreement, the appellant failed to import the vehicle or to refund the money. The appellant was duly served with summons to enter appearance on 24th March 2010 and entered appearance on 29th March 2010 through the firm of ***Ombeta & Associates Advocates***.

Thereafter the appellant did not file defence within the prescribed period or at all and on 16th April 2010 the respondent applied for default judgment, which was duly entered on 27th April 2010. On 4th May 2010 the appellant applied, through ***Owino & Owino Company Advocates,*** to set aside the default judgment, claiming that the failure of its first advocates to file a defence within the prescribed period "was inadvertent and due to unfortunate and excusable error", that he had a good defence to the action and that the respondent stood to suffer no prejudice.

The respondent opposed that application vide an affidavit sworn on 20th May 2010, contending that the appellant was duly served with summons to enter appearance as confirmed by his entry of appearance; that no valid explanation was given for failure to file the defence within the prescribed time; that he had well and truly deposited the amount claimed in the suit in the appellant's bank account on diverse dates; that the appellant was well and truly indebted to him for the said sums; and that the appellant's draft defence was a bare denial that he had received the money.

By the ruling, the subject of this appeal, the learned judge made the orders, which we have already adverted to, leading to this appeal in which the appellant is essentially challenging the exercise of discretion by the learned judge. The appellant challenged the ruling on five

grounds, contending firstly that the learned judge erred by denying him an adjournment on 25th May 2010 so as to respond to the respondent's affidavit of 20th May 2010. In his view that amounted to a denial of the right to fair hearing and justice because he intended to show that the amount deposited in his account by the appellant was meant to cater for travel and accommodation expenses only.

Secondly the appellant submitted that even one triable issue entitled him to unconditional leave to defend the suit. It was his view that had he been granted the opportunity to file a further affidavit, he would have demonstrated that the money claimed by the appellant was paid to a ***Mr. Deepak Karami*** rather than to himself, which was a triable issue. Relying on ***James Wanyoike & 2 Others v. CMC Motors Group Ltd & 4 Others [2015] eKLR***, he added that a defence, which raises a triable issue, does not mean a defence, which must succeed, but rather one that raises a *prima facie* issue deserving of adjudication.

On the third ground of appeal the appellant submitted that the learned judge erred by holding that he had not explained his failure to file the defence within the prescribed time whereas the explanation, namely mistake of his former counsel, was in the affidavit in support of the application to set aside the default judgment. On the authority of ***CMC Holdings Ltd v. James Mumo Nzioki [2004] eKLR***, and ***CFC Stanbic Ltd v. John Maina Githaiga & Another [2013] eKLR,*** it was submitted that mistake of counsel is a good ground for setting aside a default judgment and that failure by the court below to exercise discretion in favour of the appellant in this case amounted to wrong exercise of discretion.

Next the appellant submitted that in the circumstances of this appeal, conditional leave to defend was not justified and he should have been allowed to defend the suit unconditionally. He submitted that the condition to deposit the entire sum was onerous and amounted to a denial of the right to defend the suit.

Lastly the appellant submitted that the learned judge erred by relying on the then ***Order XLI rule 4(2)*** of the ***Civil Procedure Rules*** on stay of execution pending appeal whilst he had not invoked that provision and was not seeking stay of execution pending appeal. He added that the learned judge erred by holding that he had not provided any security whilst it was not necessary in an application for stay of execution pending the setting aside of the default judgment. For the above reasons the appellant urged us to allow the appeal, set aside the impugned ruling and allow him to defend the suit unconditionally.

Opposing the appeal, the respondent submitted that the power to set aside a default judgment was entirely discretionary and that the appellant had not shown that the learned judge exercised her discretion wrongly. The decisions of this Court in ***Jimnah Irungu N. Mwangi v. Eunice Nduta Kamau [2016] eKLR*** and ***Gideon Muriuki & Another v. Cleophas Wekesa & Another [2015] eKLR*** were invoked to underline the principle that this Court will not interfere with exercise of discretion by the court below unless it is satisfied that it has exercised its discretion wrongly. It was further submitted that the default judgment in this case was a regular judgment, which cannot be set aside without justification, and that it was not enough to merely blame the appellant's former advocates. In support of those propositions the respondent relied on ***Tana & Athi Rivers Development Authority v. Jeremiah Kimigho Mwakio & 2 Others [2015] eKLR*** and ***Habo Agencies Ltd v. Wilfred Odhoambo Musingo [2015] eKLR***. In the respondent's view, the appellant's proposed defence was a bare denial, which did not raise any triable issues. The respondent further urged that it was suffering prejudice by being kept out of the fruits of its judgment and that although the court below had tried to accommodate the appellant by requiring him to meet some conditions, he had failed to do so. He accordingly urged us to dismiss the appeal with costs.

We have carefully considered the record of appeal, the ruling by the learned judge, the grounds of appeal, the submissions by both parties and the authorities they relied on. In our view, this appeal turns on whether or not, in the circumstances of this appeal, the learned judge exercised her discretion properly. It cannot be gainsaid that under the former ***Order IXA rule 10*** of the Civil procedure Rules which the appellant invoked, the power of the court to set aside default judgment is discretionary. The provision provided thus:

> ***"Where judgement has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

It is also truism that this Court will not interfere with exercise of discretion by the trial court unless it is satisfied that the trial court was wrong in the manner in which it exercised its discretion. ***Madan, JA,*** (as he then was) expressed the proposition thus, in ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] EA 898:***

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

(see also ***Mbogo & Another v. Shah [1968] EA 93*** and ***Matiba v. Moi & 2 Others [2008] 1 KLR 670)***.

Whether to grant an adjournment or not is also at the discretion of the court depending on the circumstances of each case. That discretion is to be exercised judiciously and according to law and reason, not according to private opinion, whim, humour, arbitrarily, or fancifully. (See ***Jaribu Holdings v. Kenya Commercial Bank Ltd, CA. No. 314 of 2007).*** The appellant's application was certified urgent on 4th May 2010 and the Court, in addition to issuing *ex parte* orders of stay of execution, directed the appellant to serve the application for hearing within 21 days. The respondent served its replying affidavit three days before the hearing of the application *inter partes*, and in denying the appellant's application for adjournment, the learned judge noted that the application had been certified urgent and *ex parte* orders were in force.

We cannot, in the circumstances, fault the exercise of discretion by the learned judge in refusing to adjourn the hearing of the application. She adverted to relevant considerations, which guided her in the exercise of discretion. As this Court stated in ***Mohammed Hassan Musa & Another v. Peter M Mailanyi & Another**, CA No. 243 of 1998*, casually granting an adjournment on the mere asking for it is antithetical to the public policy, and we may add, the constitutional value and principle of expeditious disposal of cases. Even if we consider that we would have granted the adjournment if we were in the shoes of the learned judge, that in itself is not a good ground for interfering with her decision. (See ***Gideon Muriuki & Another v. Cleophas Wekesa & Another***, supra).

It is common ground that the default judgment was a regular judgment. The appellant was duly served with summons to enter appearance and the plaint and indeed entered appearance but failed to file defence within the prescribed time. The explanation given for failure to file defence was, to say the least, rather bare and casual. In the pertinent part of the affidavit in support of the application to set aside the default judgment, the appellant merely deposed as follows:

> ***"7. That I have been advised by my Advocates on record, which advise I verily believe to be true that the failure by my previous advocates to file a defence within the prescribed period was inadvertent and due to unfortunate and excusable error." (Emphasis added).***

The appellant was thus purporting to depose to what he was informed by his advocates (Owino & Owino) who were not the ones who had committed the alleged omission and error and the source of their information was also not disclosed. The advocates who failed to file the defence were Ombetta & Associates and it behoved them to swear the affidavit explaining the nature of inadvertence or error that led to their failure to file defence. At the very least, Owino & Owino or the appellant should have sworn an affidavit explaining what they had learnt from Ombetta & Associates, if at all they had learnt anything, regarding the alleged inadvertence or error. As it was, what was placed before the court was pure supposition or conjecture, which cannot form the basis for asking a court to exercise discretion in favour of a party. Failure to explain the delay means simply that no reasons were tendered on the basis of which the leaned judge could exercise her discretion.

In ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 Others** [2014] eKLR*, the Supreme Court reiterated that extension of time in favour of a party is not a right of a litigant but a discretionary power of the court and to entitle a party to such extension of time, he has to lay the basis to justify the order he seeks.

Even after finding that the appellant had not explained the reason for failure to file the defence, the learned judge literally bent over backwards to try and give the appellant an opportunity to defend the suit by imposing a condition requiring him to deposit the sum in dispute in an interest earning account within 30 days. Under Order IX A Rule 10, the learned judge had discretion to impose conditions that she considered just in the circumstances, taking into account the interest of both the appellant and the respondent. The appellant did not abide with the condition and accordingly his application stood dismissed.

Having failed to explain the reasons for the delay in filing the defence and to abide by the conditions that the learned judge set, it cannot fall from the mouth of the appellant to argue that he had a good defence that he must be allowed to put forward. The discretion of the court to set aside a judgment is intended to ensure that a litigant does not suffer injustice or hardship as a result of, among others, a genuine and excusable mistake or error. (See ***Patel v. E. A. Cargo Handling Services Ltd** [1974] EA 75).* In this appeal, however, the appellant did not demonstrate such genuine mistake or error and even when afforded an opportunity to defend the suit subject to meeting a condition, he did not comply. He only has himself to blame.

We agree with the appellant that there was no basis for the learned judge to invoke the provisions of the then Order XLI rule 4(2) because what was before her was not an application for stay of execution pending appeal. The conditions stipulated in that Order which the learned judge erroneously applied in the application before her are relevant only in an application for stay of execution pending appeal. However, in view of our finding that the appellant did not place before the court any material on the basis of which it could have exercised discretion in his favour, the error by the learned judge as regards application of Order XLI rule 4(2) is of no moment.

We have ultimately come to the conclusion that in the circumstances of this appeal, we cannot fault the exercise of discretion by the learned judge, which amounts to saying that we are not satisfied that grounds exist on the basis of which we can interfere with her exercise of discretion. The appeal is accordingly dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 16th day of February, 2018

ASIKE-MAKHANDIA

……………………………………

JUDGE OF APPEAL

W. OUKO

………………………………………

JUDGE OF APPEAL

K. M'INOTI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>