IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 42 OF 2013

BETWEEN

AFAPACK ENTERPRISES LIMITED.....APPELLANT

AND

PUNITA JAYANT ACHARYA*(Suing as the Administrator of the*

Estate of the LateSuchila Anantrai Raval).....**RESPONDENT**

(Being an Appeal against the entire decision contained in the Ruling dated 27th September, 2012 and the order extracted therefrom given by the High Court given by the High Court (Odunga, J)

in

H.C.C.C. NO. 530 OF 2009*)*

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JUDGMENT OF THE COURT

1. The appellant has in this appeal challenged a ruling of the High Court (Odunga J.) delivered on 27th September 2012 dismissing its application for review of an earlier order given on 11th October 2011 by the court (Mwera, J as he then was) refusing to set aside judgment entered in favour of the respondent in default of defence.

Background

2. By a plaint dated 28th September 2009, Punita Jayant Acharya, the respondent, as the administrator of the estate of Sushila Anantrai Raval, the registered proprietor of the property known as L.R No.1870/38 (suit property) filed suit against Afapack Enterprises Ltd, the appellant, seeking an order to compel the appellant to vacate and hand over possession of the suit property and in default an order of eviction to issue. The respondent also sought a permanent injunction to restrain the appellant from interfering with possession of the suit property.

3. It was pleaded in that suit that the suit property had been the subject of proceedings before the Business Premises Rent Tribunal that had aborted; that on 12th February 2009 the respondent served notice of intention to terminate the appellant's tenancy over the suit property; that the appellant did not challenge or object to the termination notice before the Business Premises Rent Tribunal; that despite the notice having lapsed, the appellant had refused to vacate and hand over vacant possession of the suit property thereby necessitating the institution of the suit.

4. Although the appellant entered appearance in the suit, it did not file a defence. Consequently, the respondent applied for and obtained interlocutory judgment in default of defence which was granted by the court on 20th December 2010. The suit was then scheduled for formal proof on 9th March 2011.

5. On 4th March 2011, the appellant presented an application before the court seeking the setting aside of the interlocutory judgment entered on 20th December 2010 and to have a statement of defence admitted out of time. In its affidavit supporting that application, the appellant deposed that the interlocutory judgment was entered irregularly and prematurely as the time for filing defence had not lapsed; that it was questionable whether service of summons had been personally served; and that the appellant had a good defence to the respondent's action.

6. The respondent opposed that application asserting in her replying affidavit that service of summons to enter appearance had indeed been effected; that a memorandum of appearance had been filed; that there was default in filing defence and that the interlocutory judgment was regularly obtained.

7. After hearing the parties, the High Court (Mwera, J), as already indicated, rejected the application in a ruling given on 11 th October 2011, having been satisfied that summons to enter appearance had been served on the appellant; that the interlocutory judgment was regularly obtained; and that the appellant had delayed, inordinately, in filing its defence.

8. Approximately 9 months later the appellant, having changed its advocates in January 2012, presented a motion before the High Court on 18th July 2012 seeking a review of the ruling given on 11th October 201. The substance of the grounds on which review was sought were that the appellant's previous advocates had failed the appellant in not filing the defence on time; that the application for setting aside the judgment had been made by the previous advocates without the appellant's knowledge; and that it had a meritorious defence to the suit. The court was urged not to visit the mistakes of the advocates upon the appellant.

9. The respondent opposed that application contending that the conditions for granting review had not been met; that the appellant had participated in the proceedings; that there was inordinate delay in making the application for review; and that the appellant was merely intent on protracting the matter so as to ensure it continued to occupy the premises at the detriment of the respondent; and that by its conduct, the appellant was not deserving of favourable treatment by the court.

10. As already noted, Odunga J. dismissed that application, prompting the present appeal.

The appeal and submissions

11. The appellant set out 19 grounds of appeal in its memorandum of appeal which can be condensed to complaints that the Judge erred in: failing to find that the conduct of its previous advocates prejudiced the appellant; failing to find that the appellant had demonstrated sufficient reason to justify review; failing to appreciate that the appellant had raised triable issues in its defence; and making conclusive findings at an interlocutory stage.

12. Although served with notice of hearing, there was no appearance for the appellant during the hearing of the appeal. The appellant's counsel had, however, filed written submissions on 31st January 2017. Learned counsel Mr. Martin Munyu appeared for the respondent. He adopted the respondent's written submissions filed on 4th April 2017 which he highlighted.

13. For the appellant, it was submitted that the unfortunate circumstances in which it found itself were brought about by the negligence of its previous advocates and that the appellant should therefore not be punished for the mistakes of its advocates. In that regard, counsel cited the decision of this Court in ***Commissioner of Income Tax v Kencell Communications Ltd [2013] eKLR*.**

14. According to the appellant the learned Judge was at fault in his decision in that he failed to consider that the appellant has a good defence to the respondent's claim; and further that the Judge made conclusive findings of fact without the benefit or consideration of the appellant's evidence or arguments.

15. Opposing the appeal, Mr. Munyu highlighted his written submissions urging that the Judge properly rejected the application for review; that none of the grounds upon which an application for review under Order 45 of the Civil Procedure Rules may be considered were present in this case; that despite the alleged mistakes on the part of its former advocates, the appellant's own conduct demonstrated his lack of diligence; and that on account of the inordinate delay by the appellant in moving the court, it did not merit favourable exercise of discretion by the Court. In that regard, counsel referred to several authorities namely: ***Daphene Parry v Murray Alexander Carson [1963] EA 546***; ***Ferruz Omar Mahendan & 4 ors v Ahmed Mohamed Honey [2016] eKLR***; and ***AG v Anyang' Nyong'o & 10 ors [2010] eKLR*.**

16. Counsel submitted that the issue of a good defence, relating to the validity of the termination notice, was taken up for the first time during the hearing of the application for review albeit in the wrong forum as it should have been taken up before the Tribunal. With that, counsel urged the Court to dismiss the appeal with costs.

Analysis and determination

17. We have considered the appeal and the submissions. In considering the application for review under Order 45 of the Civil Procedure Rules, the lower court was exercising its discretion. The circumstances in which we, as an appellate Court, can interfere with the exercise of discretion by the lower court are limited. In the often-cited decision of the predecessor to this Court in the case of ***Mbogo & another v Shah [1968] EA 93*** the Court held that:

> ***"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration any matter which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

18. Therefore the question for determination in this appeal is whether the learned Judge, in rejecting the appellant's application for review, took into consideration matters that he should not have taken into account or failed to consider matters he should have considered and whether his decision is plainly wrong.

19. The learned Judge was undoubtedly alive to the legal principles applicable when considering an application for review. The grounds on which an application for review under Order 45 Rule 1(1) of Civil Procedure Rules may be based include discovery of new and important matter or evidence which, after exercise of due diligence, was not within the applicant's knowledge; some error on the face of the record or for other sufficient reason.

20. It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant's favour was clearly the appellant's own conduct. The Judge found that the appellant "has not been diligent enough in pursuing its rights;" and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:

> ***"An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months delay in an application for review, if no reasonable explanation is offered is inordinate."***

21. The appellant did not offer a reasonable explanation for the delay. Furthermore, the Judge also found that the appellant was guilty of non-disclosure of all material facts and had deliberately attempted to mislead the court and was therefore undeserving of favourable exercise of discretion. Those matters, taken into consideration by the Judge in rejecting the application, are undoubtedly relevant considerations when the court is called upon to exercise its discretion.

22. With particular reference to an application for review and the need for an applicant to demonstrate exercise of due diligence, this Court in ***Francis Origo & another v Jacob Kumali Mungala (2005) 2 KLR 307*** stated that:

> ***"… it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And importantly, the applicant must make the application for review without unreasonable delay."*** *[Emphasis added].*

23. As noted above although the appellant blamed its previous advocates for its predicament, the appellant's own conduct was duly considered by the Judge. As the Judge pointed out that conduct suggested a lack of interest in the suit. According to the appellant, the suit in the High Court would never have been lodged had his previous advocates filed a reference before the Tribunal upon the termination notice being served. However, the respondent had made it clear in the plaint filed in 2009 that there was no reference filed before the Tribunal. One would have expected the appellant to act upon that information and move with speed to take action before the Tribunal. The appellant did not move the Tribunal until three years later, on 13th July 2012. Can the Judge be blamed, in those circumstances, for taking the view that the appellant was not diligent? We do not think so.

24. In the result, we do not have any basis at all on which we can interfere with the Judge's exercise of discretion. The appeal has no merit. It is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of May, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR