IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 268 OF 2017

BETWEEN

STEPHEN WANYEE ROKI.....APPELLANT

VERSUS

K-REP BANK LIMITED.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

DENNIS WAWERU.....3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (F. A Ochieng, J.) dated 30th May 2017

in

Civil Suit No. 1 OF 2011)

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JUDGMENT OF THE COURT

1. This appeal emanates from the ruling of the High Court **(F.A. Ochieng, J.)** dated 30th May, 2017. Pursuant to that ruling, the learned judge set aside the default judgment that had been entered in favour of the appellant against the 2nd respondent and extended time within which the 2nd respondent could put forward its defence and counter-claim. According to the appellant, the learned judge failed to exercise his discretion judiciously in granting the said orders.

2. The brief facts culminating in this appeal are that by a suit filed in the High Court at Nairobi Commercial and Admiralty Division, **Civil Suit No. 1 of 2011**, the appellant sued the 2nd respondent for recovery of an alleged debt amounting to Kshs. 78,709,174.95/= together with costs and interest thereon. Subsequently, a default judgment was entered against the 2nd respondent for non-appearance and a preliminary decree issued to that effect.

3. It is apparent that even after the said decree was served upon the 2nd respondent, it purportedly failed, neglected and/or refused to pay the said decretal sum. Accordingly, this caused the appellant to institute **Miscellaneous Application No. 93 of 2015** in the Judicial Review Division seeking orders of mandamus to compel the 2nd respondent to pay the decretal sum with interest thereon. For the reasons stated in his judgment dated 23rd February, 2016, **Odunga, J.** declined to grant the orders sought and directed that **"the applicant was at liberty to seek the same prayers if the application for setting aside the judgment fails."**

4. In the meantime, prior to that, the 2nd respondent had instructed the firm of **T.M Kuria & Co. Advocates** to act for it in the matter. On 23rd October, 2014, the 2nd respondent filed a notice of change of advocates instructing the firm of **Musyoki Mogaka & Co. Advocates** to take up the matter from the aforesaid advocates. By way of an amended notice of motion dated 18th March 2015, the 2nd respondent's advocates filed an application seeking to set aside the default judgment on the basis that although their advocates were admittedly served with the summons to enter appearance, the advocates on their own accord, failed and or neglected to enter appearance and file its defence.

5. The application was anchored on the grounds, *inter alia*, that; the 2nd respondent was keen on defending the suit and was only let down by the negligence of its first advocates and should therefore not be condemned unheard for the mistake of the advocate; that the decretal amount is colossal; that the 2nd defendant stands to suffer irreparable damage should the matter proceed without its defence on record; that there is no prejudice to be suffered by the plaintiff should the 2nd respondent be allowed to file his defence out of time.

6. In reply, the appellant maintained that the 2nd respondent had been served with the summons to enter appearance on 14th August 2014 and only filed its first application to set aside the default judgment on 7th July, 2015; that the period of the delay, almost one year, had not been explained and the 2nd defendant was thus guilty of indolence, notwithstanding the change of advocates which ought not to be used as a scapegoat.

7. Upon considering the application, (**Ochieng, J),** in the impugned ruling, allowed the 2nd respondent's application and set aside the default judgment. It is that decision that is the subject of the appeal before us. The appellant in his memorandum of appeal dated 1st August, 2017 faults the learned judge, saying that he erred in law and fact by finding that:

(a) The 2nd respondent had tendered a satisfactory explanation for not prosecuting the application to set aside;

(b) The 2nd respondent had tendered a draft defence and counter-claim that raised triable issues when it was apparently clear from the previous draft defences and the submissions in court that the same was an afterthought as the City County Government could not lodge a claim 7 years later since the completion of the project;

(c) Did not consider the evidence that the 2nd respondent had already initiated the process of paying the appellant and had executed the payment voucher and as such the application was not meritorious;

(d) The change of advocates by the 2nd respondent was a ploy intended to hoodwink the court;

(e) The application had been brought with inordinate delay and therefore prejudiced the appellant.

8. The appeal was disposed of by way of written submissions as well as oral highlights. **Mr. Stephen Roki**, who appeared in person, faulted the learned judge for failing to find that the mere change of advocates did not cause the unreasonable delay by the 2nd defendant in failing to file a defence and/or even the application to set aside the default judgment, which was filed 3 years since the entry thereof. In his view, the change of advocates was not in good faith and he considered it a ploy to have another advocates, apply to set aside the default judgment for the reasons that the same advocates, **M/S T.M Kuria & Company,** still represented the 2nd respondent in other matters.

9. He urged the Court to note that upon filing his amended plaint the parties consented to have the 2nd respondent file its defence within fourteen days, which they failed to do. He further argued that the 2nd respondent did not make any demand in its purported draft defence; neither did it contain a counter-claim, hence it was a sham. He added that even if there was a valid counter-claim the same was time barred as it was made 7 years after the completion of the contract.

10. The appellant submitted that the 2nd respondent was in the process of paying the appellant and had even prepared a payment voucher hence the application to set aside the default judgment was therefore an afterthought. According to him, if the 2nd respondent claims that the court file was missing, they ought to have applied for reconstruction of a skeleton file. He opined that the judge was thus biased and as a result reached a wrong conclusion.

11. The appellant urged us to find that the 2nd respondent was guilty of inordinate delay, in not only filing the application to set aside the default judgment, but also in prosecuting the same and in bringing a purported Counter-claim seven years after the contract had been performed.

12. It was his argument that he lost his property that was auctioned and bought by the 3rd respondent after borrowing funds to enable him facilitate the aforesaid contract. The appellant contends that the learned judge failed to exercise his discretion properly and urged us to allow the appeal and order that the default judgment be restored.

13. In opposing the appeal, **Mr. Mokua**, learned counsel for the 2nd respondent, submitted that the major issue for consideration was **"whether the trial court rightly exercised its discretion in setting aside the appellant's default judgment and in allowing the 2nd respondent to file its defence and counter-claim out of time".**

14. He asserted that the learned judge exercised his discretion in setting aside the appellant's default judgment and urged this Court to employ the principle that the right to a hearing and fair trial as enshrined in **Article 50(1)** of the Constitution is a fundamental human right and cornerstone of the rule of law. In this regard, it was then the duty of the trial court to accord or ensure that every person who had submitted themselves to its jurisdiction had an opportunity to ventilate their grievances.

15. Citing **Article159 (2) (d**) of the **Constitution**, counsel intimated that the said provision guides the court to dispense substantive justice and not give undue regard to technicalities. **See Richard Ncharpi v IEBC & 2 others [2013] eKLR**. He went on to submit that an ex-parte judgment will be set aside where a defence raises triable issues with the overriding objective being that of doing justice to the parties. He relied on **Order 10 rule 11 of the Civil Procedure Rules, 2010** which gives the court unfettered discretion to set aside interlocutory judgment after satisfying the principles as enunciated in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR; Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (1982-88) KAR 1036.**

16. Learned counsel cited several other authorities to the effect that where a defendant raises a reasonable defence to a claim and the defendant has not been guilty of obstruction of justice, the court should exercise its discretion in favour of the defendant even where the judgment is regular. Expounding on those principles, he cited **Patel v East Africa Cargo Handling Services Ltd [1974] E.A. 75.**

17. The 2nd respondent went on further to justify the delay in prosecuting its application for the following reasons; *the commencement of judicial review proceedings by the appellant; missing court file when the 2nd respondent's applications came up for inter-parties hearing; filing of a garnishee application by the appellant which took precedence over the 2nd respondent's applications to set aside the default judgment; application to strike out the 2nd respondent's applications which apparently took precedence over the respondent's 3 applications*.

18. According to the 2nd respondent, the appellant filed his further amended plaint on 7th July, 2014, hence computation of time for purposes of ascertaining delay in filing the defence ought to have been from 7th July, 2014 and not the date when it is alleged that the project was completed. He further argued that the alleged payment voucher was unsigned and therefore had no legal effect.

19. As regards the issue of change of advocates, the 2nd respondent maintained that there is no requirement in law that the previous firm of advocates must swear an affidavit deposing that the failure to file the defence in time was as a result of their oversight, inadvertence and/or omission.

20. In conclusion, learned counsel reiterated that there was no inordinate delay, considering the fact that parties had been engaging each other actively through multiple applications. He urged this Court to uphold the High Court ruling and dismiss the appeal with costs.

21. We have considered the record of appeal, submissions of the parties and the relevant law. It is now well settled that this Court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself and as a result arrived at a wrong conclusion. **See Mbogo v Shah [1958] E.A. 93.** It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court. Ordinarily, when an application to set aside a default judgment and extend time for filing a defence is filed before a court, there are several factors that the court ought to take into account.

22. In **PATEL v E.A. CARGO HANDLING SERVICES LIMITED (1974) E.A. 75**, this Court held as follows:

> ***"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."***

23. The courts should also endeavor to ensure that the factors considered are in tandem with the overriding objective of civil litigation, that is, the just, expeditious, proportionate and affordable resolution of disputes before the court. From the record, it is clear that the 2nd respondent in his amended application filed on 18th March, 2015 sought leave to file its defence out of time against the ex-parte default judgment granted on 9th October, 2014.

24. In that regard and for the stated reasons for the delay in filing the appeal, we take note that the 2nd respondent indeed acknowledged that its then advocates were duly served with summons to enter appearance. It went on to state that it was only able to file the application after appointing another advocate. Giving the 2nd respondent the benefit of doubt, which we do, its explanation related to the period from the date of the delivery of the default judgment on 9th October, 2014 until 7th July 2015, the explanation for the delay in making the application for extension of time, of about several months, was attributed to its advocates who negligently failed to prosecute the application.

25. There is a plethora of authorities from this Court regarding exercise of a court's discretion in setting aside default judgments. Our duty here is to consider whether the learned judge exercised his discretion judiciously.

26. The learned judge was satisfied that the delay in prosecuting the 2nd respondent's application had been well explained. He rendered himself thus:

> ***"From the chronology particularized above, it is clear that the case has not been dormant at all. The parties have been actively engaging each other. In the circumstances, I find and hold that the explanation tendered by the 2nd defendant for not prosecuting its application to set aside the default judgment is reasonable. I have also given due consideration to the draft Defence and Counter-claim. The same raises triable issues. It is only fair and just that the 2nd defendant be allowed an opportunity to put forward its said Defence and Counter-claim."***

27. From the record before us, we are satisfied that the learned Judge addressed himself to all the facts and evidence placed before him before arriving at the conclusion to set aside the default judgment and extend time to the 2nd respondent to file its defence. In the circumstances, we find that this appeal is devoid of merit and dismiss it. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 4th day May, 2018.

P.N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR