IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KARANJA & MUSINGA, JJ.A

CIVIL APPEAL NO. 191 OF 2009

BETWEEN

ANDREW LETEIPA SUNKULI.....1ST APPELLANT

ZILPAH NTEMEL SUNKULI.....2ND APPELLANT

AND

SOUTHERN CREDIT BANKING CORPORATION.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Mutungi, J.) dated 4th May 2004

in

H.C.C.C. NO. 394 OF 2002)

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JUDGMENT OF THE COURT

[1] **Andrew Leteipa Sunkuli** and his wife **Zilpah Ntemel Sunkuli** (appellants) and **Southern Credit Banking Corporation** (respondent) entered into an agreement on 4th August, 1999, for the sale of property described as **Land Reference No. 1/890, Nairobi**, for a sum of Ksh. 10,500,000/=

[2] By mutual agreement, the appellants took possession of the property on 25th October, 1999, before the completion of the sale, after paying the agreed down payment of Ksh.1,260,000/=. The appellants' advocates Messrs Kimani Kairu & Co. Advocates gave a professional undertaking to the effect that the balance of the purchase price would be settled in full within fourteen (14) days of the date of registration. By another mutual agreement, the parties agreed to share the outstanding rates, and other incidental expenses, bringing the balance of the purchase price to Ksh 9,039,873/=. That amount was not paid as agreed, and consequently, the respondent sued the appellants for the interest on the same from the date of taking possession to the 15th April, 2000 being the date when the balance of the purchase price fell due.

[3] The respondent, moved the court by way of the plaint filed on 2nd April, 2002 claiming *inter alia* the sum of Ksh 1,630,603/= as at 15th April 2000, together with interest thereon at the rate of 35% per annum from 16th April, 2000 until payment in full. Upon being served with the plaint, the appellants started negotiations with the respondents with a view to settling the matter out of court. As a show of good faith, the respondent undertook not to take any further steps in court as an amicable solution was awaited. Parties agreed that in the event of the negotiations breaking down, the respondent would serve notice to the appellants giving them ten (10) days within which to file a statement of defence.

[4] The negotiations were not fruitful and this precipitated the writing of the letter dated 6th June, 2002, which letter gave the appellants, through their advocates fourteen (14) days within which to lodge their defence in court in response to the respondent's claim. It is not disputed that the said letter was duly received by the appellants' advocates who had by then merged with the firm of Archer & Wilcock to form Archer, Wilcock & Kairu Advocates.

[5] The respondent waited and having not received any response to the said letter, moved the court with a request for entry of *ex-parte* judgment in its favour. *Ex-parte* judgment was entered by the Deputy Registrar of the court on 5th August, 2002. A decree was extracted, and a notice of entry of judgment and intention to execute was sent to the appellants, giving then ten (10) days to pay Ksh 2,705,581.52 failing which execution of the decree would follow.

[6] This prompted the applicants through their counsel on record to file the notice of motion dated 31st October, 2002, seeking orders of stay of execution pending hearing of the said application; that the ex-parte judgment, and all other consequential orders be set aside; and that the defendants be granted leave to file its defence. The application was predicated on the ground that failure to enter an appearance and file a defence was inadvertent and not negligent. The appellants also stated that they had a good defence to the claim, and the matter should have been accorded a full hearing.

In support of the application, Peter Kimani Kairu, learned counsel for the appellants deposed that failure to file the defence was inadvertent, and that the respondent would not suffer any prejudice if the ex-parte judgment was set aside and the matter heard and determined on its own merit.

[7] In opposition to the application, Mr. Wilfred Oroko, a legal officer of the respondent, averred that they fully notified the appellants to file their defence after it was clear that the appellants were not keen on pursuing negotiations out of court. After their letter failed to elicit any response, they moved the court to enter judgment against the appellants. Mr. Oroko deposed that the said judgment was a regular judgment; that the appellants had no defence as there was no denial of the money owed; and consequently asked the court to dismiss the application.

[8] The court (Mutungi, J.) considered the application. He made findings that the letter notifying the appellants to file their defence within thirty (30) days was received

in Mr. Kairu's Office; that the same was acknowledged in the delivery book, that the appellants in spite of the said notice failed to file their defence, and so the judgment had been properly applied for and obtained.

The learned Judge also doubted the *bonafides* of Mr. P. K. Kairu, when he claimed not to have seen the said notice and appears to have placed the blame on him for the manner in which he had dealt with the issue. Ultimately, the learned Judge found the application lacking merit and dismissed it with costs to the respondent. That is the Ruling that is challenged in this appeal by way of the memorandum of appeal dated 28th August, 2009 in which the appellants have proffered sixteen (16) grounds of

appeal.

[9] The gravamen of the appeal is twofold. Firstly, that failure to file the defence was inadvertent on the part of counsel, having not read the letter asking them to file the defence within fourteen (14) days; and

secondly, that contrary to the finding of the learned Judge their draft defence raised triable issues which ought to have been canvassed in court at a full trial. The appellants pray that their appeal be allowed; the impugned Ruling be set aside; that they be allowed to file their defence within a reasonable time; and the matter before the High Court once reinstated proceeds to full hearing.

Upon directions given by this Court on 29th July 2015, parties filed written submissions, with the appellant filing theirs on 11th August 2016, and the respondent filing its submissions on 14th October, 2016.

[10] Learned counsel were also given an opportunity to highlight the said submissions orally when the appeal came up for hearing. In her oral submissions before this Court, Ms. Ouma, learned counsel for the appellant, expounded the two issues we have indicated above. She emphasised that failure to file the said defence was an honest and inadvertent mistake on the part of counsel, and ought not to have been visited on the appellants. For that proposition, she called in aid the time honoured case of **Mbogo & another vs Shah [1968] EA 93** where this Court, when determining an almost similar issue had this to say:

> *"… it would in our mind not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident, or error. Such an exercise would in our mind be wrong in principle."*

According to learned counsel, the learned Judge had fettered his own discretion when determining this matter and in the process, visited an honest mistake of counsel on his clients, namely, the appellants.

On the second issue as to whether the defence was triable or not, it was learned counsel's submission that the learned Judge had even acknowledged that there were issues that were triable – for instance, he had posed the question as to "*whether a buyer who is given possession of the property before completion of the sale should get away from any payment for the period prior to the completion of the sale*". Counsel therefore submitted that given that the mistake by counsel was excusable, and there were triable issues raised in the draft defence, then the application ought to have been allowed, and this appeal should therefore succeed.

[11] On his part, Mr. Kissinger, learned counsel for the respondent, submitted that no evidence had been tendered before Court to show that the learned Judge had proceeded on the wrong principles of law when he refused to exercise his discretion in favour of the appellants. He maintained that the judgment was a regular judgment. Further, that indeed the draft defence raised no triable issues as all issues of fact had been conceded, and that the Law Society of Kenya (LSK) conditions of sale were clearly spelt out and needed no articulation by way of hearing.

On the issue of interest, he said that it was also clearly provided for in the LSK conditions of sale which the parties had agreed to be bound by. There was, according to learned counsel, no sufficient reason for this Court to interfere with the ruling appealed from.

[12] We have carefully considered the entire record, the submissions of counsel and the law applicable, particularly as espoused in the decided cases cited to us. The principles to guide the court when determining whether to set aside an *ex-parte* judgment are now old hat. Whether to set aside such a judgment or not is purely at the discretion of the court. This discretion is unfettered but it must be exercised judicially, and in a manner that will foster rather than suppress justice. It is a discretion that must not be evoked to obstruct or delay justice, or cause prejudice to an innocent party. (See **Shah vs Mbogo [1967] EA 116**.)

In determining this matter, we must address two issues. First is whether failure to file the defence by the appellants was an excusable or inadvertent mistake. It is common ground that the parties herein were exploring an out of court settlement after the plaint was filed. It is also conceded, that learned counsel for the respondent gave an undertaking that he would not request for entry of ex-parte judgment in default of entering appearance or filing a defence in the event the negotiations broke down before giving the appellants ten (10) days' notice.

[13] The negotiations failed to yield fruit and the respondent's counsel kept his word and sent the notice to the appellant's counsel. It is conceded that the said letter was duly received. However, learned counsel for the appellant failed to respond and so judgment was sought and entered by the court.

Mr. Kairu, who was seized of the matter, owned up and swore an affidavit saying that although the said letter was received in his office, he never saw it, and hence the inaction on his part. His explanation was that the letter was sent at a time when his firm was merging with the firm of Archer and Wilcock and the letter may have been misplaced in the process. The learned Judge did not believe Mr. Kairu. Hear the learned Judge:-

> *"I do not believe the bonafides of Mr. P. K. Kairu, when he claims that he did not see the notice from the plaintiff, calling on the defendants to enter appearance and file their defence. I fail to see what else the plaintiff was expected to do after delivering the notice to Mr. P. K. Kairu's offices and having it signed for? Short of being required to read the notice for Kairu, there was nothing else that could be done."(emphasis ours.)*

This was to say the least unpalatable language to use in respect of an officer of the court whose only fault appears to not have seen the said letter, yet he had given a reasonable explanation for this. The learned Judge did not even mention in his ruling, the explanation that Mr. Kairu had given on oath.

[14] In our view therefore, the learned Judge failed to consider important material that he ought to have considered before exercising his discretion against the appellant. We further note that the learned Judge did actually go even further and consider other matters that can be said to be extraneous when he said:-

> *"My disbelief in Kairu's claims is strengthened by his failure to write the proposals upon which the negotiations were based. Mr. Kairu not only failed to put down his clients proposals to the plaintiff despite his undertaking at the meeting, but wrote on 23rd May, 2002, promising to get the proposals to the plaintiff's lawyers by Monday of the following week. He never made good his promise."*

This, with profound respect to the learned Judge had nothing to do with Mr. Kairu's failure to see the letter. The only issue before the learned Judge was whether the explanation given by Mr. Kairu for his failure to file a defence was acceptable or not. It had nothing to do with why the negotiations had stalled, and who was to blame for it. This was not Mr. Kairu's personal matter. It was his client's matter, and however displeased the learned Judge was with Mr. Kairu's conduct of the negotiations, the learned Judge should not have penalised the appellants. We also note that the learned Judge did not even mention the 1st appellant's affidavit in his ruling, which would mean that he did not consider it at all, before dismissing the application before him.

In our view, the learned Judge failed to exercise his discretion judicially within the parameters set out in **Mbogo vs Shah & Another** case (*supra*). In so doing, the appellants were punished for no fault of their own.

On the second issue of whether the draft defence raised any triable issues, we find that the learned Judge did actually frame an issue in his Ruling which was triable, when he stated:-

> *"The question then is whether a buyer who is given possession of the property before completion of the sale should get away from any payment for the period prior to the completion of sale……"*

That was an issue that was triable. Even the issue of the interest rate was triable, because the Law Society conditions of sale only stated that the interest rate, if not specified would be 2% points above the maximum rate of interest charged by the banks. Evidence was necessary to establish what the market interest rates were as at the time the interest accrued.

As this Court stated in **CMC Holdings Ltd – vs – Jame Mumo Nzyoki**, **Civil Appeal No. 329 of 2001**. (unreported)

> *"… the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant had reasonable defence …. and whether the defence if filed already or if draft defence is annexed to the application, raises triable issues."*

In this case, the appellants had established these two requirements before the Judge, and in our view ,they deserved favourable exercise of the learned Judge's discretion.

If their advocate needed to be penalised for his inaction in the matter, there were other remedies open to the Judge to deal with that, rather than shut out the appellants completely, and slam the door of justice on their face.

[15] We must say however that the *exparte* judgment was *prima facie* a regular judgment, given that counsel for the respondent had complied with all that he and counsel for the appellants had agreed on. He had sent the agreed notice to learned counsel after it was clear that no settlement was in sight; he had ensured that the notice was received and made an entry in the delivery book to that effect; and waited to be served with the appellants' statement of defence to no avail before requesting the court to enter judgment. What we are not comfortable with however is the fact that the learned Judge failed to consider the reasons that were given for the default. Had he addressed his mind judicially on the matter, he would have appreciated the fact that whatever prejudice the respondent had suffered could have been remedied by an award of costs. That way, the appellants who had a triable defence could not have been denied a hearing and the respondent, who was not at fault, could have been compensated for the set back of having the *exparte* judgment vacated. The learned Judge ought to have set aside the *exparte* judgment on terms.

[16] Having considered all these issues, our finding is that this appeal has merit. We allow the same and set aside the impugned ruling with the result that the *ex-parte* judgment entered against the appellants on 5th August, 2002 and all other consequential orders are hereby set aside. We nonetheless order that the appellants pay the respondent thrown away costs of Ksh. 20,000/= before the filing of the defence, which defence must be filed and served within fifteen (15) days from the date of this judgment; failing which the *ex-parte* judgment will be automatically restored.

In view of the fact that the respondent was not at fault in respect of the entry of the said judgment, we order that costs of this appeal shall be costs in the suit and will abide the outcome thereof.

Dated and delivered at Nairobi this 24th day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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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