IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA

CIVIL APPEAL NO. 265 OF 2014

BETWEEN

AFRICA ECO-CAMPS LTD …….....……. APPELLANT

AND

EXCLUSIVE AFRICAN

TREASURERS LTD …….....…… RESPONDENT

(An appeal from the decision of the High Court of Kenya at Nairobi Milimani Commercial and Admirality Division (Mabeya, J.) dated 5th March, 2014

in

NAIROBI H.C.C.C. NO. 378 OF 2008)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling and order of the High Court (A. Mabeya, J.) dated at Bungoma on 21st February 2014 and delivered at Nairobi on 5th March 2014 dismissing the appellant's application dated 24th May 2012 seeking to set aside a judgment in favour of the respondent delivered on 18th January 2012 after hearing the respondent *ex parte*.

Background

2. The record shows that the parties entered into business relationship in June 2007 under which the respondent undertook to provide marketing and sales services to the appellant on the terms set out in a contract dated 15th June 2007.

3. On termination of that relationship effective 1st May 2008, the respondent claimed that the appellant owed it an amount of Kshs. 297,916.00. In settlement, the appellant issued two cheques in favour of the respondent for Kshs. 139,000.00 each but subsequently countermanded payment when, according to the appellant, it discovered that the respondent had not supplied any services at all.

4. On receiving a demand for payment of the said amount from the respondent, the appellant countered

that demand by serving a notice for winding up of the respondent under Section 220 of the then Companies Act. The relevant portion of that notice read:

> *"To,*
>
> ***EXCLUSIVE AFRICA TREASURES LIMITED***
>
> *P.O. Box 63437-00619*
>
> ***NAIROBI***
>
> *This is a formal notice of demand on you* ***EXCLUSIVE AFRICA TREASURES LTD*** *for the payment of the sum* ***US Dollars Seven Thousand Five Hundred (USD 7500)*** *owing by you to us for non performance and lack of consideration paid in advance under the contract dated* ***15th June 2007,*** *the particulars whereof are within your knowledge.*
>
> ***TAKE NOTICE*** *that unless we receive payment of the said sum of* ***USD 7500*** *within* ***THREE (3) WEEKS*** *from the date of service hereof upon yourselves, you will be deemed to be unable to pay your debts within the meaning of section 220 of companies Act and we will petition the High Court of Kenya for winding-up order against you without further notice to you.*
>
> ***DATED at NAIROBI this Friday 13th day June, 2008."***

5. The respondent protested that notice through its advocates, asserting that the purported debt of USD 7,500.00 *"is disputed"* and demanded its withdrawal as well as confirmation that the appellant would not file winding up proceedings in view of *"the serious injury that such winding up proceedings would occasion"* to the respondent's *"credit reputation standing and business."* The appellant did not withdraw the notice.

6. By a plaint dated 7th July 2008, the respondent commenced suit against the appellant in the High Court at Nairobi seeking a permanent injunction to restrain the appellant from presenting filing, advertising or taking further steps to wind up the respondent. It also sought judgment for Kshs. 297,916.00, damages and costs among other reliefs.

7. Alongside the plaint, the respondent sought interlocutory injunction to restrain the appellant from presenting filing, advertising or taking further steps to wind up the respondent pending the hearing and determination of the suit.

8. The firm of Kimanga & Co Advocates entered appearance for the appellant by a Memorandum of Appearance dated 21st July 2008 in which the appellant's address for service for purposes of the suit was given as *"C/O Kimanga and Company Advocates, Cargen House, 3rd Floor Room 315, Harambee Avenue, P. O. Box 5511-00200, Nairobi."* That firm also filed an affidavit sworn by Azim Jiwa Rajwani, a director of the appellant, in opposition to the respondent's application for interlocutory injunction as well as a statement of defence.

9. The application for interlocutory injunction was scheduled to be heard on 24th February 2009. A Mr. Michuki held brief for Mr. Makori advocate for the appellant and applied for adjournment of the hearing of the application on grounds that Mr. Makori was before the Court of Appeal that day. The Judge granted an adjournment as *"the last adjournment to be granted"* and rescheduled the hearing of the application to 10th March 2009. On 10th March 2009, there was no representation for the appellant in court and the Judge heard and granted interlocutory restraining order.

10. The main suit was thereafter scheduled for hearing and was on a number of occasions adjourned. On 5th December 2011 when the hearing was scheduled with the consent of the parties, there was no representation for the appellant. The trial proceeded ex parte before Mabeya, J. with the respondent

calling one witness. Judgment was subsequently delivered on 18th January 2012. The court issued an order permanently restraining the appellant from proceeding with winding up proceedings against the respondent; awarding the respondent Kshs. 298,591.00; and a further award for Kshs. 1,300,000.00 in aggravated damages on the basis that *"the act of issuing a winding up notice and the threat of winding up proceedings amounted to intimidation and aggravated damages can be awarded."*

11. That then set the stage for the appellant's application dated 24th May 2012 in which the appellant sought orders; that its advocates, Kimanga and Company Advocates, be replaced with the firm of P. K. Njiiri & Company Advocates; that there be a stay of execution of the decree; that the judgment and decree be set aside; and that the judgment be reviewed, varied or set aside.

12. That application was based on the grounds set out on the face of the application and was supported by an affidavit sworn by Azim Jiwa and an affidavit sworn by his father Lutafali Jiwa Rajwani. Azim Jiwa Rajwani (Azim) deposed that Mr. Makori advocate of the firm of Kimanga and Company Advocates was introduced to him by his father; that his subsequent efforts to trace Mr. Makori were not successful; that the appellant *"lost track of the matter"* after sometime due to *"pressure of work"*; that on 14th May 2012 his father brought it to his attention that some correspondence had been brought about a month or so ago from Kisii including a letter from Kimanga and Company Advocates dated 25th October 2011 by which Mr. Makori informed his father that he had been unable to contact Azim to obtain further instructions and requested that *"Azim to get in touch or appoint an advocate based in Nairobi."*; that thereafter he instructed P. K. Njiiri & Company Advocates to make inquiries on the case but was unable to locate Mr. Makori; and on perusing the court file established that judgment had been entered on 18th January 2012; that the judgment does not reflect the true status as it is the respondent which owes the appellant and the judgment would unjustly enrich the respondent.

13. In opposition to that application, Deepar Darbar, a director of the respondent, swore a replying affidavit deposing that the appellant had not been diligent in the matter; that the appellant's advocates had persistently failed to attend court despite service of hearing notices and had on several occasions sought adjournments in the matter; that the hearing date for 5th December 2011 when the trial proceeded had been fixed by consent and the judgment given thereafter is regular; that the allegation that the appellant had made efforts to contact its advocates was not credible as the respondent had evidence that the firm of Kimanga and Company Advocates was indeed located at the address given as the address for service.

14. Having considered the application, the Judge was not persuaded that there was any basis for reviewing the judgment given on 18th January 2012. The Judge was also of the view that the appellant did not make out a case justifying the exercise of his discretion in its favour. He therefore refused to set aside the judgment and dismissed the appellant's application in its entirety with costs to the respondent. Aggrieved, the appellant lodged this appeal.

The appeal and submissions by counsel

15. In its memorandum of appeal, the appellant complains that the Judge erred in failing to appreciate that an award for aggravated damages for Kshs. 1,300,000 was not justified; that a claim for exemplary or aggravated damages had not been pleaded; that the Judge failed to give due consideration to the fact that the appellant demonstrated that there was a triable issue; that whether the court could, in the circumstances, award aggravated damages was a triable issue justifying the setting aside of the judgment; that the appellant was denied an opportunity to be heard; that no evidence was presented to show that the appellant had notice of the hearing from his advocate; that in all the circumstances, the court should have exercised its wide discretion to prevent an obvious injustice visited upon the appellant; that the Judge wrongly penalized the appellant for the blunders committed by its advocate's failure to attend court; and that the refusal by the Judge to allow the application to set aside the judgment was a wrong exercise of the Judge's discretion.

16. Both parties filed written submissions, which counsel highlighted before us. Miss Ouko, N. D. A,

learned counsel for the appellant, submitted that sufficient explanation was offered by the appellant why there was no representation for the appellant during the trial on 5th December 2011; that the defence raised several triable issues; that the appellant should not suffer because a mistake was made by its advocates; and that the case should be heard on merits. Counsel referred us to past decisions of this Court, including **Patel vs. E. A. Cargo Handling Service Ltd [1974] E. A 75** and urged that an award of costs would have compensated the respondent.

17. Mr. S. Sarvia, learned counsel for the respondent, referred us to decisions of this Court on legal principles applicable in an application to set aside judgment including, **Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 2 others [2003] eKLR**; **K vs. K [1993] eKLR**.

18. He submitted that the appellant has not demonstrated that the refusal to set aside the judgment was a wrong exercise of discretion by the Judge; that no error on the part of the Judge has been shown; that the Judge considered all the aspects of the case and the explanation offered for non attendance at the trial on 5th December 2011; that the defence by the appellant was in any case a mere denial and did not raise triable issues.

19. Counsel cautioned that it must be borne in mind that this is not an appeal against the judgment delivered on 18th January 2012, but an appeal against the decision given on 5th March 2014 refusing to set aside that judgment.

Analysis and determination

20. We have considered the appeal and submissions by counsel. When dealing with the application to set aside the judgment, the lower court was called upon to exercise its discretion. The principles applicable when dealing with such an application were considered in **Patel vs. E. A. Cargo Handling Service Ltd [1974] E. A 75** where Duffus, P stated:

> ***"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

21. Being a matter entirely in the discretion of the Judge, the circumstances in which we, as an appellate court, can interfere with the decision of the court are limited. We can interfere if we are satisfied that the judge misdirected himself in law or that he misapprehended the facts or that he took into account extraneous considerations or that he failed to take into account relevant considerations or that his decision is plainly wrong.

22. Sir Charles Newbold P stated in **Mbogo & Another vs. Shah [1968] E.A. 93** that:

> ***"…a 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 the exercise of his discretion and that as a result there has been misjustice…."***

23. What then are the circumstances in this case? Azim, the appellant's director, says that his father Lutafali Jiwa Rajwani, introduced him to Mr. Makori advocate of the firm of Kimanga and Company Advocates. Mr. Makori had apparently acted for his father in the sale of a petrol station in Kisii. Mr. Makori entered appearance and filed a defence on behalf of the appellant. He also filed an affidavit on behalf of the appellant in response to the respondent's application for interlocutory injunction. He appeared once before the lower court on 16th July 2008 when he applied for an adjournment and protested

the mode of service of process on the appellant. He was never to be seen again.

24. On all subsequent occasions when the matter was in court, and there were at least 7 such occasions when the matter was before a judge, Mr. Makori never appeared. Other advocates held his brief and sought adjournments on his behalf. On other occasions, there was no representation for the appellant. Even the Respondent's application for the interlocutory injunction, as already mentioned, was heard without any representation on the part of the appellant.

25. Curiously, although the statement of defence filed by Kimanga and Company Advocates on behalf of the appellant consisted of mere denials, including a denial of a relationship having ever existed between the parties, the affidavit sworn by Azim on 21st July 2008 contradicted that defence and acknowledged the existence of the contractual relationship; the manner in which according to the appellant that relationship was terminated and attempted to answer the respondent's claims.

26. In its application dated 24th May 2012 to set aside the judgment before the lower court, the appellant asserted that its *"former advocates have been incommunicado and cannot be traced from the official address that they gave for the past one year."* Beyond stating that attempts to locate Mr. Makori had not succeeded, Azim gave no details of the specific steps he took to trace his advocates between July 2008 and 14th May 2012 when he stumbled upon the letter dated 25th October 2011 from Kimanga and Company Advocates in his father's house in which Mr. Makori requested Azim's father to *"inform Azim to get" "in touch or appoint an advocate based in Nairobi."*

27. In the foregoing circumstances, the learned Judge was therefore right in our view when in his ruling he stated:

> ***"1 have considered the fact that whilst the Defendant went into great detail to show that its former Advocates were no longer at Cargen House Nairobi, the Defendant did not offer any explanation why it did not seek to contact those advocates at their Kisumu offices to be able to offer an explanation for non-attendance in court on 5th December, 2011. It is also to be recalled that in exhibit "AJR2" produced by the Defendant, in the letter dated 25th October 2011, Mr. Makori Advocate was complaining of not being able to trace the defendant."***

28. That said, it is significant, in our view, that the letter of 25th October 2011 from Kimanga and Company Advocates is addressed to Azim's father as opposed to the appellant. It gives credence to the claim by Azim that it was his father who introduced Mr. Makori to the appellant and to the claim by Azim that he only came across that letter at his father's house in May 2012 and immediately engaged another firm of advocates. Furthermore, the statement in that letter that the appellant *"should appoint an advocate based in Nairobi"* is also significant to the extent that it implies that Mr. Makori was not himself based in Nairobi.

29. Although there can be no doubt that the appellant went to sleep for a long time and was undoubtedly let down by the Mr. Makori, the learned Judge does not appear to have taken into account, the import of that letter. It was written, on the face of it, on 25th October 2011. By that time, the trial had not taken place. The trial took place on 5th December 2011. It is instructive that immediately the letter dated 25th October 2011 came to his attention in May 2012, he immediately moved to replace the firm of Kimanga and Company Advocates, at the same time seeking a review or setting aside of the judgment. There was therefore a plausible explanation, in our view, why there was no appearance for the appellant during the trial on 5th December 2012. We think the learned Judge should have taken this into account. Had he done so, we think he would have come to a different conclusion and would have exercised his discretion in favour of the appellant.

30. As already noted, the defence filed on behalf of the appellant was a mere denial. Considered alongside the affidavit to which we have made reference, there are certainly triable issues that merited adjudication.

31. Although the judgment in favour of the respondent is regular and the respondent is entitled to the

fruits of that judgment, we think an award for thrown away costs in favour of the respondent alongside an order for the appellant to furnish security for the decretal amount would have secured the respondent.

32. For those reasons, we allow the appeal and set aside the ruling and order of the High Court given on 5th March 2014. We substitute therewith an order allowing the appellant's application dated 24th May 2012 to the extent that the judgment dated 18th January 2012 is hereby set aside on condition that the appellant shall (unless the amount is already secured) within 30 days, from the date of delivery of this judgment deposit the entire decretal amount of Kshs1,726,177/20 in an interest earning bank account in the joint names of the advocates for the parties pending the hearing and determination of the suit by the High Court.

33. The appellant shall pay to the respondent, the thrown away costs occasioned by the setting aside of the judgment. Such costs shall be assessed upon finalization of the case by the High Court. Any judge of the High Court, other than Mabeya, J. shall conduct the trial.

34. The respondent shall in any event have the costs of the application dated 24th May 2012 and of this appeal.

Dated and delivered at Nairobi this 3rd day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR