IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 295 OF 2014

BETWEEN

GELU UNICRAFTS LIMITED..... 1ST APPELLANT

ALEX SANAIKA OLE MAGELU..... 2ND APPELLANT

LUCY MUTHONI KAHIA MAGELO..... 3RD APPELLANT

AND

USAFI SERVICES LIMITED..... RESPONDENT

(*An appeal from the ruling and order of the High Court of Kenya at Nairobi (**Waweru, J**.) dated 14th February, 2014 **in H.C.C.C. No. 658 of 2007.)***

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JUDGMENT OF THE COURT

By a plaint dated 18th September, 2007 and filed in the High Court at Nairobi on the same day the respondent claimed from the appellants jointly and severally a sum of Kshs.3,615,540/= with interest at the rate of 30% from 30th December, 1998 until payment in full. In the alternative the respondent prayed for an order of Specific Performance directed at the appellants to transfer **plot number 67 (a)** situate off Suna Road in Woodley (Joseph Kangethe) estate "*the suit premises*" to the respondent. The basis for the claim was an agreement of sale dated 30th December, 1998 entered into between the respondent and the 1st appellant with the 2nd and 3rd appellants acting as the guarantors. By the said agreement the 1st appellant agreed to sale and transfer to the respondent who agreed to purchase free from all encumbrances, the suit premises for a consideration of Khs.4,000,000/=.

It was a term and or condition of the said agreement that should the agreement be frustrated for one reason or another the 1st appellant would refund the consideration aforesaid with interest at the rate of 30% per month from the date of the agreement. Pursuant to the agreement, the respondent made payment to the appellants and or on their behalf on different occasions to the tune of Kshs.3,615,540/=. However despite making the payments, the appellants failed, neglected and or refused to transfer the suit premises to the respondent or refund the consideration so far paid, leading to the suit by the respondent.

The appellants entered appearance to the suit jointly through **Messrs J.M. Theuri & Associates**

Advocates. However, the appellants' advocates aforesaid failed to file a defence to the claim in time or at all. The respondentthereafter filed a request for interlocutory judgment in default of defence which was entered on 15th April, 2008 with a direction by the Deputy Registrar that the issue of interest proceeds to hearing by way of formal proof.

The formal proof proceeded before **Waweru, J.** on 29th February, 2012 *ex-parte* though the appellants had been served with the hearing notice. Final judgment was eventually entered on 18th May, 2012 in terms that the appellants pay the respondent the sum claimed in the plaint but with interest at the rate of 30% per annum from 15th April, 2008 until payment in full. The respondent thereafter filed its bill of costs for taxation. The appellants were again served with the taxation notice but failed once more to attend and the bill of costs was eventually taxed in the sum of Kshs.187,180/= on 25th October, 2012.

The appellants, it would appear at this point instructed the law firm now on record in this appeal to act for them. Through this law firm the appellants filed a motion on notice dated 31st October, 2012 seeking to have both the interlocutory and final judgment entered against them as aforesaid set aside. The grounds in support of the application were that the appellants learnt of the final judgment on 25th October, 2012 on being served with notice for theruling on taxation, that the appellants all along believed that their previous advocates had taken all necessary steps to secure their interests in the suit including filing of defence, that the mistakes and inaction on the part of their counsel should not be visited upon them, that there was no proper service or at all of the hearing notice and therefore the appellants were condemned unheard, more so when they had a good defence to the claim.

As expected the application was resisted by the respondent who averred that the lapse of five years before final judgment was entered showed that the appellants were not diligent enough in following up the suit, that the appellants truly owed the respondent the amount on account oftotal failure of consideration as it turned out that they did not infact own the suit premises they were purporting to sell and therefore had no good defence to the claim. That the application was only meant to delay justice and finally that, notwithstanding the foregoing the respondent was willing to complete the transaction.

In a ruling delivered on 12th February, 2014 Waweru, J, partially allowed the application by setting aside the final judgment on account of improper service of the hearing notice on the appellants and allowed the appellants to participate in the next formal proof. The prayer seeking to have the interlocutory judgment entered against the appellants for want of defence was however denied.

It is this ruling that has precipitated this appeal. The appeal is however limited to that part of the ruling in which Waweru, J declined to set aside the interlocutory judgment and to grant the appellants leave to defend the suit. The memorandum of appeal sets out a host of grounds. However, the said grounds taken as a whole merely challenge the manner the learned judge exercised his discretion when considering the application to set aside the interlocutory judgment. Essentially the appellants are saying that in declining to set aside the interlocutory judgment, the learned judge erred and misdirected himself in law by failing to firstly appreciate all legal principles that are applicable in an application to set aside an interlocutory judgment and secondly, in considering and applying those principles.

Pursuant to the case management conference held on 17th August, 2016 before **Ole Kantai, J.A**., parties agreed to canvass the appeal by way of written submissions which were subsequently filed and exchanged their respective written submissions. When the appeal came before us, for hearing **Mr. Mutua** and **Mr. Maina,** learned counsel for the appellants and respondent respectively, elected to rely entirely on the written submissions on record and wished not to highlight them.

The appellants maintain that the learned judge misapprehended the principles applicable in an application to set aside an *exparte* judgment, and in the alternative, that even if hedid not, he misapplied them totally. On the other hand, the respondent submitted that in refusing to allow the application, the learned judge properly exercised his unfettered discretion and further that he was alive to the relevant principles.

The principles upon which the court's discretion to set aside an interlocutory judgment and or order is

exercised are largely settled. In considering such an application, the overarching interest of the court is to do justice to the parties. The discretion is exercised in order to ensure that a litigant does not suffer injustice or hardship as a consequence of *inter alia* an excusable mistake or error on his part and or his advocate. The same however ought not to be exercised in favour of a party seeking to deliberately obstruct or delay the course of justice. The court is bound to consider the reason(s) advanced by the party seeking the exercise of discretion as to why the action resulting into the entry of the interlocutory judgment or order was not taken. Similarly it will also interrogate the delay and or prejudice occasioned to the party in whose favour the interlocutory judgment has been made and whether an award costs will adequately compensate him. Besides, the court is also called upon to bear in mind whether the party seeking the exercise of discretion has a defence on the merits and that denying a litigant a hearing should be an action of last resort. In doing so the court must also look at the conduct of the parties to the suit as well. Lastly, we may add that the court is also called upon to consider **Article 159** of the **Constitution** as well as the overriding objective under **Sections 1A** and 1**B** of **Civil Procedure Act**. See **Mbogo & Another v Shah [1968] EA 93, Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** and **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio [2015] eKLR**.

In his ruling the learned judge delivered himself thus on the exercise of his discretion:-

> **"...The court's power under Order X rule 11 of the rules is quite wide and unfettered, subject to the dictates of justice. But like all judicial discretions, it will not be exercised whimsically but upon settled principles. The principles here include that the power will be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The power will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice** (Shah v Mbogo (1969) EA 116) (*sic*)**. The court will also consider the nature of the action, the defence, if one has been bought to the notice of the court, however irregularly, whether the plaintiff can reasonably be compensated by costs for any delay occasioned; and all this, bearing in mind that to deny anyone a hearing should be the last resort a court (**Jamnadas Sodha v Gordandas Hemraj (1952) ULR7**. I have considered the above principles in relation to the facts of this case...."**

From the foregoing, can the appellants really be heard to say that the learned judge did not appreciate the governing principles in the consideration of an application to set aside an interlocutory judgment? We do not think so. It is clearly demonstrable that the judge was fully aware of these principles and invoked them in the consideration of the application before him.

Did he then misapply them to the facts of the case? In rejecting the application, the judge considered the following; that no good explanation had been offered as to why the defence was not filed, the delay of 4 years from the date when the interlocutory judgment was entered to the date of filing the application, that in this day and age the mere plea that "**it was my advocates fault**" was no longer the magic bullet. "**Then sue your advocate**" would be a proper retort. He also took into account the fact that the appellants had not denied receiving a total of Kshs.3,615,590/= from the respondent as part payment of the purchase price of Kshs.4,000,000/=, that indeed as it turned out the 1st appellant did not own the suit premises and could not therefore pass good title to the respondent resulting in total failure of consideration. Finally, the judge considered the fact that the sale agreement was entered on 30th December, 1998, and the appellants had received almost the entire purchase price and therefore it was rather late in the day almost 15 years down the line for the appellants to turn around and claim that the sale agreement was procured by undue influence, material misrepresentation, unfairadvantage and excessive benefit. The judge was therefore not satisfied that the appellants had a defence to the claim for a refund of the purchase price paid and interest as provided for in the sale agreement.

There is no doubt at all that the learned judge fully appreciated the guiding principles in the exercise of hisdiscretion in an application of this nature and applied them faithfully to the facts of the case and cannot be faulted. He appreciated that there are no limits or restriction on the judge's discretion. See **Pithon Waweru Maingi v Thika Magina [1968] eKLR**.

We are also aware that in the latter case the Court of Appeal stated the circumstances under which it could interfere with the discretion exercised by the trial court in these terms:-

> **"... A Court of Appeal should not interfere with the exercise of 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.**"

We discern no such misdirection in the manner in which the judge dealt with the application. Further, the court record is replete with the appellants'indolence. There is no reason given as to why their counsel could not file the defence in time. The appellants too have not given any explanation as to why they did not follow up their case with their counsel. It appears that once they instructed counsel, they went into slumber. It is hard to imagine or believe that for over 4 years since instructing their counsel to defend them, they never sought to know the fate of the suit. Indeed, from the record and contrary to the appellants' submissions, they were all along aware of the entry of the interlocutory judgment. The court record shows that on 4th July, 2011 when the suit was scheduled for formal proof, Kihara appeared for the appellants and applied for adjournment on the grounds that Mr. Otieno who had personal conduct of the suit on behalf of the appellants was indisposed. Before then it had been made clear to Mr. Kihara that interlocutory judgment had been entered in favour of the respondent on 15th April, 2008 in default of defence. The application for adjournment was nonetheless allowed. Accordingly, the appellants are not being candid when they claim not to have been aware of the entry of the interlocutory judgment until they were served with notice of taxation ruling. Clearly therefore this is not a case of sins of counsel not being visited upon a litigant. Simply put the appellants and or their counsel were negligent and indolent. They were all aware of the entry of interlocutory judgment and elected to do nothing. There were even negotiations for an amicable out of court settlement instigated by the appellants that never came to pass.

Perhaps this is one of those cases that Lord Griffith had in mind when he stated in the case of **Ketterman & Others v Hansel Properties Ltd [1988] 1 ALL ER 38:-**

> **"...Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late state in the proceedings...**"

See also **Madison Insurance Co. v Samuel Ndemo Makori [2004] eKLR** where it was stated: ***"... The same blame, mistake and blunder of an advocate can be***

visited upon the client in order to do justice to the situation."

In our view this was not a mere mistake or inadvertence on the part of the advocate but a case of negligence and indolence. Perhaps and as correctly observed by the learned judge, the appellants have a remedy against their previous advocate. On the whole, we find no merit in this appeal which is accordingly dismissed with costs to the respondent.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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