



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO.115 OF 2016

BETWEEN

KENYA POWER & LIGHTING CO LTD.....APPELLANT

AND

ABDULHAKIM ABDULLA MOHAMED.....1ST RESPONDENT

MULKYS IMPORTERS LIMITED.....2ND RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Mombasa, (Otieno, J.) dated 7th December 2016 in HCC COMM No. 73 of 2016)

JUDGMENT OF THE COURT

On 7th December 2016, the High Court at Mombasa (*Otieno, J.*) set aside, on terms, a default judgment obtained by the respondents, *Abdulkhikim Abdulla Mohamed* and *Mulkys Importers Ltd* against the appellant, *Kenya Power & Lighting Company Ltd*. One of the terms, which triggered this appeal, is an order requiring the appellant to deposit of *Kshs 522,713,576/=* in an interest earning account within 21 days from the date of the order. The appellant contends that in making that order, the learned judge exercised discretion wrongly, which justifies interference by this Court, while the respondents are of the contrary view and urge us to dismiss the appeal.

This is how this appeal ended up before us. The 1st respondent is the registered owner of the properties known as *Plot Nos. 105/VI/MN* and *2921/VI/MN* (the suit properties) in Changamwe, Mombasa and a director of the 2nd respondent. At all material times, the 1st respondent had constructed warehouses on the suit properties, which were let to the 2nd respondent for storage of its goods and for use as administration offices. Electricity to the suit premises was supplied by the appellant, a national electric power transmitter and supplier. On the night of 21st July 2015, a fire broke out at the suit premises, burnt down the buildings erected thereon, and destroyed all the goods therein.

The respondents blamed the appellant for the fire, contending that it was caused by an electric short circuit in one of the appellant's transformers, due to overloading. By a plaint dated 19th July 2016, they filed a suit against the appellant for negligence, claiming a total of *Kshs 522,713,576/=*, damages for loss of profit and business, interest and costs of the suit.

Summons to enter appearance were duly served on the appellant on 29th July 2016 but it did not enter appearance or file defence within the prescribed time. On 18th August 2016, the respondents' advocates applied for judgment in default of appearance and defence and on 24th August 2016 judgment was entered on the liquidated sum of Kshs 522,713,576/= with interest at court rates from the date of judgment. The rest of the claim was to be determined by formal proof.

On or about 19th September 2016, the appellant applied to set aside the default judgment and for leave to defend the suit. It candidly admitted having been served with summons to enter appearance at its regional offices in Mombasa, but explained that when the summons were forwarded to its headquarters in Nairobi to arrange legal representation, by human error the summons were filed away instead of being brought to the attention of its legal department. By the time the error was noticed and an advocate appointed to represent the appellant, default judgment had already been entered, a fact which came to light after the advocate tried to file a memorandum of appearance on 15th September 2016. The appellant attached a copy of a draft defence, which it contended raised triable issues deserving to be determined at trial. In the draft defence, the appellant denied liability for the fire that razed down the suit premises, contending that it did not emanate from its transformer, which in any event was examined after the fire and found to be intact and free of defect or malfunction. The appellant averred further that none of its other customers in the neighbourhood of the respondents had been affected by the alleged overload or malfunction of the transformer as would have been expected to be the case. It pleaded that the fire was instead caused by localized electrical fault within the suit premises.

The application was vigorously opposed by the respondents vide a replying affidavit sworn by the 1st respondent on 17th October 2016. The respondents contended, among others, that the appellant had delayed in making the application to set aside the default judgment, that the delay was inordinate and unreasonable; that the appellant had not presented any good reasons why it did not enter appearance and file defence on time; that the intended defence did not raise any triable issues; and that, in all there was no basis for setting aside the default judgment.

By the ruling dated 7th December 2016, part of which is impugned in this appeal, the learned judge found in favour of the appellant on the question whether he should set aside the default judgment, concluding:

“All in all I have come to the conclusion that the defendant/applicant ought to be allowed to put forth its defence before this court at least to enable it prove its allegations that the fire was caused by factors other than defects of its equipment and transmission line and also to prove the allegations that the value of the damage is not as pleaded by the plaintiff.”

In the next part of the ruling, the learned judge however imposed the terms upon which the default judgment would be set aside and the appellant allowed to file defence. The purpose of those terms, he stated was to ***“assuage the defendant (sic) for the dissipated vested rights”*** and ***“to enable expeditious disposal of the matter”***. Condition No. 2, which has aggrieved the appellant, required it to deposit within 21 days of the ruling, Kshs 522,713,576/= into an interest earning account in the names of the parties' advocates. In default, the order setting aside the judgment would stand vacated. It is important to point out that the learned judge also awarded the appellants Kshs 100,000/= as thrown away costs, which was also to be paid within 21 days of the order.

Although the appellant's memorandum of appeal raises 9 grounds impugning the part of the ruling relating to the deposit, all the grounds boil down to whether the learned judge properly exercised his discretion in imposing that condition. **Mr. Oraro**, learned Senior Counsel, leading **Mr. Mogaka**, learned counsel, submitted in support of the appeal that the default judgment was wrongly entered under **Order 10 rule 6** rather than **Order 10 rule 9** because the respondents' claim was not for pecuniary damages alone.

Learned counsel further submitted that having found for the appellant in virtually all scores and having concluded that the appellant was entitled to defend the suit, the learned judge erred by imposing an onerous condition for the deposit of the entire amount claimed by the respondents, even before it was

proved. It was contended that the respondents were adequately compensated for any loss or damage that they suffered as a result of the setting aside of the judgment by the Kshs 100,000/= awarded as thrown away costs, which the appellant promptly paid. Relying on *Patel v East Africa Cargo Handling Services* [1974] EA 75, *Sebei District Administration v Gasyali & Others* [1968] EA 300, *Philip Keipto Chemwolo & Another v Augustine Kubende* [1982-1988] KAR 1036, and *Bai Lin (K) Ltd & 2 Others v Zingo Investments Ltd & Another*, CA No. 12 of 2014 the appellant submitted that the concern of the courts is to do justice to the parties and not to impede justice or to drive away parties from the seat of justice by imposing onerous conditions.

Regarding the grounds upon which the learned judge justified the order for payment of deposit namely to assuage “the defendant” and to ensure expeditious disposal of the suit, the appellant submitted that it amounted to a fundamental misdirection and erroneous exercise of discretion as well as denial of the appellant of the right to access justice guaranteed by **Articles 50** and **159(2)(a)** of the **Constitution**. **Sections 1A** and **1B** of the **Civil Procedure Act** which requires courts to facilitate the just, proportionate and affordable resolution of disputes was also invoked.

Lastly, the appellant submitted that in imposing the condition for deposit, the learned judge had failed to consider a material and relevant factor, namely the effect of the order on the ability of the appellant to discharge its public duties. It was urged that the court ought, as much as possible to facilitate public bodies in the discharge of their duties to the public rather than hamstringing them by onerous and eviscerating conditions. For all the above reasons, we were urged to find that the learned judge had erred in the exercise of his discretion to an extent justifying interference by this Court.

Taking up his turn, **Mr. Balala**, learned counsel for the respondents opposed the appeal submitting that the challenge to the validity of the interlocutory judgment was belated because the appellant’s appeal was restricted only to the condition to deposit the money and in any event, the question was never raised before the learned judge and was also not raised in the grounds of appeal. Counsel submitted that under **Order 10 rule 11** of the Civil Procedure Act under which the appellant made the application to set aside the default judgment, the court had unfettered discretionary power to set aside or vary the judgment on such terms as are just. He relied on the judgments in *Shanzu Investments Ltd v. Commissioner of Lands*, CA No. 100 of 1983 and *Patel v. East Africa Cargo Handling Services* (supra), to underline the unfettered discretion of the court and the virtual free hand in imposing conditions, which is only constrained by the requirement that such conditions should be just. It was submitted that in the circumstances, that the learned judge did not err by imposing the condition, because the law allowed him to.

It was Mr. Balala’s, further submission that this appeal is an invitation to this Court to interfere with exercise of discretion by the learned judge, and that on the authority of *Mbogo & Another v Shah* [1968] EA 93, this Court cannot readily do so absent evidence of misdirection or misjustice. By imposing the condition, it was submitted, the learned judge was not impeding the appellant’s access to justice but was only balancing the scales of justice between the interests of the appellant and the respondents.

Lastly we were urged to find that if the appellant made the deposit as ordered by the learned judge, it would not suffer any prejudice and the discharge of its public duties would not be affected, because it had taken out an insurance cover, which was in force. On the authority of *Consolidated Marine v. Nampijja & Another*, CA No.93 of 1989 we were urged to find that the requirement of deposit motivates a party to expedite the hearing and disposal of a suit. We were also urged to find that the appellants ought to have applied to the High Court for review of the order on deposit rather than appealing to this Court and that in any case the appeal was academic because the 21 days within which the deposit was to be made had passed and therefore the application to set aside the default judgment stood dismissed.

We have carefully considered this appeal. We agree with the respondents that the question whether the judgment was regular or not was neither raised before the learned judge nor in the memorandum of appeal. In this appeal the appellant proceeded on the basis that the judgment was regularly entered and set aside, but was aggrieved only by the conditions upon which it was set aside. Indeed, the issue was not even raised in the appellant’s written submissions but was sprung belatedly during oral highlighting. We

shall accordingly not be sidetracked and will determine this appeal on its merits (See *George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015*)

The learned judge found that the appellant's application to set aside the default judgment was merited. He for example specifically found that the sum in dispute was colossal; that the failure to enter appearance and file defence on time arose from an excusable mistake; that there was no evidence that the appellant intended to occasion delay or defeat the course of justice; that in the circumstances the court should not shut the appellant out from justice; and that the appellant's draft defence raised triable issues. However, having resolved all those important questions in favour of the appellant, the learned judge still ordered it to deposit the disputed amount in court, in addition to awarding the respondents Kshs 100,000/= as thrown away costs.

It cannot be gainsaid that the court's discretion to set aside a default judgment is wide and unfettered. But like all judicial discretion it must be exercised judiciously and upon reason rather than arbitrarily or capriciously. See *Jaribu Holdings v. Kenya Commercial Bank Ltd, CA No. 314 of 2007*. The fact that under Order 10 rule 11 the court has power to set the terms and conditions for vacating a default judgment does not mean that such conditions must be set arbitrarily without regard to the peculiar circumstances of each case. The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of intention or deliberate action by the appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties. (See *Mbogo & Another v Shah, (supra)*). That is what both **Order 10 rule 11** and the judgment in *Patel v. East Africa Cargo Handling Services (supra)* emphasize.

As far as we can discern from the ruling, the only reason why the learned judge made the order for the deposit of the sum in dispute was to assuage the "defendant" (may be meant the "plaintiffs") and to prod the appellant to expedite the hearing and determination of the suit. Firstly, we wonder whether it was necessary to assuage the respondents by the order for deposit of the money even after the learned judge awarded them thrown away costs of Kshs 100,000/=. And how was the money, tied up in a deposit account, which the respondents could not access unless and until they proved their claim, going to assuage them?

Secondly the respondents argue that a party who is compelled to make a deposit is motivated to expedite the hearing and determination of the suit. On face value that looks like an attractive argument. But it should not be forgotten that sometimes delay arises from a combination of factors, many of which cannot be attributed to a single party. And if indeed there was any proven correlation between an order to deposit money and expedition of hearing and determination of cases as the respondents contend, naturally the better approach to expedite disposal of cases would be to order both parties to deposit money, so that they can all be motivated or compelled in equal measure to get on with the hearing. The fact that by law and by practice that is not the approach taken to expedite litigation must put to serious question the correctness of the respondents' argument.

Having found no evidence that the appellant intended to occasion delay or defeat the course of justice, we do not understand how the learned judge could immediately make an about turn, without new evidence being adduced, and find it necessary to order the same appellant to deposit the money in dispute as a way of getting it to expedite the determination of the suit. This in our mind is a major contradiction, which points to a fundamental misdirection.

For our part, we are not persuaded that was a relevant factor in the circumstances of this appeal, on which to base an order for deposit of the contested sum. The court had and still has the power to fast track the hearing of the suit and to set the time within which to hear and dispose of it. There was not even a remote suggestion that the appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective.

This Court will not readily interfere with exercise of discretion by a trial court. The Court's approach in this issue was articulated as follows by *Madan, J.A.*, (as he then was) in *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898: -

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

On the facts of this appeal, we are satisfied that as far as the order for deposit of Kshs 522,713,576/= as a condition for setting aside the default judgment is concerned, it is vitiated by serious misdirection, the taking into account of irrelevant factors, and failure to take into account relevant matters. That is enough to justify our interference with the exercise of discretion by the learned judge. Accordingly we allow this appeal and set aside the part of the order dated 7th December 2016 requiring the appellant to deposit Kshs 522,713,576/= in an interest earning account in the names of the parties' advocates. The appellant shall have costs of this appeal. It is so ordered.

Dated and delivered at Mombasa this 11th day of May, 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