



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: NAMBUYE, G. B. M. KARIUKI & KIAGE, JJ.A)

CIVIL APPEAL NO. 291 OF 2010

BETWEEN

SAMSON KARINO OLE NAMPASO.....APPELLANT

AND

KAANA KA ARUME CO. LTD.....RESPONDENT

(Being an appeal from the entire Ruling and Order of the High Court at

Nakuru (Ouko, J) delivered on 29th July, 2010

in

H. C. C. No. 195 of 2004)

JUDGMENT OF THE COURT

This appeal by Samson Karino ole Nampaso (the appellant) is against the ruling of the High Court at Nakuru (Ouko J., as he then was) by which the learned Judge rejected the appellant's application dated 18th November, 2008 that had sought to set aside the judgment entered against the appellant on 28th September 2007.

That judgment followed the hearing of the suit filed by the respondent against the appellant before Koome J. (as she then was) on 6th June 2007. The respondent's case proceeded in the absence of the appellant or his advocate. A Mr. Mwangi, advocate had appeared earlier in the day and applied for an adjournment on the basis that Mr. Kinyanjui, the appellant's learned counsel before that court as before us, was engaged in Nairobi HCCC No. 16 of 2006 and unable to attend. He also made mention of an application dated 6th May 2005 which was still pending and yet to be disposed of and for which he requested a hearing date.

The application for adjournment was opposed by counsel for the respondent herein who stated, *inter alia*, that the matter had been listed on three previous occasions and never proceeded due to the appellant's non-attendance and that the application for adjournment was a delaying tactic. Koome J. rejected the

application for adjournment because the reasons for it were “not plausible” and directed the matter to proceed to hearing as scheduled.

The respondent's case then commenced with one Pius Mburu Thande, the respondent's Chairman giving his evidence in chief. It is not clear whether Koome J. had noticed the appellant's absence or non-representation during that witness' testimony but at the end of it the records reads as follows;

“Court: Non-appearance by defence.

(Mr. Mwangi seems to have walked out of court.)”

Ms. Njagua then indicated that, that was the close of the plaintiff's case and the court recorded thus;

“There being no evidence by the defence the case is closed.”

The court fixed the case for submissions on 25th June 2007 when the respondent filed written submissions and a date for judgment was given on 28th September 2007, when it was rendered.

The appellant's application to set aside that judgment, which was termed *ex-parte*, was brought under **Section 63 (A)** of the **Civil Procedure Act** and **Order IXB Rule 8** of the **Civil Procedure Rules** and bore on its face various grounds on which it was based including that;

“d. The defendant has a good defence and it is expedient that his evidence be heard before judgment is entered in this suit.

g. The suit was not decided on merit. The dates taken for the hearing of the suit were not convenient to the defendant's advocate to attend before the court and in spite of this notification, the plaintiff proceeded with the suit ex-parte.

.....

j. No notification of the withdrawal or dealing with the plaintiff's application dated May 6th 2005 was made to the defendant and in the result the defendant was of the impression that the said application was to be dealt with prior to the hearing”

It was also supported by the affidavit of the appellant in which those grounds were expounded on and in which he declared his ever willingness to tender evidence in the matter and bemoaned the seeming injustice of being unjustly and drastically shut out of the “table of justice” (sic) unheard.

The respondent opposed that application by way of a replying affidavit the gist of which was that the appellant was afforded opportunity to adduce evidence and participate in the trial but squandered it by failing to do so.

The learned Judge in his brief ruling first agonized on whether it was open to him to deal with the matter before him without seeming to sit in judgment or appeal on the orders of Koome J, a judge of coordinate jurisdiction, who had already found in her discretion that there was no sufficient cause shown for the application for adjournment that had been made before her. Notwithstanding that he found that this Court had in **JOSEPH NATHANIEL KIPRUTO ARAP NGOK VS. ATTORNEY GENERAL & ANOTHER CIVIL APPEAL NO. 326 of 2005** held that it was permissible for a Judge to consider an application to set aside the judgment entered by a fellow Judge of concurrent jurisdiction and that such did not amount to sitting on appeal, he nevertheless proceeded to express himself thus;

“I do not see how I can consider whether or not to set aside the judgment in question without revisiting the questions which Koome J. has already made a finding on.”

So finding and after quoting a passage from Mulla's – **The Code of Civil Procedure** 9th Edition at p 545 in which the said author expressed the view that a defendant against whom an ex-parte decree has been passed has other options beyond an application to set aside, namely to appeal or to seek review, the learned Judge opined that Koome J's finding could only be challenged by way of an appeal, and dismissed the application.

The appellant has raised some eleven grounds of appeal against the learned Judge's impugned ruling and which Mr. Kinyanjui argued globally before us.

The only issue that falls for our determination is whether the learned Judge exercised his discretion properly in dismissing the application to set aside the *ex-parte* judgment on the basis only that it was brought before him and he was loath to appear to sit on appeal over Koome J. With respect to the learned Judge, this Court had already expressed itself without ambiguity that the jurisdiction under the former order **IXB Rule 8** could be exercised by a Judge other than the one who entered the ex-parte judgment without violating the parity of judges and without amounting to an appeal. We are a little puzzled that the learned judge appeared to say, without giving discernible reasons, that he did not perceive himself as bound to follow that holding of the Court.

The effect of the learned judge's approach in diverting the appellant who was properly before him, onto the path of appeal, was to essentially abdicate his jurisdiction under Order 9B Rule 8 and thus deny the appellant the opportunity to exercise a mode of relief donated by the Rules and acknowledged in practice and authority including by the learned authors of Mulla's Code aforesaid. In this he erred.

The principles for the setting aside of ex-parte judgments are well-settled and have been for long. The issue falls within the discretion of the judge and it is a discretion that is to be exercised in a judicial and judicious way on the basis of clear principle, not capriciously or on a whim. It is exercised “**to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice**” as was famously stated by the High Court of Kenya in **SHAH VS. MBOGO & ANOTHER [1967] EA 116** and upheld by the predecessor of this Court in **MBOGO VS. SHAH [1968] EA 93** .

We have already stated that the learned Judge simply did not go into a consideration of the application on merits. Had he done so, he might as well have come to the conclusion that this was a case of mistake or error that was excusable and that there is no indication that the appellant himself fitted the mold of a person who had deliberately sought to obstruct or delay the cause of justice. Indeed, the record is quite clear that he could not fairly be said to have done so.

The learned Judge was also obligated to consider in an application to set aside an ex-parte judgment whether the defendant had a defence that was not frivolous, a sham, or shadowy or, put another way, that raised a triable issue. If it did raise such an issue, the defence ought to have been allowed to be ventilated on merit at a trial for it should never be lost sight of that courts exist for the purpose of determining rights and entitlements of parties substantively and on merit upon hearing them and considering such evidence as they may tender. In the instant case, the learned Judge made no mention of the defence filed, just as Koome J. also did not. It is urged before us that the said defence did raise serious triable issues including the alleged non-existence of Title **NAROK/CIS-MARA/LEMEK/136**; issues of privity of contract; and the alleged statutory time bar to the respondents' claim.

Given the learned Judge's failure to consider these crucial matters that he was required to do under the setting aside jurisdiction, we think that this is a proper case for us to interfere with his exercise of discretion because, as this Court held in **CMC HOLDINGS LIMITED VS. NZIOKI, [2004] KLR 173**, the learned Judge essentially turned his back to a litigant who clearly demonstrated an excusable mistake, inadvertence, accident or error and, moreover, appeared to have a good defence. Such an exercise of discretion was, respectfully, wrong in principle, thus inviting our intervention. See also **PATEL VS. E.A. CARGO HANDLING SERVICES LTD [1974] EA 75**.

The totality of our consideration of this appeal is that it is for allowing. The orders of the High Court are set aside and substituted with an order setting aside the judgment of Koome J. dated 28th September 2010 and the resultant decree. The suit is remitted to the High Court for expeditious hearing on merit.

Each party shall bear its own costs of this appeal.

Dated and delivered at Nakuru this 14th day of July, 2016.

R. N. NAMBUYE

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR