IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & MUSINGA, JJ.A)

CIVIL APPEAL NO.181 OF 2003

BETWEEN

SIMON THUO MWANGI.....……..……APPELLANT

AND

UNGA FEEDS LIMITED…….RESPONDENT

(An appeal from the Order of the High Court of Kenya at Nairobi (Mbaluto, J.) dated 26th November, 2003

in

H.C.C.C. No.900 of 2002)

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JUDGMENT OF THE COURT

Following the ruling of the High Court (***Mbaluto, J.***) delivered on 26th November, 2002 this appeal was filed by ***Simon Thuo Mwangi***, the defendant in Nairobi HCCC 900/2002 where the respondent company, ***Unga Feeds Ltd*** had sued him to recover a debt of Sh.3,825,679/70 said to have been the balance of the cost of goods sold and delivered to ***Simon Thuo***. It was presented to the learned Judge that summons to enter appearance was served on the appellant at his place of business at Wangige Township on 23rd July, 2002. He accepted service by signing at the back of the original summons, a thing that he denied. That consequently a judgment was entered against the appellant on 22nd August, 2002 in default of entering appearance and filing a defence. The notice of entry of that default judgment and intention to execute was then sent to the appellant by registered post through his known address. That the notice was not returned unclaimed. Then the respondent moved to execute, an act which prompted the appellant to file an application under ***Order 9A rule 10***, ***Order 21 Rule 21 of the Civil Procedure Rules*** and ***Section 3A of the Civil Procedure Act,*** seeking orders to stay execution of the subject judgment and also to set aside the same. The appellant also sought leave to defend the suit by fling a defence. A further prayer was that the court do order the release of his goods attached on 17th October, 2002. The appellant stated in the grounds in the body of the application that his defence raised triable issues; that no summons to enter appearance was served on him and, besides, he had a valid counter-claim against the respondent company. The respondent filed two grounds in opposition to the application, stating that the appellant was guilty of non-disclosure of material particulars and that all along he was aware of the amount owed. He never challenged the claim, save to request to be given time to pay.

After hearing both sides, the learned Judge declined to grant the orders sought on the material before him. The Judge found that the appellant was served with the summons to enter appearance. He did not enter appearance and the default judgment was entered against him. That even when served with the notice of entry of that judgment by registered post, the notice was not returned unclaimed which meant that the appellant received it. The learned Judge added that the appellant did not take any steps to set aside the default judgment or stay its execution, only attempting to do so after his goods had been attached. That he failed to give a reasonable explanation as to why he did not enter appearance or file defence. With that and as observed earlier, the appellant's application was dismissed, hence the present appeal.

The memorandum of appeal based on nine grounds stated that the learned Judge did not take into account the draft defence to see whether it raised triable issues or not. That similarly the appellant's draft counter-claim against the respondent was not taken into regard and that had the judgment under review been set aside, the respondent could have been compensated with costs. Further, that it was in error for the learned Judge to find that the appellant was properly served when there was no proper evidence to that effect and so the judgment on record was not properly obtained.

Parties filed written submissions and desired us to pen a decision based thereon without any need to highlight. On the day of the hearing the appeal, ***Mr. H. Kabiru***, learned counsel for the appellant informed us that execution in the High Court took place before the appeal was filed and that the respondent had since not demanded for further payment over and above what was realized on execution. ***Ms B. Wamwea***, learned counsel for the respondent was in agreement. So we rose to consider our decision.

Briefly put, the appellant submitted that the learned Judge was in error not to set aside the impugned default judgment when he held that service of the notice of the notice of entry of the judgment dated 27th August, 2002 was valid yet it did not comply with the mandatory 10 days. Before going further, it may be pertinent to state here and now that the issue of invalidity of this notice was never raised before ***Mbaluto, J***.

Moving to consideration of the merits of the draft defence, the appellant relied on the case of ***Tree Shade Motors vs D. T. Dobie & Another (1995-1998) EA 324*** to assert that the learned Judge was obliged to consider it before dismissing the appellant's application, a thing he did not do. The appellant insisted that his draft defence contained triable issues, and his counterclaim was valid. So it was wrong for the learned judge to make a finding that summons to enter appearance was properly served basing the decision on similarities of the appellant's signatures. That it was a triable issue in the defence on account of 3% per cent discount involved in the parties' transactions, which if verified, would go along way to reduce the appellant's alleged liability to the respondent. We were told that the defence need not have necessarily meant success on the part of the appellant, except that it was worth going to trial for adjudication. In that regard, the case of ***Patel vs E.A. Cargo Handling services Ltd [1974] EA 75*** was cited.

The appellant attacked the manner in which ***Mbaluto, J***. exercised his discretion in refusing to grant the orders sought claiming that that denied him his day in court. Other aspects touching on the details governing service of summons and notice of entry of judgment were gone into, with the submission that we allow the appeal.

The respondent's side began by recounting the basis of the suit in the High Court, to the decision of the learned Judge and the grounds of appeal. We were told that the duty to set aside a judgment as was the case here, is in the discretion of the Court, both as per the old rules under which the application ***Mbaluto, J***. heard came, and the current Order 10 Rule 11 of the Civil Procedure Rules. To stress the point, two cases of ***Shah vs Mbogo [1967] EA 116 and Esther Wamaitha Njihia & Others vs Safaricom Ltd [2014] eKLR*** were cited. It was submitted that in a case like this one the discretion is exercised to avoid injustice or hardship and not to assist those deliberately intending to evade or obstruct the course of justice. That ***Mbaluto, J.*** took all those factors in regard, including the comparison of the appellant's signatures, the unreturned notice of entry of judgment sent to his address by pre-paid postage, to find as he did. That failure to enter appearance was not inadvertent on the part of the appellant. He was only

being untruthful about that. He thus did not deserve the court's discretion being exercised in his favour and a stronger case ought to have been made for this Court to interfere with the judicial discretion that ***Mbaluto, J***. exercised. Such a case had not been made out and as stated in ***Sango Bay Estates Ltd & Others vs Dresden Bank A. G. [1971] EA 70,*** this appeal ought to be dismissed. Over ten years have passed since execution took place, so it could be unfortunate to reopen the whole case now.

We begin by setting out our provision of law under which the application ***Mbaluto, J.*** heard and dismissed, was brought – ***Order IXA Rule 10*** (now repealed and replaced by ***Order 10 Rule 11***):

> ***"10. Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

The heading under which the Order falls reads as follows:

> "**CONSEQUENCE OF NON-APPEARANCE,**
>
> **DEFAULT OF DEFENCE AND**
>
> **FAILURE TO SERVE."**

Under this provision of law where a judgment has been entered in default of entering appearance or filing a defence or other, the court may set aside that judgment or vary it. But that it may do on terms it considers just. The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.

In this case, the appellant desired the High Court to set aside the judgment entered in default of entering appearance and/or defence. The appellant denied that summons to enter appearance was served on him. The learned Judge was not persuaded with that denial by the appellant. He said: -

> ***"According to the affidavit of service filed herein summons to enter appearance was served upon the defendant at his place of business at Wangige Township within Nairobi on 23rd July, 2002. The defendant accepted service by signing at the back of the original summons.***
>
> ***Although the defendant disputes having signed the summons he does not say that it is a forgery. In any case, having compared the signature on the summons to enter appearance and signature appearing in the affidavit in support of his application, I notice sufficient similarities in the two signatures to justify an inference that both were made by the same hand to wit that of the defendant."***

A judicial officer exercising discretion as ***Mbaluto J***. was doing in this matter, is surely entitled to form an opinion or draw an inference, so long as that is not fanciful, illogical, speculative or without basis. The learned Judge had two signatures before him and he compared them. He found sufficient similarities that they both belonged to the appellant – that on the summons to enter appearance and on the affidavit in support of the application before him. The appellant did not deny the signature on the summons by terming it a forgery, in which event, steps would have been taken to have the process server examined on oath on the authenticity of that signature on the summons. In our view, the learned Judge was justified and entitled, in the circumstances, to infer and conclude that the appellant signed at the back of the summons to enter appearance when it was served on him. Faulting the Judge on this score therefore is found baseless.

The other aspect that the learned Judge took into consideration when declining to exercise his discretion in favour of the appellant to set aside the default judgment, was on service of the notice of entry of the judgment and on this he stated:

> ***"Having been served with the summons the defendant did not enter appearance within the time prescribed. Consequently upon the request of the plaintiff a default judgment against the defendant was entered on 22nd August, 2002. Following the entry of the default judgment a notice of the entry of the judgment and intention to execute was sent to the defendant by registered post, through the defendant's known address. The document not having been returned unclaimed, the defendant cannot now claim not to have received it."***

The learned Judge added that even with clear evidence of receipt of the said notice, the appellant did not take steps to set aside the default judgment or stay its execution. He only woke up to attempt to do so when the auctioneers appeared at his door step. In our view, even if ***Mbaluto, J***. did not say so in so many words, he definitely was of the impression that the appellant was being less than candid and straightforward in the whole affair and therefore did not deserve the exercise of the discretion to set aside the questioned judgment in his favour. Again and referring to the ***Esther Wamaitha Njihia Case*** (supra), the exercise of a judicial discretion:

> ***"…is intended …to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice,"***

To us and as it should have appeared so to the learned Judge, the appellant was bent on evading, obstructing or delaying the course of justice. He had denied service of the summons to enter appearance, without claiming that the signature appearing at its back was a forgery. He had been served with a notice of entry of judgment, whose length he did not challenge, which he had received. He did not take steps to set aside the judgment or stay its execution until the auctioneers arrived. That cannot constitute conduct of a person who wants to see that justice is not evaded, delayed or obstructed. And for all the above, the appellant did not place before the High Court a reasonable explanation as to why he did not enter appearance or file his defence. So in the end the Judge said:

> ***"In my judgment the applicant's purported explanation in the case is not credible and I reject it."***

In the circumstances, we too, could be inclined and are inclined to find so.

As for the failure of the learned Judge to address and appreciate the triable issues said to feature in the draft defence and counter-claim, we note that that did not appear in his ruling. We say that he ought to have considered what issues had been raised to find whether they were worth adjudication by way of trial or not (see the ***Patel Case*** (supra)). However, this being a first appeal we have addressed the said draft defence and concluded that it could not pass muster to go far especially when it was pleaded, *inter alia*, that:

> ***"5. The defendant by way of defence avers that the sum of Kshs.3,825,679/70 is grossly exaggerated and does not take into account the discounts that the defendant enjoyed at that time."***

And it is that discount put at 3% on agency basis, that formed the core of the counterclaim which, being in essence a separate suit we are not told its fate. Thus this was a question of not denying receiving the goods or owing on them but telling the court that the two parties could sort out their accounts probably with a view to set-off. So the debt was owed. Well, be that as it may.

In conclusion, we dismiss this appeal and noting that execution took place long time ago, let the matter rest there.

Costs of the appeal shall be paid by the appellant to the respondent.

Dated and delivered at Nairobi this 20th day of February, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

D. K. MUSINGA

…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

/jkc