IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MWERA , KANTAI JJ. A)

CIVIL APPEAL NO. 94 OF 2012

BETWEEN

JOHNSTONE BARASA MAKOKHA..... APPELLANT

AND

DANIEL AKWALA .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega

(Hon. Justice S. J. Chitembwe, J) dated 6th March, 2012

in

H. C. C. C. 6 OF 2007

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JUDGMENT OF THE COURT

By a Plaint filed at the Chief Magistrates' Court, Kakamega, the respondent, **Daniel Akwala,** who is an advocate of the High Court of Kenya, sued the appellant, Johnstone Barasa Makokha, his former client, in a suit founded on defamation. That court being satisfied that the appellant had been served with Summons to Enter Appearance but had failed to do so, upon application entered interlocutory judgement against the appellant. There followed a formal proof before the learned Senior Resident Magistrate (E.O. Obaga) as he then was and in a judgement delivered on 21st February, 2006 the respondent was awarded general damages in the sum of Kshs. 800,000/= together with costs and interest. Meanwhile the appellant had on 7th December, 2005 through M/s Bulimo & Company Advocates entered an appearance when the matter was before the trial magistrate awaiting submission and judgement. No application was made to the said trial magistrate to enable the appellant to participate in making submissions before judgement or to arrest the said judgement before its delivery.

A perusal of the record shows that the advocate engaged by the appellant drew an application dated 17th January, 2006 which prayed, inter alia, that what the appellant called ex-parte judgement entered be set aside. That application was filed in court on 5th May, 2006, over two months after judgement had been delivered. That application was eventually heard by the same magistrate on 1st August, 2006 and in a Ruling delivered on 19th December, 2006 the learned magistrate found no merit in the application and dismissed it.

The appellant moved with speed and filed **High Court Civil Appeal No. 6 of 2007** where various grounds of appeal were taken challenging the judgment that had been entered against him. That appeal was heard by Said J. Chitembwe, J, who in the judgement delivered on 6th March, 2012, although finding that the appeal was not merited because the appellant had been indolent instead of being vigilant to observe procedural steps in the matter, allowed the appeal ordering that a defence be filed in the original suit within fifteen days but on condition that the appellant deposited in court a sum of Kshs. 600,000/=within sixty days of the date of that judgement in default his orders be vacated. Those are the orders that provoked this appeal.

Being a second appeal our jurisdiction is limited in law. That jurisdiction is donated by **Section 72** of the **Civil Procedure Act** which in relation to second appeals to this court from the High Court provides that:

> **"(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds, namely-**
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> **(a) the decision being contrary to law or to some usage having the force of law;**
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> **(b) the decision having failed to determine some material issue of law or usage having the force of law;**
>
> **(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.**
>
> **(2) An appeal may lie under this section from an appellate decree passed ex-parte".**

Judicial pronouncements on this aspect of jurisdiction are to be found in such cases as **Maina v Mugiria [1983] KLR 79** where this Court observed that only matters of law are to be taken on a second appeal. Our counterparts in Uganda in **Mutazindwa v Agba & Others [2008] 2 EA 265,** held that the duty of a second appellate court is not to re-evaluate the evidence but to consider whether the first appellate court properly carried out the functions of re-appraisal of the evidence.

Chesoni, Ag.JA (as he then was) summarized the issue this way in **Stephen Muriungi & Anor v Republic (1982 -88) 1 KAR 360** at page 360:

> **"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."**

We accept the Stephen Muriungi case was a Criminal appeal, but the principle therein enunciated is relevant.

Four grounds of appeal are taken by the appellant in the Memorandum of Appeal drawn by himself in person. In the first ground the appellant takes issue with the learned judge who is said to have blamed the appellant for the long period the matter took in court ... "***without any justifiable reason".*** In the second ground the learned judge is said to have erred for ordering the appellant to deposit in court a huge sum of money while in the third ground …. "***The Hon. Judge erred in Law in allowing the Appellant's appeal on the one hand and proceeded to impose unmerited punishment on the other hand..."***. The final ground is an attack on the learned judge who is said to have failed to properly analyse the grounds of appeal and evidence and in the event misunderstood the appeal before him.

The appellant, in arguments before us thought that the learned judge erred in ordering him to deposit money in court as a condition for judgement in the lower Court to be set aside believing that the order was punitive to him. In the event, according to the appellant, the learned judge misused his discretion and this had shut the door of justice in the appellants' face.

Mr. Munyendo, learned counsel for the respondent, submitted that the learned judge had exercised his discretion correctly by ordering deposit in court of a sum less than the sum decreed by the trial court.

We have considered the record of appeal, the grounds of appeal, submissions made before us and the law.

The learned Judge after considering the events that started with filing of plaint, entry of interlocutory judgement, formal proof, entry of judgement and the application that followed for setting aside judgement, was of the view that the appellant and his legal counsel had been indolent and not vigilant leading to the orders that had been made against the appellant. He said that:

> **" ...Although I am satisfied that the trial court exercised its discretion correctly, I do find that there is need to accord each litigant the opportunity to present his case before a trial court. A winning litigant should be seen to have won his case fairly and the losing one should go home while knowing that his side of the story has been properly heard by the court..."**

And:

> **"...The overriding objective in each litigation is to arrive at a just conclusion of any dispute between parties. Although the appellant took his sweet time to file his application to set aside the judgment, I will exercise my discretion and allow him to defend the suit before the trial court.."**

After so holding, the learned Judge made the orders setting aside the judgment but imposing a condition which the appellant had to meet to benefit from that setting aside of the judgement.

On our consideration of the matter, we are of the respectful opinion that there is no point of law raised in this appeal at all. The learned Judge who even found that the appeal before him had no merit still found it to be within his discretion to allow the appellant to defend the original suit which had been decreed by the subordinate court but he imposed a condition for setting aside that judgement. That condition was that the appellant could file his defence to the decreed suit within a specified period of time provided he deposited in court a sum of money which was less than the decreed amount. The learned Judge did not abuse or misuse his discretion at all in making those orders as the appellant claimed. Whether he could have ordered a deposit of a lesser sum would not be a matter for our consideration at all. The appellant should probably have gone back to the learned Judge and humbly requested him to review the order if he found the deposit of the sum ordered to be beyond him. We cannot interfere with the exercise of discretion by a judge unless it is shown that the judge misdirected himself in some matter and in the result reached a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of that discretion and that as a result there has been misjustice of justice see– **Mbogo & Another v Shah [1968] EA 93.**

The upshot of our findings is that this appeal has no merit and we accordingly dismiss it with costs.

Dated and delivered at Kisumu this 23rd day of April, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR