IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & SICHALE, JJ.A.)

CIVIL APPEAL NO. 33 OF 2007

BETWEEN

KANWAL SARJIT SINGH DHIMAN……APPELLANT AND

KESHAVJI JIVRAJ SHAH.....…….... RESPONDENT

(*Appeal from Judgment and Order of the High Court of Kenya at Nairobi (Milimani Commercial Courts) (Kasango, J)delivered on 18th December, 2006.*

in

H.C.C.C. NO. 205 OF 1999)

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JUDGMENT OF THE COURT

The appellant who was the defendant in HCCC No. 205 of 1999 filed a chamber summons application dated 16th November 2006 under the then O.IXA Rule 10 and O.XLIV Rule 1 of the Civil Procedure Rules. He sought several orders including the following:

a. The Honourable Court be pleased to review and set aside its ex-parte judgment of 16th June, 1999 and subsequent decree dated 16th September, 1999.

b. All consequential orders ensuing thereafter be set aside.

c. The defendant be granted leave to defend the suit out of time.

The chamber summons application was opposed and was heard by Kasango, J who in a ruling dated 18th December, 2006 dismissed the application. The appellant was aggrieved by the ruling and filed this appeal.

The relevant antecedent facts giving rise to this appeal as can be discerned from the pleadings are not contested. On 17th December, 1996, the respondent and the applicant entered into an agreement whereby the respondent agreed to lend a total sum of Shs.13,000,000/= to the applicant in three installments, that is :

a. Shs.2,500,000 on or before the execution of the Agreement.

b. Shs.2,500,000 on 31st January, 1997.

c. Shs.8,000,000 on 2nd April, 1997.

The terms and conditions of the written agreement provided that the loan was repayable with interest at the rate of 36% p.a. on the sums advanced payable in arrears at the end of each quarter. The agreement also provided, among other terms, that the first two installments were to be secured by two promissory notes each for Shs.2,500,000/= payable on 31st March, 1997 and also by a Memorandum of Charge by Deposit of Documents of Title in favour of the lender over L.R. No. 209/8192/8; that the applicant had the option to take the third installment of Shs.8,000,000 and a further option to repay the sums already advanced before taking the third installment; and further that if the applicant exercised the option to take the third installment, then the applicant was required to execute a first legal charge on L.R. No. 209/8192/8. It is not in dispute that that the respondent only lent to the appellant the sum of KShs.6,000,000/= being the total in the 1st and 2nd installments and another KShs.1,000,000/= from the 3rd installment - a total of KShs.7,000,000/=. It is also not contested that upto 25th February, 1999, the applicant had not repaid any part of the loan amount of Kshs. 7,000,000/= plus interest accrued.

On 25th February, 1999, the respondent filed a suit in the High Court being HCCC No. 205 of 1999 against the appellant for the recovery of the Ksh. 7,000,000/= loan amount plus interest. He averred in the plaint that pursuant to an Agreement dated 17th December,1996, he lent a total of Shs.7,000,000/= to the appellant; that the respondent caused the Memorandum of the Charge by Deposit of Document of Title executed by the appellant pursuant to the Agreement to be registered against the title on 15th October, 1998; that the appellant failed to repay the loan and that the amount outstanding then was KShs.13,813,132/25 inclusive of interest for which he sought judgment.

On 26th May, 1999 the respondent filed an application for an interlocutory judgment on the ground that the applicant had failed to either enter appearance or file his defence. On 16th September, 1999 the High court upon formal proof, entered an interlocutory judgment in favour of the respondent for KShs.17,020,365/40 plus interest at 36% p.a. from 31st August, 1999 until payment in full plus costs of the suit.

It is also note-worthy that in July, 2001, about four and a half years after the date of the Agreement, and about one year after the Judgment was entered, the applicant paid Kshs. 3,000,000/= to the respondent in an attempt to reduce the decretal amount which was by that time well over Kshs. 17,000,000/=.

Thereafter, the respondent attached the applicant's property L.R. 209/8192/8 in execution of the decree; advertised the applicant's property for sale by public auction and obtained leave of the court to bid at the auction. The respondent being the successful bidder ultimately purchased the applicant's property at the auction for KShs.17,000,000/= and a Vesting Order was given to him on 13th June, 2006 which Vesting Order was registered against the title on 27th September, 2006. Thereafter, the respondent applied for and obtained an eviction order against the appellant on 11th August, 2006.

On 16th November, 2006, the appellant filed an application in the High Court under ***Order IXA Rule 10*** and ***Order XLIV Rule 1*** & ***2*** of the *Civil Procedure Rules* for an order that the ex parte judgment of 16th June, 1999 be reviewed and set aside and that he be given leave to defend the suit. The application was supported by the affidavit of the appellant who deposed, among other things, that after the summons to enter appearance was served on him, negotiations for settlement commenced at the instance of the respondent which he innocently believed to be in good faith; that the *ex parte* judgment was obtained without any notice to him; that he was not given notice of all the subsequent proceedings or served with any subsequent application; that the delay in bringing the application was partly occasioned by the respondent who deliberately took advantage of his ignorance of legal matters and deliberately engaged him in negotiations aimed at misleading him to waste time so that he could not challenge the judgment, and, partly by his former advocates who filed the wrong application in court; that the appellant subsequently paid KShs.3,000,000/= to the respondent who later declined the payment of the balance of

KShs.4,000,000/=; that the property is a matrimonial property valued over KShs.30,000,000/= where he has lived with his family for over 30 years; and that he has a good defence to the respondent's claim.

The appellant annexed a draft defence and counter claim raising various defences to the respondent's claim. He avers, *inter alia*, that he entered into the Agreement through duress and coercion; that the respondent's interest was to illegally acquire the applicant's property; that the contract was illegal as the respondent was not authorized to operate as a money lender or to charge such high interest; that the rate of interest was unconscionable; that he had repaid Shs.3,000,000/=; and that the sale of the property was irregular. By the counter – claim he sought a declaration that the agreement was null and void and unenforceable in law; that he be allowed to pay the balance of the principal sum and that the registration of the transfer of the property be nullified.

After hearing the rival submissions, the law pertaining thereto and the authorities cited by rival counsel, the learned Judge (Kasango J) disallowed the application for review and to set aside the ex-parte judgment, thus precipitating this appeal.

In his amended memorandum of appeal dated 20th July, 2010 the appellant listed 5 grounds of appeal. These are:

"1. The learned judge erred in law and in fact by dismissing the Appellant's application on extraneous reasons rather than substance.

2. The learned judge erred in law in rejecting the application without due regard to the serious issues of law raised inter alia:- legality of the contract the subject matter of the suit, strength of the proposed defence, error in accounts taking and other issues hence arrived at the wrong decision.

3. The learned judge clearly misdirected herself in law and in fact by failing to appreciate the principles of law on the matter advanced at the hearing of the

Appellants's application and hence arrived at the wrong decision.

4. The learned judge misdirected herself in law and in fact by failing to appreciate that the Respondent was non-suited by reason of the illegality of the contract basis of his suit and hence allow the application.

5. The learned judge erred in fact and in law to have admitted into evidence the purported loan agreement as basis for the decision while the same had been varied by conduct and deed of the parties and the same could not have been validly and\or lawfully admitted into evidence as purportedly presented." On 18th November, 2014 with the concurrence of parties the court directed

that the appeal be disposed of by way of written submissions. The appellant filed his submissions on 17th November, 2014 and a reply to the respondent's submissions was filed on 4th February, 2015. The matter was thereafter fixed for hearing on 19th February, 2015. However, on this date Mr. A. B. Shah learned counsel for the respondent sought leave to address ground No. 5 of the amended memorandum of appeal as due to an oversight, the respondent had addressed the four issues in the original memorandum of appeal dated 28th February, 2007 without addressing the 5th ground set out in the supplementary memorandum of appeal. With the concurrence of Mr. Nduati for the appellant, the court granted the respondent leave to file further submissions. These further submissions were filed on 24th February, 2015.

When the parties appeared before us on 27th May, 2015 Mr. Nduati did not wish to highlight the appellant's submissions. He relied on his written submissions. Mr. A. B Shah for the respondent made a brief submission and he too, wholly relied on the filed submissions.

In the first limb of his written submissions, the appellant faulted the judgment of the High Court delivered on 16th September, 1999 *inter alia* that ***"the trial judge openly misdirected himself in relying on an illegal contract which allowed an individual to engage in money lending at an unconscionable***

interest rate of 30% per annum contrary to the Banking Act ……."; for admitting into evidence the agreement which agreement was not registered under the Stamp Duty Act and further that the learned judge erred in enforcing an illegal contract. He relied on several authorities including the following:

1. **HEPTULLA VS NOOR MOHAMED CIVIL APPEAL NO. 62 OF 1983 [1984] KLR 580.**

2. **MISTRY AMOR SINGH VS SINGH VS SECOANA KULUBYA [1963] EA 408**

In his second limb the appellant faulted the trial judge for disallowing the application seeking an order to set aside the impugned judgment on the basis that the proceedings were undertaken ex-parte and the fact that the appellant had a good defence.

In response, the respondent submitted that the appellant was duly served with all the processes including the summonses to enter appearance, notice of date of formal proof and notice of settling terms of sale; that the appellant did not deny owing the money; that the appellant signed the agreement to repay the borrowed sum of Kshs. 7,000,000.00 at an interest rate of 36% per annum; that the appellant never challenged the sum owing but sought to pay by instalments; that the respondent obtained leave to bid at the auction and he subsequently obtained a vesting order vesting LR No. 209/8192/8 in the respondent's name; that it is not illegal for an individual to lend money at an interest rate; that the application to set aside the judgment of 1999 was dated 16th November, 2006, almost 7 years later; that the application did not meet the conditions for a review; that the appeal is not against the judgment of the High Court but the dismissal of an application for review and setting aside. The respondent relied on the following authorities:

1. **AJAN INDRAVAN SHAH V GUILDERS INTERNATIONAL BANK [2002] IEA 269.**

2. **CLARION LTD & OTHERS V NATIONAL PROVIDENT INSTITUTION [2002] 2 ALL ER 265.**

3. **NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOUT (K) LTD & ANOTHER [2002] 2 EA 503**

4. **SECURICOR COURIER (K) LTD V BENSON DAVID ONYANGO & ANOTHER CA NO. 324 OF 2002.**

We have considered the appeal and the supporting affidavit, the affidavit in opposition to the motion, the written submissions as well as the oral submissions by Mr. A. B. Shah as well as the law.

The appeal herein was in respect of the ruling of Kasango, J delivered on 18th December 2006 disallowing the Chamber Summons dated 16th November, 2006 that sought a review and setting aside of the exparte judgment entered on 16th September, 1999.

In the Chamber Summons dated 16th November 2006 the appellant sought to

"review and set aside the exparte judgment of 16th June, 1999 ……"

As rightly pointed out by Mr. A. B. Shah, the basis for reviewing a judgment is provided in the Civil Procedure Rules. O. 45 rule 1 (the then O. XIV) of the Civil Procedure Rules provides as follows:-

1.(1) Any person considering himself aggrieved –

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new

and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review or judgment to the court which passed the decree or made the order without unreasonable delay.

We were not told of any error apparent on the face of the record in respect of the judgment entered on 16th June 1999 and neither were we told of any new and important matter that had now come to the knowledge of the appellant and which was not in his possession then.

We therefore are of the view that the application for review was not well-founded.

However it is not lost to us that the appellant also sought to have the exparte

judgment set aside. In **ASHWINCHAND HIRJIE SHAH & ANOTHER V LUCY WAIRIMU MWAURA CIVIL APPEAL NO. 59 OF 2006**, this court whilst considering an application to set aside an ex-parte judgment rendered itself as follows:

"In an application of this nature an applicant has to show that there is prima facie defence to the action and further satisfy the judge as the cause of the delay in entering an appearance and filing the defence".

Similarly, in **PETER V EA. CARGO HANDLING SERVICES LTD [1974] EA 75 at P. 75** Duffus stated:

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance. He relied on various English authorities and on our decision in MBOGO V SHAH [1968] E.A. 93. In his judgment NEWBOLD, P. adopted the principles set out by HARRIS, J. in KIMANI V. McCONNEL, [1966] E.A. 547 when he said:-

"…… In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

We are aware that the application dated 16th November 2006 sought to set aside the ex-parte judgment entered on 16th September, 1999. Whereas this is indeed a long period, the history of the case shows that the parties have actively engaged the court in one application or the other. It would also appear that the parties herein engaged in discussions outside the court in a bid to resolve the matter and this led to the appellant making the payment of Kshs. 3,000,000.00 outside court. The appellant does not deny borrowing the 7,000,000.00. His defence however is that the interest charged is unconscionable as the sum due and owing now stands at over 45,000,000.00. He insists that he has a good defence as he thinks that the interest rate was unconscionable. Be that as it may, it is important for us to point out that the courts exist for the purposes of dispensing justice, and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests. Further it has been said time and again that a technical judgment is not the best judgment.

We think that it is only fair, in the circumstances of this matter, that the appellant is given a chance to ventilate his case. We are of the considered view that the learned judge failed to exercise her discretion judiciously and the law allows us to interfere with the exercise of such discretion so as not to cause injustice. See **MBOGO & ANOTHER V SHAH [1968] EA 93.**

Accordingly, we allow the appeal. We set aside the exparte judgment entered on 16th September 1999. The draft defence is deemed as duly filed upon payment of the requisite fees within 7 days from today's date. The costs of this appeal shall be borne by the appellant.

Dated and delivered at Nairobi this 31st day of July, 2015.

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR