IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OTIENO-ODEK & KANTAI, JJA)

CIVIL APPEAL NO. 100 OF 2012

BETWEEN

HELLEN MAKONE ……..... APPELLANT

AND

BRENDA MICHIEKA ……..... RESPONDENT

***(An appeal from the ruling and Order of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 15th March 2012* in HCCC No.452 of 2011)**

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JUDGMENT OF THE COURT

1. The appellant and respondent are biological sisters. By a plaint dated 21st October 2011, the respondent filed a suit against the appellant claiming the sum of Kshs. 18,500,000/= being the market value of half ($^1/_2$) an acre of a plot at Runda Estate in Nairobi. The respondent further claimed exemplary and restitution damages as well as costs of the suit.

2. The facts giving rise to the respondent's claim are that on or about 1993 while the respondent was in the United States of America, she sent US $ 5,700 to the appellant for purchase on her behalf of ½ an acre of land in Runda Estate in Nairobi; that the appellant fraudulently represented to the respondent that she had purchased the ½ acre plot when in fact she had not purchased the same but purchased a plot and registered it in her own (appellant's) name. That on several occasions the appellant pointed out different plots to the respondent; that when the respondent came to Kenya in July 2011, she discovered that the appellant had been fraudulent and had all along misrepresented to her that she was to purchase a plot for her. In the particulars of claim itemised at paragraph 10 of the plaint, the respondent claimed loss and damages as follows:

> *"(a) Market value of ½ acre plot at Runda which amounts to Kshs.18,500,000/=.*
>
> b. *Alternatively loss of the said sum of US $5,700 plus interest at the prevailing rate in 1993 of 69% per annum."*

3. Upon service of summons to enter appearance, the appellant neither filed a memorandum of appearance nor a statement of defence. An interlocutory judgment was entered on 16th December 2011 against the appellant in the sum of Kshs.18,500,000/=. The rest of the respondent's claim

was left for formal proof which is yet to be done.

4. By a notice of motion dated 25th January 2012, the respondent applied to set aside the interlocutory judgment stating that she was never served with summons to enter appearance and that there are triable issues disclosed in the proposed statement of defence annexed to the supporting affidavit. The respondent, in opposing the application to set aside the interlocutory judgment stated that an affidavit of service dated 5th December 2011 and deposed by the process server ***Mr. Francis Makau Mbuvi*** was filed in court to prove service of summons upon the appellant.

5. The appellant's motion seeking to set aside the interlocutory judgment was heard *inter partes* and a by a ruling dated 15th March 2012, the trial court dismissed the motion. The learned judge made a finding that the appellant had been served with summons to enter appearance; that the draft statement of defence was a sham and full of denials; that there was no triable issue raised and the purpose of the defence was to delay the suit.

6. Aggrieved by the ruling, the appellant filed the present appeal raising the following grounds:

> *"(i) The learned judge erred in law and fact in holding that the proposed defence was a sham, full of denials and did not raise triable issues;*

ii. *The learned judge erred in law and fact in failing to consider that there was no agreement of sale for any plot of land between the parties;*

iii. *The learned judge erred in law and fact in failing to consider that the interlocutory judgment obtained was not based on contract but on an abstract figure obtained by the respondent based on a valuation report that was not binding;*

iv. *That the learned judge erred in law and fact in holding that the appellant did not disclose receiving US $5,700/= yet the amount is admitted as having been received in the statement of proposed defence; and*

v. *The learned judge erred in law and fact in holding that the appellant did not deny service of summons."*

7. At the hearing of this appeal, learned counsel Mr. Alfred Ongoto represented the appellant while learned counsel Ms Ben Bella appeared for the respondent.

8. Counsel for the appellant reiterated the grounds cited in support of the appeal emphasizing that the learned judge erred in failing to appreciate that there were triable issues disclosed in the proposed defence. That the triable issues are that the appellant had denied being served with summons to enter appearance; that the interlocutory judgment of Ksh. 18,500,000/= entered against the appellant was not based on any contract between the parties; that there was no written agreement for principal/agent relationship or commission agency between the parties; that there was no specific plot of land identified and agreed between the parties as subject to purchase by the appellant on behalf of the respondent; and there was no agreement in writing for sale or purchase of land between the parties; that the learned judge having failed to appreciate that triable issues had been disclosed erred in law and fact in holding that the proposed defence was a sham and full of denials. A list of authorities was submitted in support of the appellant's case.

9. Counsel for the respondent in opposing the appeal urged this Court to find that all procedural requirements for entering the interlocutory judgment were fulfilled; that the claim was for a liquidated sum of Kshs.18,500,000/= and upon the appellant failing to enter appearance, the interlocutory judgment was properly entered; that service of summons was effected upon the appellant and an affidavit of service deposed by the process server Mr. Francis Makau Mbuvi was filed in court; that the process server was not cross-examined as to the authenticity and veracity of

service; that it was upon the appellant to call the process server for cross-examination and failure to do this did not dent the contents of the affidavit of service; that the appellant having admitted receipt of US $5,700 there is no defence to the respondent's claim and for this reason the trial court properly held that the proposed defence was a sham.

10. We have considered the grounds of appeal and submissions by counsel as well as authorities cited to us. This appeal is against the decision of the trial judge declining to set aside the interlocutory judgment entered against the appellant. This being a first appeal we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see als**o Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270)**. In **Sanitam Services (EA) Ltd. -v- Rentokil [2006] 2 KLR 70**, this Court stated that it would not lightly differ with the trial court's finding of fact unless the conclusion is based on no evidence or misapprehension or on application of the wrong principles.

11. In declining to set aside the interlocutory judgment, the trial court was exercising its discretionary powers. In **Edward Sargent -v- Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63**, it was held that an appeal does not lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also Spry VP in **Haman Singh & Others -v- Mistri [1971] EA 122, 125)**. The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of **Mbogo & Another -v- Shah [1968] EA 93,** where it was held at 96 that:

> **"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion…."**

12. The principles upon which a court can set aside an interlocutory judgment are well stated in the case of **Chemwolo& another -v- Kubende [1986] KLR 492.** Where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a *prima facie* defence which should go for trial. The Court of Appeal will not interfere with the discretion of a trial judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest that he was clearly wrong on the exercise of his discretion and as a result there has been a miscarriage of justice. In **Kenya Safari Lodges & Hotels Ltd -v- Tembo Tours & Safaris Ltd. [1985] KLR 441** it was stated that in an application for setting aside a default judgment, the court will consider whether the defendant has any merits to which it should pay heed and if merit is shown, the court will not *prima facie* allow the default judgment to stand. The court will have regard to the applicant's explanation for his failure to appear after being served, though as a rule, his fault, if any, can be sufficiently punished by terms as to costs.

13. In this appeal, two critical issues stand out for our determination. The first is whether the appellant was served with summons to enter appearance and the second is whether the trial court erred in finding that the proposed statement of defence was a sham and did not raise triable issues.

14. In **Karatina Garmanets Ltd -v- Nyanarua [1976-80] 1 KLR 114**, it was stated that where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth. It then becomes a matter of fact as to which party is to be believed.

15. In the present appeal, the trial court established that as per the affidavit of service, the appellant was known to the process server who had served her with a letter in the same matter after being pointed out by the respondent who is her sister; that this evidence was not challenged and the process server was not called for cross-examination.

16. We have considered this finding by the trial court and weighted it against the affidavit of the appellant filed in support of the application to set aside the interlocutory judgment. Nowhere in the affidavit in support does the appellant challenge the contents of the affidavit of service as deposed by the process server; what is there is a bare denial of service; this cannot do. A specific averment has been made in the affidavit of service and this requires specific rebuttal; the appellant did not controvert that the process server knew her or that she had previously been served with a letter. The failure to challenge this specific aspect of the affidavit of service leads us to find that the learned judge did not err in finding that service of summons was effected upon the appellant.

17. The next issue for our consideration is whether the proposed defence is a sham and does not raise triable issues. Two grounds of appeal stand out in this regard: these are that the learned judge erred in law and fact in failing to consider that the interlocutory judgment obtained was not based on contract but on an abstract figure obtained by the respondent; and that the judge failed to consider that there was no agreement for sale of any plot of land between the parties. In the particulars pleaded in the plaint, the respondent makes two alternative claims against the appellant: one is for the market value of ½ acre of plot at Runda which amounts to Kshs.18,500,000/= and the other is an alternative claim for loss of US $5,700 being money to the appellant paid plus interest at the prevailing rate in 1993 of 69% per annum.

18. The prayer contained in the plaint does not include the alternative claim for US $ 5,700; the alternative claim seeks interest at the rate of 69% per annum, this rate is higher than the court rates and a triable issue is disclosed whether 69% per annum interest is payable .

19. A relevant fact ignored by the learned judge is that there was no agreement for sale of an identified plot that the appellant was to purchase for the respondent; in the absence of a specific plot, the triable point of law is whether the respondent is entitled to compensation based on the market value of a plot located in the same geographical location or a refund of the money paid. The type of remedy available to the respondent and the measure of compensation is a triable issue disclosed in the proposed defence. This triable issue is captured in the ground stating that the interlocutory judgment obtained was not based on contract but on an abstract figure obtained by the respondent. We are satisfied that the learned judge misdirected herself and ignored the fact that there was no agreement for sale of land between the parties. The learned judge erred in failing to appreciate whether the interlocutory judgment was in line with the legal principles applicable in determining the measure of damages relevant to the facts of this case. We are satisfied that there are triable issues which raise a *prima facie* defence which should go for trial. In **Karatina Garmanets Ltd -v- Nyanarua (supra),** it is stated that courts should lean towards a policy of deciding cases on their merits rather than encourage *ex-parte* judgments based on procedural technicalities. The respondent's claim against the appellant as pleaded in the plaint is based on fraud and misrepresentation. As a general rule, proof of fraud requires oral evidence and trial.

20. Based on the foregoing reasons, we are satisfied that the learned judge erred in failing to appreciate that the proposed defence was not a sham as it raised triable issues. The upshot is that we set aside the ruling and order of the High Court dated 15th March 2012 and we substitute in its place an order setting aside the interlocutory judgment entered in favour of the respondent on 16th February 2011 and all consequential orders arising therefrom. The appellant be and is hereby granted leave to file and serve her statement of defence within twenty one (21) days of the date hereof. Noting that summons to enter appearance was served; the appellant shall bear the costs before the High Court. In this appeal, each party shall bear her costs.

Dated and delivered at Nairobi this 25th day of September, 2015.

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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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