IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 92 OF 2005

MACHO CREDIT LIMITED ……………………..……………..APPELLANT

VERSUS

GIRO COMMERCIAL BANK LIMITED …………..…………RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi, Milimani Commercial Courts being the Ruling of Hon. Mr. Justice L. Njagi delivered on the 30th September, 2004

in

Misc. Application No. 168 of 2002)

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JUDGMENT OF THE COURT

1. **GIRO COMMERCIAL BANK LTD** (respondent) was the Plaintiff in the Chief Magistrate's Court at Milimani in CMCC no. 982 of 2001 in which the Defendant was **MACHO CREDIT LIMITED** (appellant). The respondent subsequently took out a notice of motion under the provisions of **section 18** of the **Civil Procedure Act** and the then **Order 50 Rule 1** of the **Civil Procedure Rules** praying that the suit be transferred to the High Court for trial and final determination. The application was successfully resisted by the appellant as the court, (J.L.A. Osiemo J. as he then was) dismissed the same on the grounds that the suit having been instituted in a court without jurisdiction, the High Court lacked competency to transfer the same to itself.

That was on 28th October, 2002.

2. Aggrieved, the respondent took out another notice of motion this time pursuant to the provisions of the then **order XLIV Rule 1** and **Order L Rule 1** praying that the orders made on 28th October 2002 be reviewed on the basis that there was an error apparent on the face of the record as the court had found the existence of a controlled tenancy between the parties while no such relationship existed and further that the original suit had been filed in a court with jurisdiction. This latter motion was heard in the absence of the appellant who had also not filed any papers in opposition. The respondent had shown the court that the appellant had been served with both the motion and the hearing notice. In its Ruling dated and delivered on 24th March, 2004 the court (L. Njagi, J. as he then was) reviewed the orders of the 28th October, 2002 by setting

aside the same and transferred the suit from the magistrate's court to the High Court.

3. The order of 24th March 2004 gave rise to the appellant's motion brought pursuant to the provisions of **sections 80** and **3A** of the **Civil Procedure Act** and **orders L Rules**, **1, 2** and **17; XLIV Rule 1** of the **Civil Procedure Rules** which sought an order staying the orders of 24th March 2004 and the setting aside of the same, or, in the alternative, the review of those orders and for time to be extended for the filing of grounds of objection and/or a replying affidavit and for the costs of the application. That motion was dismissed for lack of merit on 30th September, 2004 prompting the appeal the subject of this determination.

4. The appellant, in the memorandum of appeal raises a chronology of nine (9) grounds which may be safely summarized into the following amalgamated ones, that the mode of service of the relevant motion and hearing notice was unlawful and improper; the trial Judge erred in both law and fact in not discerning the merit in the dismissed motion and in requiring that the decree or order be attached to the motion if the same were to succeed.

5. At the hearing of this appeal Mr. Nderitu, learned counsel for the appellant submitted that service of the motion and hearing notice was by way of certificate of posting and not by registered post as noted by the Judge yet the law requires that service be in person, and that substituted service of process is allowable only after reasonable steps have been taken to effect personal service and such personal service has not been possible. Counsel told us that nothing was shown by way of steps taken to effect proper service such as contacting the Law Society of Kenya to assist in locating the appellant's advocates and that, the court allowed no consideration for intervening circumstances that could have delayed delivery of process through mail.

Counsel concluded his submissions by stating that there is no requirement in law that there be annexed an order to the motion for review for that motion to succeed. He therefore urged us to allow the appeal as the appellant had suffered prejudice by not being heard.

6. Mr. Murugara the learned counsel for the respondent in opposing the appeal submitted that this court was being asked to interfere with the unfettered discretion of the trial court and that unless it was shown that that discretion was exercised capriciously or injudiciously, then we would not interfere. Saying that the mode of service matters not so long as the Judge was satisfied that service had indeed been effected, Mr. Murugara added that the Judge had satisfied himself that it was optimal to serve by post which counsel said was not the same as substituted service. He said that the respondent in fact showed the court that they had attempted to effect personal service without success. Counsel said that the appellant's counsel had indeed admitted receiving the letter that forwarded the motion and the hearing notice and asked us to dismiss this appeal as it was the respondent suffering prejudice in that it was not receiving rent.

7. This is an interlocutory appeal.

We have perused the record carefully and on the issue of service of process we observe that the appellant easily admitted receiving the letter that was sent via post and which letter was said to carry the motion and the hearing Notice. This the trial Judge correctly found in his Ruling at page 9 thereof by recaputilating the appellant's advocate's averments in the affidavit in support of their motion for review and observing that it was plain beyond controversy that the respondent's advocates had indeed received the relevant letter. The learned Judge wrote, quoting in paragraph 8 of the affidavit in support of their review application;

> ***"THAT I believe from the pertinent facts that the applicant's/ plaintiff's advocates have acted in bad faith to obtain the orders ex parte in that;***
>
> (a) ***the application was filed in court on the 10th December 2003 and was not posted until almost one month later that it was 9th January, 2004. I annex hereto true copies of the letter dated 8th January, 2004 addressed to my firm, the contents of which are self explanatory and the envelope clearly illustrating the date of postage, all marked as AT1."***

The learned Judge further found it necessary and we share that view, to repeat the contents of the all important letter of 8th January 2004 as hereunder;

"under certificate of Posting

A. ***Taibjee & Company***

Advocates,

P. O. Box 64136 NAIROBI.

Dear Sirs,

MILIMANI COMMERCIAL COURT CIVIL CASE NUMBER 168 OF 2002

GIRO COMMERCIAL BANK LIMITED –V- MACHO CREDIT LIMITED

We forward the Notice of Change of Advocates in respect of this matter together with a copy of the Notice of Motion dated 6th December, 2003 and listed for hearing on 28th January 2004. The notice of motion is served upon you by virtue of this letter.

Yours faithfully,

HAMILTON HARRISON & MATHEWS,

G. GITONGA MURUGARA

ENCLS"

It is crystal clear from the contents of the above letter that it was forwarding both the notice of motion and the hearing notice and hence the word

"ENCLS". It is further crystal clear from the appellant's advocate's affidavit and more particularly paragraph 8 thereof that that letter was indeed received. It therefore beats logic that a complaint on the mode of service would be made a central issue whereas receipt of such service is neither denied nor proved to be a non-service. To such illogical complaint we would say this, that service by whatever mode having been proved and not denied, that mode of service becomes a secondary lame duck excuse, not serious enough to be reason for setting aside the exparte orders, despite notice of the hearing date. In these circumstances, we do not find ground to fault the trial Judge.

8. It was in the exercise of his judicial discretion that the trial Judge refused the appellant's motion to review, set aside or stay aside his orders of the 24th March 2004. We have already found in paragraph 7 above that the learned Judge cannot be faulted for proceeding as he did and in refusing the orders sought in light of his being satisfied, rightly in our view, that service of the motion and hearing notice had indeed been effected. He exercised his judicial discretion judiciously and not capriciously and we cannot rightly interfere with such correct exercise of his discretion. We are further satisfied that the Judge's decision was right. We are guided by the principles set out in numerous cases on interference of judicial discretion, as we are being urged to interfere, and suffice to cite only the case of **MBOGO AND ANOTHER V SHAH [1968] E.A 93** where the three Justices of Appeal held;

per NEWBOLD P:

> ***"--- a Court of Appeal should not interfere with the exercise of the discretion of a 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 from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

Per sir CLEMENT DE LESTANG, V-P.

> ***"Order 9 r. 10 gives the High Court an unfetted discretion to set aside or vary an ex parte judgment**. (Evans V Bartlam (1937)2 ALL ER 646)* ***and it was in the exercise of his discretion that the learned judge refused the application. I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this Court that the judge was wrong and this, in my view, it has failed to do."***

per LAW, J.A.

> ***"The court's power to set aside a judgment under O. 9, r.10, is an unconditional discretionary power, and this Court will not interfere with the exercise of such discretion unless clearly satisfied that the judge was wrong."***

On our part we are satisfied that the learned Judge took into account all the matters he was entitled to so take into account before refusing the application and he was not wrong in his exercise of judicial discretion.

9. We are unable to find any error of law or fact that the trial Judge fell into by not finding any merit in the appellant's motion. The trial Judge is faulted for having refused the aspect of the motion that sought review by stating that no decree or order were annexed to the motion and so there was nothing to review. That criticism cannot be a serious one considering that the learned Judge used both decree and order in the same sentence and no injustice is shown to have been occasioned by such a statement. At any rate, in the totality of the motion and the Judge having correctly found that the service of the motion and of the hearing Notice had been effected and the appellant not denying receipt of the letter of 8th January, 2004, the Judge would have been wrong to allow the setting aside, stay or review of his earlier orders of 24th March 2004.

10. We find no merit whatsoever in this appeal and the same is dismissed with costs to the respondent.

DATED and **DELIVERED** at **NAIROBI** this 18th day of December, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

…………………………

JUDGE OF APPEAL

J. MOHAMMED

…………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>