



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)**

**CIVIL APPEAL NO. 112 OF 2010**

**BETWEEN**

**LINEAR COACH COMPANY LIMITED .....APPELLANT**

**AND**

**1. ALHUSNAIN MOTORS LIMITED.....1ST RESPONDENT**

**2. MUMTAZ MUGHAL.....2ND RESPONDENT**

***(Appeal from the Ruling and order of the High Court of Kenya at***

***Kisii (Judge Justice Daniel Musinga) dated the 27th day of February, 2009.***

**in**

**(HCC NO. 70 OF 2005)**

**\*\*\*\*\***

**JUDGEMENT OF THE COURT**

The appellant, ***Linear Coach Company Limited***, was the plaintiff in the suit at the High Court. It sued ***Alhusnain Motors Limited*** (hereinafter “*the 1st Respondent*”) and ***Mumtaz Mughal*** (hereinafter “*the 2nd Respondent*”). The Appellant's claim was for special damages which it suffered as a result of a road traffic accident involving its vehicle Registration Number KAN 418 R and which it alleged was registered in the name of the 1st Respondent and was at the material time of the accident on 11th November, 2003 being used or under the management of the 2nd respondent.

The learned Judge of the High Court found that the 2nd respondent had been served with summons to enter appearance and had not entered appearance. The appellant, on 29th July, 2008 requested for Judgment in default of appearance against the 2nd respondent which was entered on 4th August, 2008 in the sum of Kshs.3,948, 164/60. On 8th October, 2008 the appellant's bill of costs was taxed in the sum of Kshs. 307,331/= followed by issuance of a decree on 3rd September, 2008.

On 24th September, 2008 the appellant took out a notice to show cause why execution should not issue against the 2nd respondent. On the return date which was 6th October, 2008 the 2nd respondent failed to attend the court and a warrant of arrest was issued against her.

The 2nd respondent lodged an application seeking a stay of execution of the Judgment entered against her and for leave to file a defence out of time. She made the application on the ground, inter alia, that she had not been personally served with summons to enter appearance and learnt of the suit and the Judgment entered against her when she was served with a warrant of arrest.

The appellant opposed the application on the basis of a replying affidavit sworn by its advocate, **Kennedy Bosire Gichana**. He deponed among other things that the 2nd respondent had indeed been served with summons to enter appearance, a notice of entry of Judgment, a notice to show cause and a warrant of arrest. In addition, according to the said learned counsel, the 2nd respondent's insurers, **M/S Concord Insurance Company Limited** were brought into the picture by the 2nd respondent.

The Learned Judge considered the 2nd respondent's application, the affidavits filed and submissions of counsel who appeared before him. Having done so he concluded as follows:-

“

**(a) The 2nd defendant was sued by the plaintiff on 6th May, 2008 when an amended plaint was filed. The Plaintiff's suit against her was by then time barred, see section 4 (2) limitation of Actions Act. Such suit could only be brought after three years from the date of the accident with leave of the court. As no such leave was sought and obtained, the plaintiff's suit against Mumtaz Mughal does not lie.**

**(b) The second defendant was served with summons to enter appearance and plaint. However in view of this court's findings in (a) above, the default judgment that was entered against it (sic) is of no legal consequence as the suit against her is a nullity.**

**(c) The judgment that was entered against the second defendant must and is hereby set aside.**

**(d) I now invite the plaintiff's counsel to show cause why this court should not strike out the plaintiffs case against the second defendant with costs to her.”**

The plaintiff, rather than show cause why its suit should not be dismissed, lodged this appeal before us citing four grounds as follows:-

- 1. The learned Judge erred in Law and misdirected himself fundamentally in holding that the default judgment entered against 2nd respondent was of no legal consequence as the suit against her was (a) nullity contrary to his orders given by consent earlier to enjoin the 2nd Respondent in the suit.*
- 2. The learned Judge erred in Law and misdirected himself fundamentally in setting aside default judgment when the same had not been sought by the 2nd respondent.*
- 3. The learned Judge misapprehended the law on limitation of actions and acted on wrong principles hence arriving at a wrong decision.*
- 4. The Learned Judge erred in holding that the suit against the 2nd Respondent is a nullity and (in) the same breath invited the appellant's counsel to show cause why the court should not strike out the Appellant's claim against the 2nd Respondent with costs.”*

In urging those grounds, **Mr. Bosire**, learned counsel for the appellant condensed them into two by arguing grounds 1,3, and 4 together and ground 2 separately. On ground two counsel submitted that a

party is bound by his pleadings and as the 2nd respondent had not sought the setting aside of the default judgment, she could not be granted the same and the learned Judge therefore erred in law in setting aside the default judgment.

On grounds 1,3, and 4, Mr. Bosire submitted that the issue of limitation could not be conclusively disposed of at the stage of the application to set aside the default judgment. At that stage, according to counsel, the appellants claim had not been traversed. Counsel was also of the view that the learned Judge misinterpreted the provisions of the Limitation of Actions Act. He concluded that judicial discretion was not properly exercised by the learned Judge.

Responding to Mr. Bosire's submissions, **Mr P.J. Otieno**, learned counsel for the 2nd respondent contended that the issue of limitation was properly considered by the learned judge who had not taken into account irrelevant matters or left out matters which ought to have been considered in determining the 2nd respondent's application.

We have considered the grounds of appeal, the record of the High Court, counsels' submissions and the law. Having done so, we shall first dispose of ground No. 2. We note that indeed the appellant did not expressly seek to set aside the default judgment in her application dated 17th January, 2009. She however sought leave to file her defence out of time among other reliefs. We do not see how she would file a defence without the default judgment first being set aside. Setting aside of the default judgment was inevitable if leave to file defence was granted. We find no merit in this ground of appeal.

The 2nd respondent's application was lodged, inter alia, **under Order 1X A rule 10 of the Civil Procedure Rules**. There is no dispute with regard to the guiding principles which must apply in considering applications made under the said rule. There is a plethora of authorities on those principles and we need not cite all of them. Only a few will suffice.

In ***Kimani -v- McConnel [1966] EA 547, Harris, J***, as he then was, in considering an application for setting aside a default Judgment, stated that the application should be considered:-

***“In the light of all the facts and circumstances both prior to, subsequently and of the respective merits of the parties.”***

**Harris J** also said, the court should further consider whether

***“It would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be imposed”***

That opinion was adopted in several subsequent cases including the often cited decisions in ***Mbogo -v- Shah [1968] EA 93 and Patel -v- E.A Cargo Handling Services Ltd [1974] E.A. 75***. In the latter case, the court went on to explain, at page 76, that the main concern of the court in an application to set aside a default judgment was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the rules.

The court also cited with approval the judgment of **Lord Russel of Killowen in *Evans -v- Barthlam [1937] AC 437*** as follows:-

***“ It was argued by counsel for the respondent that before the court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved, the door was closed to the Judicial discretion, in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of the authorities which were cited in argument nor if such authority existed could it be easily justified in face of the wording of the rule.***

*It would be adding a limitation which the rule does not impose. The contention no doubt contains this element of truth, that from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment and obviously no useful purpose would be served if there was no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."*

*(See also Price and Anor -v- Hilder [1986] KLR 96).*

What emerges from the authorities is that the discretion exercisable under **Order IX A rule 10** is unfettered and unconditional, but the discretion is not exercised on whim nor capriciously. Did the learned Judge of the High Court appreciate the above principles?

As this appeal arose from the exercise of discretion by the Judge principles applicable on appeal are settled. *Sir Clement De Lestang VP in Mbogoh & Anor -v- Shah* (Supra) said:-

*" 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 not acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

In the same case *Sir Charles Newbold P* stated as follows:-

*" For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision , or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."*

In the case before us, as stated earlier, the learned Judge held that the 2nd respondent was duly served with summons to enter appearance and plead. However, as already stated, he also found that as the appellant's suit was statute barred **under section 4 (2)** of the Limitation of Actions Act, and that the default judgment entered against the 2nd respondent was of no legal consequence as the appellant's suit was a nullity.

The 2nd respondent, in her application which was before the learned judge, had merely sought, among other reliefs, leave to file her defence out of time. One of the grounds she gave for her application was that she had a good and tenable defence. And in the proposed defence, the 2nd respondent intended to rely on the statute of limitations. That defence was yet to be filed, indeed it was the primary relief sought by the 2nd respondent that she be granted leave to file the same out of time.

The learned judge concluded that the defence of limitation was unassailable. That may very well be the case, but at that stage, the appellant had not been called upon to respond to that defence since it already had a regular judgment in its favour.

At the stage at which the matter came up before the learned Judge, all the 2nd respondent urged was an opportunity to canvass her **"good and tenable defence."**

She was not seeking to nullify the appellant's suit. She was merely telling the court *" if you give me a chance, I will show that the plaintiff's claim against me is statute barred."* The learned Judge instead of granting her the opportunity to demonstrate her **"good and tenable defence"** nullified the appellant's suit.

We think in doing so, the learned judge overreached himself. He improperly exercised his discretion. The learned judge prematurely determined that the appellant's claim against the 2nd respondent was statute barred without considering whether the appellant had a bonafide explanation for the delay in instituting the suit. The learned judge therefore took into account a matter which he ought not to have taken into account and at the same time failed to take account of a matter he ought to have taken account of and in doing so arrived at a wrong conclusion. The result has been a misjustice to the appellant. There is therefore reason to interfere with the manner in which the learned Judge exercised his discretion. We shall therefore interfere with the same in the circumstances. We allow this appeal, set aside the ruling and order of the learned Judge and substitute therefor an order allowing the 2nd respondent's application dated 17th January, 2009. The draft statement of defence annexed to the said application is deemed duly filed and served with the leave of the court on payment of requisite court fees.

The appellant is at liberty to file its response to the said defence within fourteen 14 days from the date hereof.

The 2nd respondent shall pay to the appellant costs of this appeal and costs of her aforesaid application dated 17th January, 2009.

Those then are our orders on this appeal.

**DATED AND DELIVERED AT KISUMU THIS 22nd DAY OF November, 2013**

**J.W.ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F.AZANGALALA**

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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**