IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, KEIWUA & GITHINJI JJA)

CIVIL APPEAL NO 63 OF 2005

BETWEEN

JAPHETH ANGILA…….....……APPELLANT

AND

PAUL OJIGO OMANGA T/A VICTORIA VIEW HOTEL

G.H.Z. ADUDA T/A ADUDA AUCTIONEERS…….RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Nyamu, J) dated 12th March 2004

in

HCCC NO 1740 OF 2002)

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JUDGMENT OF TUNOI J.A

1 This is an appeal by **JAPHETH ANGILA**, the appellant herein, against the ruling and order of Nyamu, J (as he then was) dated 12th March 2004 by which the learned Judge declined to exercise his discretion in favour of the appellant and to set aside an interlocutory judgment for the sum of shs. 5,369, 480/- with consequential orders which judgment had been entered against the appellant on 10th January 2003 in default of entering an appearance.

2 The appeal was disposed of by way of written submissions pursuant to the order of the Court dated 6th July 2010. The appeal was mentioned on 23rd September 2010 with the view to fixing the dates on which the parties could highlight their submissions. Later, the counsel for the parties informed the Court that they did not wish to highlight the submissions as earlier indicated, but, instead asked that a date for judgment be given.

3 Though the judgment was initially scheduled to be delivered on 11th February 2011 that was not to be and its delivery was postponed on three occasions. This was because the late Hon. Ole Keiwua, JA. who was one of the learned Judges who heard the appeal fell gravely ill in early 2011 and had to seek treatment abroad. Though, he briefly recovered in the middle of the year, he appeared not well enough to

resume work. He eventually passed on towards the end of the 2011. Consequently, it was not possible for the Bench to have a post-hearing conference. As a result of the demise of the learned Judge this judgment has been delivered under the provisions of **rule 32(3)** of the Court of Appeal Rules.

4 Though there were originally two respondents, Zephania Aduda Otweyo, the 2nd respondent, died on 11th November 2009 and as no legal representative was appointed within the time prescribed by the Rules of the Court, the appeal against the 2nd respondent was on 6th July 2010 marked as having abated under **rule 96(2)** of the Court of Appeal Rules.

5 The facts giving rise to the appeal are simple. The appellant is the owner of all that business premises known as L.R. NO. 1430/Plot 177, situate in Homa Bay (hereinafter referred to as the suit premises). The 1st respondent occupied the said suit premises as a tenant thereof under a written agreement dated 1st June 1999. It is common knowledge that "a misunderstanding" arose between the appellant and the 1st respondent leading to the appellant terminating the tenancy. The 1st respondent, in turn, filed a reference before the Business Premises Rent Tribunal being BPRT NO 43/2000 and a suit Nairobi H.C.C.C. No 1823 of 2003.

6 In the Nairobi H.C.C.C. No 1823 of 2000 an interim injunction was issued ex-parte on 30th January 2001 to restrain the appellant from evicting the 1st respondent from the suit premises. However, the parties on 31st May 2001 recorded a consent order to maintain the status quo until the determination of the suit.

7 Whilst the said order was in force the appellant ex-parte moved the Business Premises Tribunal in BPRT No. 43 of 2000 for an order of distress for arrears of rents and eviction of the 1st respondent from the suit premises.

8 The appellant having obtained the orders he had sought jointly together with the auctioneers, the 2nd respondent in the appeal entered the suit premises and without giving statutory notice of proclamation, seized, attached and removed all the shop goods therefrom and locked the suit premises.

9 It is not in dispute that the respondents effected eviction and attachment of the appellant's goods without complying with the provisions of section 14(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 which mandated that Tribunal's orders be first filed before the subordinate court and notice thereof being served.

10 It is also in evidence that the 2nd respondent was disqualified to hold an auctioneer's licence when he purportedly evicted the 1st respondent from the suit premises.

11 The suit, the subject matter of the appeal, was filed on 22nd November 2002 by the 1st respondent against the appellant and the auctioneer, the 2nd respondent, claiming against both of them jointly and severally for:-

(a) Kshs. 2,529,480/- being the total value of the distrained goods as per inventory attached hereto.

(b) Kshs. 2,850,000 constituting loss of business profits as set out in paragraph 9 hereof.

(c) General damages for unlawful eviction, distress as well as loss of business reputation and goodwill.

(d) Cost (sic) this suit.

(e) Interest on (a), (b), (c) and (d) hereof at Court rates.

12 As there was no appearance, interlocutory judgment was entered against the appellant in the sum of Kshs 5,369,480/- together with interest and costs taxed at Kshs 260,000/- which sum continued to

attract interest at court rates until payment in full. However, the 2nd respondent entered appearance and filed a statement of defence. The learned Judge, Rawal J (as she then was), however, rejected it on the ground that the goods belonging to the 1st respondent were attached under a wrong procedure and without any authority in law. She found that the appellant and the auctioneer had carried out an absolute and outrageous act of dispossessing a citizen and depriving him of property and business and must therefore face the legal consequences.

13 The appellant then moved the superior court under Order 1XA **Rules 10** and **11** of the Civil Procedure Rules and sections **3A** and **63** of the Civil Procedure Act seeking an order to set aside the interlocutory judgment with all the consequential orders. The main grounds relied on by the appellant were:-

(i) That the appellant was never served with the summons and that the process server's affidavit is not in the form prescribed and the affidavit does not identify the name and address of the person who identified the appellant to the process server. And that the affidavit of service contravenes Order 5 Rule 15 of the Civil Procedure Rules.

(ii) That the request for judgment was prematurely made and the form used is not as prescribed in Order 9A rule 4.

(iii) That the appellant has a good defence for the claim.

The application came up for hearing before Nyamu, J (as he then was) who having considered the arguments from both sides came to the conclusion that the application lacked merit.

14 The learned Judge held that the appellant had been duly served with the summons at his offices at Rongo and that the appellant having declined to be cross-examined on the issue of service, the court was in the circumstances entitled to hold that there was something adverse to the appellant which the cross-examination could have revealed.

15 Further, the learned Judge found that no cause had been shown for interfering with the judgment which was regular and meritorious. He, therefore, dismissed the application thus triggering his appeal.

16 The appellant has in the memorandum of appeal preferred eight grounds of appeal to challenge the ruling of the learned Judge. The gist of all these grounds are firstly, that the learned Judge misdirected himself on the principles applicable in exercise of judicial discretion and therefore reached an erroneous conclusion in refusing to set aside the interlocutory judgment; and secondly, that the learned Judge took into consideration irrelevant factors and/or issues while omitting to consider relevant issues which would have shown that the intended defence of the appellant did raise triable issues.

17 It is trite law that the court has an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. In **Patel v EA Cargo Handling Services Limited [1974] EA 75** the former Court of Appeal, following its previous decision in **Mbogo v Shah [1968] EA 93** adopted the opinion of Harris J in **Kimani v McConnell [1966] EA 547** where he said:

"In the light of all the fact 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."

However, the Court reiterated that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the Rules. On the other hand, it reiterated, where a regular judgment had been entered, the Court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial.

18 The Court in those decisions emphasized that the discretion is in terms unconditional and that where judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must

produce to the court evidence that he has a prima facie defence. See **Evans v Bartlam [1937] AC 473.**

19 In this case I pose: Were there issues in the defence which merited ventilation in a trial? In my view, not so. The appellant was plainly aware of the Court orders which had been granted to the 1st respondent prohibiting his eviction from the suit premises. The appellant, also, acted in total derogation of the further consent injunctive order in Nairobi H.C.C.C. NO. 1823 of 2000 in which he had agreed to observe and had so recorded in Court.

20 Further, the appellant sought the assistance of an unauthorized agent, the 2nd respondent to evict the 1st respondent and to cart away his goods. Moreover, the two blatantly refused to return the said goods as later ordered by the court. They were in fact in total contempt of the Court orders.

21 I am satisfied therefore that the appellant did not in his defence raise any prima facie defence which could go for trial for adjudication.

22 The appellant again has not, in his written submissions, shown that the learned Judge in exercising his discretion misdirected himself in some matter and as a result had arrived at a wrong decision or is it manifest from the entire case that the learned Judge had been clearly wrong in the exercise of his discretion and that consequently there has been misjustice.

23 Accordingly, in my judgment, taking into account the interests of justice and the overriding objective being to do justice to the parties irrespective of legal technicalities, I think that this appeal should fail. As Githinji JA agrees, the order of the court is that this appeal be and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 2nd day of March,2012.

P.K. TUNOI
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JUDGE OF APPEAL (as he then was)

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF GITHINJI JA

I have had the advantage of reading in draft the judgment of Tunoi JA (as he then was). I respectfully agree with it and I have nothing useful to add. I would, like Tunoi JA, dismiss the appeal with costs to 1st respondent

Dated and delivered at Nairobi this 2nd day of March 2012

E. M. GITHINJI
……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR