IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 52 OF 2003

BETWEEN

HOUSING FINANCE COMPANY OF KENYA…..…...…….……APPELLANT

AND

1. RICHARD NDERE JOHNSON …….…….1ST RESPONDENT

2. SAMUEL KAHIGA MUIGAI…….…….2ND RESPONDENT

3. CHERI KENYA LIMITED……...…..…….…..…3RD RESPONDENT

4. COMMISSIONER OF LANDS…….……4TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Mwera, J) dated 31st October 2002

in

H.C.C.C. NO. 2095 of 2000

****

JUDGMENT OF THE COURT

The First respondent in this appeal, **Richard Ndere Johnson** on **24th November 2000**, instituted a suit in the superior court against Housing Finance Company of Kenya the appellant, Samuel Kahiga Muigai, Cheri Kenya Limited and Commissioner of Lands who are respectively the second, third and fourth respondents contending that an alleged public auction of the suit premises namely **KOMOROCK PHASE 11 NO 310 BLOCK 129/86,** did not take place on 9th December 1998, or at all. The First respondent also contended that any resultant transfer of the suit premises to the Second respondent was rendered null and void *ab initio*. He also alleged that if the said auction took place, it was conducted fraudulently by the appellant or its agents, servants or officers and was also in breach of the provisions of the law.

The plaint shows that the First respondent, in 1993, requested the appellant for financial accommodation by way of a charge over the suit premises, KOMOROCK PHASE 11 No 310 BLOCK 129/86, in respect whereof Kshs 595,0000/= was availed less Kshs 114,278/= which was to be contributed by the First respondent. The balance of Kshs 480,722/= was to be repaid by the First respondent by monthly installments of Kshs12,000/= at 26% interest rate per annum and by the time the alleged auction was held he had already repaid Kshs 362,291.60/- and that he has always been ready and willing to repay any sums owing to the appellant but he was never given any opportunity to clear any outstanding loan balance.

The First respondent complained that he suffered loss of the suit premises, with buildings and improvements thereon, valued at Kshs 1.8 million and any bids offered by the second respondent at the alleged auction were never accepted at the fall of the hammer and therefore the Third respondent was obliged to re-advertise the premises for sale by public auction. As a consequence, the transfer to the Second respondent was a nullity and also because that respondent never made any offer to purchase the suit premises and at the time when the suit premises were transferred to him, the Second respondent was an employee of the Third respondent.

The First respondent therefore sought a declaration that the sale to the Second respondent was a nullity, an order directing the Commissioner of Lands to rectify the register by directing the cancellation of the registration of the Second respondent and an account as at 9th December 1997 of the redeemable amount due to the mortgage account.

Though the appellant defaulted in filing a defence, it, in a draft defence attached to an application to set aside judgment, alludes to writing to the First respondent informing him of the sale of the suit premises by Public auction. This was when the suit premises were duly advertised in the Daily Newspapers requesting the First respondent to pay the balance outstanding on his account. According to this draft, the appellant had also served the First respondent with a statutory notice which the First respondent neglected. The First respondent was aware of the indebtedness and promised in writing to settle it. The Third respondent also notified that the suit premises was going to be sold by Public auction on 9th December 1997, and was eventually sold to the Second respondent for Kshs. 1 million.

The appellant in the application to set aside judgment and in draft defence attached thereto denied that the auction was conducted fraudulently. The appellant also filed a suit against the First respondent for the balance outstanding. The relevance of this draft defence, in this appeal is that a prima facie defence on merit is one of the matters this court will have to consider in this appeal.

The Second Respondent filed defence and denied what is alleged against him stating that he attended the auction of the suit premises and placed bids thereat whereafter he was declared the highest bidder and upon payment of the purchase price, he was declared purchaser of the suit premises and accordingly denied any fraud on his part and denied he was ever employed by the Third respondent. So much for the pleadings, which were before the superior court.

In its ruling delivered on 31st October, 2002, the superior court (Mwera, J) dismissed the appellant's application and thus provoked this appeal. We now turn to the appeal before us and according to which it is contended that the learned Judge of the superior court erred in finding that there was no explanation offered for the failure to enter appearance. It is also contended that he failed to consider the merits of the draft defence filed in court. It is also urged that the Judge erred in ignoring the evidence of loss of summons and misdirected himself in not holding that the defence was plausible. He erred in refusing to set aside the ex parte judgment thereby failing to exercise his discretion in favour of setting aside the exparte judgment. The Judge is said to have erred in holding that the delay of two months was inordinate.

At the hearing of the appeal, Mr. Ondieki, learned counsel for the appellant, argued grounds 1, 3, 5 and 6 of appeal together. These grounds range from complaints that the Judge erred in finding that the delay was not explained and that he ignored the evidence of loss of summons and to refusing to set aside the ex parte judgment. Grounds 2, 4, 7 and 8 were also argued together. These are; the Judge failed to consider the merits of the draft defence, and that he misdirected himself in not holding that there was a plausible defence on merits and he failed to exercise his discretion by refusing to set aside the ex parte judgment

and that a delay of two months was inordinate.

Mr. Sumba, learned counsel for the first respondent, opposed the appeal and agrees with the findings and conclusions of the learned Judge. Mr. Sumba submitted that the case of **Shah vs Mbogo [1967] E A 116** applied in this case because there was deliberate intention on the part of the appellant to subvert justice. This is because the appellant did not explain to the court where the summons to enter appearance disappeared to and why. He also submitted that whether the appellant filed defence or not was immaterial because the prayers in the plaint were not directed against the appellant and the remedy the first respondent sought was not in damages.

The principles on which the Court acts to set aside ex parte judgment are now well known and settled. Harris J in the case of **Shah vs Mbogo & Another [1967} EA 116** had this to say at page 123:-

"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the Society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July 8, 1966, and accordingly the motion must be refused."

The decision of Harris J was upheld on appeal by the Court of Appeal in **Mbogo & Another vs Shah [1968] E A 93** in which Newbold P stated:-

"A Court of Appeal should not interfere with the exercise of the discretion of Judge unless it is satisfied that he misdirected himself in some matter and as a result he 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."

Sheridan J in the case of **Sebei District Administration Vs Gasyali & Others [1968] E A 300** at page 301 stated:-

"It is not disputed that the appellants have a defence on the merits of the case. Nor does it appear that they have been trying to obstruct or delay the course of justice. As soon as they became aware by the application for execution they took steps to rectify the position. And as I have already observed, they have paid the decretal amount into court. In these circumstances the justice of the case required the defence to be heard on its merits."

Sheridan J relied on the decision of the Court of Appeal in **Kanji Purshottam Toprani Vs K. C. Patel [1958] EA 346** in which that court stated that refusal to enlarge time would in the circumstances of the case have resulted in an injustice. Sheridan J also relied on the decision of Ainley J in the case of **Jamnadas V. Sodha Vs Gordhandas Hemraj [1952], 7 U.L.R. at page11** in which he observed:-

"Though I have the greatest sympathy with a busy magistrate who no doubt has a great deal to put up with in the way of belated applications and requests for adjournments, though two views can no doubt be taken of this matter, I yet think that insufficient attention was paid by the lower court to the fact that the appellant had a defence to put forward, and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs have been made. I may be doing the learned magistrate an injustice, but from a reading of his ruling of June 19 it seems to me he has concentrated solely upon the poverty of the appellant's excuse. In my view that is not the sole matter which must be considered in cases of this kind. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally it should always be remembered that to deny the subject a hearing should be the last resort of a court."

These decisions make it abundantly clear, that delay is not the only matter to be considered in an application for enlargement of time. The appellant filed a draft defence with the application to set aside an ex parte judgment in the suit in the superior court. Accordingly, the superior court was seized of the defence the appellant was proposing to file if leave to do so would be granted.

We note that the learned Judge of the superior Court says he is not convinced that it makes any difference whether the appellant filed a defence or not. We see that he has not given any reasons for his conviction that it does not make any difference if the appellant is granted leave to defend or not. It is not also clear to us whether heis saying there is or there is no defence on merit.

The learned Judge was under a duty in dealing with that application to set aside an ex-parte judgment to consider whether there was a defence on merit to be allowed to be filed and to be tested at the trial. He appeared to have shut his mind to such an essential requirement and equally obligatory consideration thereby misdirecting himself.The draft defence does indeed disclose some merit which the learned trial judge should have but did not look at.

The learned Judge also says the only time a party can be permitted to file defence out of time is when such a party demonstrates to the court the reason why it failed to file defence within the time stipulated by the rules of court and what the intended defence will ultimately come to. We see that the appellant attempted to explain its failure to file defence on time blaming it on the lapses in its offices. That explanation did not convince the learned Judge.

We would at this juncture refer to what was said by Sheridan J in the case of **Sebei District Administration Vs Gasyali (supra)** when he said a distinction has to be drawn between an individual defendant who fails to enter appearance and a secretary of an incorporated body which is a defendant with his multifarious duties to perform. We believe that Janet Mwaluma, the Assistant Manager, Legal Services, of the appellant can besaid to be in the same vein as Mr. Arapata in the aforementioned case. It is also clear from authorities that failure to satisfactorily explain default in filing defence is not the only criterion to be taken into account so long as an intention to deliberately subvert or delay the cause of justice is not evinced thereby.

We are of the view that there was no such intention to deliberately subvert or delay the cause of justice in what took place in the offices of the appellant, in relation to the summons to enter appearance which the officer who received them and passed to another department explained as havingbeen lost. Such loss, alone without more, does not point to such an intention.

Goudie J in the case of **Girado Vs Alam & Sons (U) Ltd [1971] EA 448** was faced with a situation where no sufficient cause for non appearance at the hearing was shown but he nevertheless and in order that there be no injustice to the applicant, set aside judgment in the exercise of the court's inherent jurisdiction.

We would accordingly and in order that no injustice is occasioned to the appellant, allow the appeal, set aside the order dismissing the appellant's application and order that the ex parte judgment entered against the appellant on 2nd April 2002 inHigh Court Civil Case No 2095 of 2000 be and is hereby set aside with an order that the appellant pays the First Respondent costs of the appeal and in the court below. The appellant shall have 21 days from the date hereof to file and serve its defence on the respondents who are still on record.

Dated and delivered at Nairobi this 9th day of July 2010

S. E. O. BOSIRE

……

JUDGE OF APPEAL

E. O. O'KUBASU

……..

JUDGE OF APPEAL

M. OLE KEIWUA

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR