



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 59 OF 2006**

**ASHWINCHAND HIRJI SHAH ..... 1<sup>ST</sup> APPELLANT**

**(i) MUKESH KUMAR HIRJI PUNJA SHAH (ii) KANJI DAMJI PATNI and (iii)**

**ABDUL JANMOHAMED as Administrators of the Estate of the late NAVINCHAND  
HIRJI SHAH (cited as the 2<sup>nd</sup> Defendant in the superior court who died on 11<sup>th</sup> January,**

**2000 at Nairobi) and who ought to be substituted in place of the deceased**

**NAVINCHAND HIRJI SHAH ..... 2<sup>ND</sup> APPELLANT**

**MUKESH KUMAR HIRJI SHAH ..... 3<sup>RD</sup> APPELLANT**

**ABDUL JANMOHAMMED ..... 4<sup>TH</sup> APPELLANT**

**AND**

**LUCY WAIRIMU MWAURA ..... RESPONDENT**

***(Appeal from the ruling and order of the High Court of Kenya***

***Nairobi (Emukule, J.) dated and delivered at Nairobi on 17<sup>th</sup> day of June, 2005***

**in**

**H.C.C.C. NO. 1130 OF 1996)**

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

**JUDGMENT OF THE COURT**

This is an appeal from the ruling of Emukule, J. dated and delivered at Nairobi on 17<sup>th</sup> June, 2005 in which the learned Judge dismissed the appellants' application dated 21<sup>st</sup> June, 2004 in which the appellants sought the following orders:-

***“(a) that the interlocutory judgment entered by the Court on the basis of formal proof be set aside,***

**(b) that ex-parte judgment and decree passed against the defendants be set aside and the defendants be allowed to defend the suit,**

**(c) that the execution, if any; be set aside ex debito justitiae without imposing any terms against the defendants,**

**(d) that the draft defence filed herein may be deemed to be filed and served upon the plaintiff,**

**(e) that such other further order that the Court may deem expedient to grant,**

**(f) costs of the application.”**

That application was made as a result of a judgment of the superior court delivered on 7<sup>th</sup> February, 2003 in which that court made orders of injunction restraining the appellants (who were the defendants in the superior court) from harassing and/or evicting the respondent herein (who was the plaintiff in the superior court) from the premises, and compelling the appellants to transfer the suit premises to the respondent and further compelling the appellants, or their agents to release the respondent's goods and damages for illegal distress.

This litigation has a long history which can be traced back to a plaint dated and filed in the superior court on 9<sup>th</sup> May, 1996. The plaintiff in that plaint, one **Lucy Wairimu Mwaura** sued four defendants – **Ashwinchand Hirji Shah** (1<sup>st</sup> Defendant) **Navinchand Hirji Shah** (2<sup>nd</sup> Defendant), **Mukesh Kumar Hirji Shah** (3<sup>rd</sup> Defendant) and **Abdul Janmohamed** (4<sup>th</sup> Defendant) seeking judgment against the said defendants jointly and severally for:-

**“(a) An injunction restraining the defendants from harassing and or evicting the plaintiff from the premises.**

**(b) An order compelling the defendants to transfer the suit premises to the plaintiff.**

**(c) An order compelling the defendants, their agents to release the plaintiff's goods.**

**(d) Damages from (sic) illegal distress.**

**(e) Any other or further relief as this court may deem fit.**

**(f) Costs of this suit.”**

The suit arose from the contested purchase of **L.R. 1870/VI/131 Flat No. 7 Block C Valley View Flats Nairobi**. The plaintiff averred in the plaint that in the month of April, 1992, the defendants agreed to sell and she agreed to purchase the defendants' leasehold interest in the suit property. She stated that the agreement was partly in writing. She further claimed that on 7<sup>th</sup> April, 1992 she paid **Shs.168,000/=** to the defendants as a deposit and the balance of the purchase price was agreed to be paid on completion. She also averred that it was a condition of the agreement that she should provide written confirmation from the financiers regarding her ability to pay the balance of the purchase price and that she did so. Finally she claimed that she paid a further sum of **Shs.180,000/=** towards the purchase price making a total payment by way of deposit of **Shs.348,000/=**.

At the time the parties were entering into the purchase agreement, the plaintiff was a tenant of the defendants in respect of the suit property. Because of that, it was agreed between the parties that the plaintiff would continue to occupy the suit premises pending completion at a monthly rental of **Shs.10,000/=** which was subsequently reviewed and increased in March, 1993 to **Shs.12,000/=**.

In May 1995 the parties entered into negotiations concerning the delay in the transfer of the suit property to the plaintiff and it was agreed that by reason of the delay, the plaintiff would withhold

payment of rent. But on 21<sup>st</sup> July, 1995 and 21<sup>st</sup> December, 1995 the defendants levied distress upon the goods of the plaintiff, purportedly for being in arrears of rent and the goods listed in the plaint were seized. She averred that the distress was illegal and she sought to recover damages in respect thereof. The value of the distrained goods was given as **Shs.1,500,000/=**.

The plaintiff stated that she had performed her obligations under the agreement but the defendants had refused and/or neglected to transfer the suit premises despite repeated demands to do so. Hence the filing of the suit in the superior court.

The matter was placed before Mbaluto, J. for formal proof following entry of interlocutory judgment on 14<sup>th</sup> November, 2000 on account of the defendants' failure to enter appearance and/or to file a defence. The learned Judge considered the matter and came to the conclusion that the plaintiff had performed her obligations under the agreement and that she was able and willing to pay the balance of the purchase price. The learned Judge also made a finding that the plaintiff was entitled to damages in respect of unlawful distress. The learned Judge proceeded to make an award of **Shs.3 million** as damages for unlawful distress. In concluding his judgment, the learned Judge said:-

***“By reason of the foregoing, I find the plaintiff's suit proved on a balance of probability and I enter judgment in favour of the plaintiff against the defendants in terms of prayers (a), (b) and (c) above. In addition the defendants will jointly and severally pay to the plaintiff the sum of Shs.3,000,000/= together with costs and interest at court rates.”***

That judgment by Mbaluto, J. was delivered on 7<sup>th</sup> March, 2003. It was pursuant to that judgment that the defendants took out a Chamber Summons application dated 21<sup>st</sup> June, 2004 seeking the orders that we set out at the beginning of this judgment. That was the application that was placed before Emukule, J. for determination. The learned Judge carefully considered the matter and came to the conclusion that the application before him lacked merit. He therefore dismissed it. In dismissing the application, the learned Judge in his ruling concluded thus:-

***“Finally, applications of this nature must be brought promptly, and not over two years after judgment has been passed. In all the circumstances of this case and the application there is no cause for setting aside the judgment of Mbaluto, J. delivered on 7<sup>th</sup> March, 2003.***

***The consequences of that decision is that the defendants are liable to the plaintiff in the sum of Kshs.3 million. If the sum of Kshs.752,000/= by way of set off is allowed for the balance of the purchase price, there would still be a sum of Kshs.2,248,000/= together with interest thereon at Court rates from 7<sup>th</sup> March, 2003 due from defendants jointly and severally to the plaintiff in accordance with the judgment of Mbaluto, J. of 7<sup>th</sup> March, 2003 on account of the illegal distress for rent. It is so ordered.***

***In the result therefore, I would dismiss, which I hereby do, the defendant's application dated 21<sup>st</sup> June, 2004 and direct that the defendants do execute a transfer to the plaintiff of the suit property within sixty (60) days of the date of this Order. As the defendants have been in illegal occupation of the plaintiff's suit property, they, would if there had been a prayer to that effect, have been liable also to pay mesne profits thereon as from 7<sup>th</sup> March, 2003 at the average commercial rental rate of letting till the date expiration of the said sixty days. Since there was no such prayer, no order is made to that effect. The plaintiff will however have the costs of this application.”***

It is the foregoing ruling by Emukule, J. that provoked this appeal which came up for hearing before us on 21<sup>st</sup> November, 2007, when Mr. Joseph Wagara, appeared for the appellants, and Mr. Andrew Wandabwa, appeared for the respondent. Mr. Wagara took us through his **13 grounds of appeal** but abandoned **ground 8**. He chose to argue **grounds 1 to 7** together. His main argument here was that the learned Judge failed to exercise his discretion properly in that he failed to consider the fact that the 2<sup>nd</sup> defendant had died. It was in his view that the judgment was irregular as it was given in contravention of

**Order XXIII(4)** of the Civil Procedure Rules. It was further submitted that the order issued by Emukule, J. had the effect of altering the title and yet a certified copy of the title had not been produced as required by **Order XX r. 5A** of the Civil Procedure Rules. To buttress his submissions Mr. Wagara relied on this Court's decision in **RUSSELL CO. LTD. V. COMMERCIAL BANK OF AFRICA LTD & ANOTHER [1986] KLR 633** and **JOSEPH NJENGA NJOROGE V. KABIRI MBITI – Civil Appeal No. 87 of 1983** (unreported).

Mr. Wagara contended that another anomaly was that there was no contract of sale executed and, in his view, the alleged sale transaction between the parties was a nullity.

Mr. Wagara went on to submit that the learned Judge ought to have considered whether the defence raised triable issues.

Finally, Mr. Wagara submitted that the learned Judge awarded what constituted special damages and yet there was no prayer for special damages and no attempt was made to prove the same.

It is for the foregoing reasons that Mr. Wagara asked us to allow this appeal and set aside the judgment of Mbaluto, J. dated 7<sup>th</sup> March, 2003 and the ruling of Emukule, J. dated 17<sup>th</sup> June, 2005.

In opposing this appeal, Mr. Wandabwa started by reminding us that the suit in the superior court was filed way back in 1996 and as the appellants (*as defendants in the superior court*) were not interested in pursuing the matter the respondent, (*as the plaintiff*) was entitled to apply for judgment. He submitted that the appellants refused to abide by due process until after three years when they went back to complain that due process had not been followed. Furthermore, after the judgment pursuant to a formal proof the appellants waited for one year when they applied for the setting aside of the judgment. Mr. Wandabwa contended that the learned Judge considered all these factors when he refused to set aside the judgment.

Mr. Wandabwa pointed out that there was no notice of appeal filed against the judgment of Mbaluto, J. and that what was before Emukule, J. was not an application for review but application to set aside the judgment.

Before dealing with other issues raised, we would agree with Mr. Wandabwa that this appeal is indeed, against the ruling of Emukule, J. and we made this quite clear at the commencement of this judgment. The notice of appeal dated 30<sup>th</sup> June, 2005 at p. 298 of the record clearly shows that the appellants were appealing against the ruling of Emukule, J. given on 17<sup>th</sup> June, 2005.

As regards the death of one of the defendants, Mr. Wandabwa pointed out that this fact was not known to the learned Judge and indeed, Mr. Wagara conceded as much. As regards a certified copy of the title, Mr. Wandabwa was of the view that the learned Judge should not be faulted as the matter was not brought to his attention. On the whole, it was Mr. Wandabwa's contention that Emukule, J. should not be faulted as he was not sitting on appeal on Mbaluto, J.'s judgment. For these reasons, Mr. Wandabwa urged us to dismiss this appeal.

We have now set out a brief history of this dispute and the summary of the learned submissions by counsel appearing for the parties. What was before Emukule, J. was essentially an application to set aside interlocutory and ex parte judgment and leave to allow the appellants (as defendants) to defend the suit in the superior court. This was not an unusual application since the Courts are daily involved in applications of this nature. It can therefore be said that we are treading on a well beaten path. The application before Emukule, J. was pursuant to **Order IXA rules 10 and 11** and **Order XXI rule 22(1) and (2)** of the **Civil Procedure Rules**. In an application of this nature an applicant has to show that there is a prima facie defence to the action and further satisfy the judge as to the cause of the delay in entering an appearance and filing the defence. We are not saying anything new. Dealing with a similar situation in **PATEL V. E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75** at p.76 Duffus P. authoritatively stated:-

***“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment***

**he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance. He relied on various English authorities and on our decision in MBOGO V. SHAH [1968] E.A. 93. In his judgment NEWBOLD, P. adopted the principles set out by HARRIS, J. in KIMANI V. McCONNEL, [1966] E.A. 547 when he said:-**

**“..... In the light of all the facts 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.”**

**I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN, J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”**

We have given a chronological order of events right from the time the suit was filed to the interlocutory judgment and the ex parte judgment upon formal proof. We have now been offered an explanation for the long delay and we are told there is a good defence to the respondent’s claim in the superior court. Although this appeal is of an interlocutory nature, we must consider whether there was sufficient reason given for failure to file a defence in time and, more importantly, whether the defence raises triable issues. It was submitted that one of the defendants had died and hence this is a matter that should be put into consideration. In JOSEPH NJENGA NJOROGE V. KABIRI MBITI (supra) Platt Ag JA (as he then was) stated:-

**“The shorter answer to this is that he certainly should have done so, because the defendant had died, and on any view of the case, as the prohibitory order was to be lifted and the deceased’s land transferred free of that order the deceased had to be served with the application. The deceased was not served because he had died. The ex parte order was a nullity on that account.”**

There was the central issue of a certified copy of the title not having been produced contrary to **Order XX rule 5A** which provides:-

**“Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land a certified copy of the title shall be produced to the court before any judgment is delivered.”**

(underlining provided).

There was then the central issue of the contract of sale not having been executed by the parties to the sale transaction.

Having considered the rival submissions by counsel and in view of what we have stated above, we are of the opinion that this is a proper case in which we should interfere with the discretion of Emukule, J. We hasten to point out that what is before us was rather complicated by the fact that Emukule, J. was not the one who had entered the ex parte judgment after formal proof. For that reason there was a tendency to fault the learned Judge and yet he was handling a matter dealt with by another judge of concurrent jurisdiction. But in view of the explanation given both by way of affidavits and oral submission in respect of the failure and delay in filing defence, we think that the appellants should have been granted the orders sought in their chamber summons application dated 21<sup>st</sup> June, 2004. We are fortified in arriving at that conclusion by the fact that the defence raised triable issues which ought to go for trial, but which Emukule, J. unfortunately said nothing about.

For the foregoing reasons, we allow this appeal, set aside the ruling of Emukule, J. dated 17<sup>th</sup> June 2005 and in its place order that the chamber summons application dated 21<sup>st</sup> June, 2004 be allowed in terms of **Prayers 1, 2 and 4** thereof. As the interlocutory judgment and the ensuing ex parte judgment were regular, the applicants in that application (*the appellants here*) shall bear the costs of the application.

As regards costs of this appeal, we are of the opinion that in view of the conduct of the appellants and their legal advisers, it would be more appropriate to order that the costs of the appeal be awarded to the respondent. It is so ordered.

***Dated and delivered in NAIROBI this 15<sup>th</sup> day of February, 2008.***

***E.O. O’KUBASU***

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***JUDGE OF APPEAL***

***P.N. WAKI***

.....

***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**