REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

Civil Appeal 210 OF 2002

KAYS INVESTMENTS LIMITED .... APPELLANT

AND

THRIFT HOMES LIMITED ....RESPONDENT

***(An appeal from a ruling and order of the High Court of Kenya at Nairobi (Githinji, J.) dated 16th day of May, 2000* In H.C.C.C. NO. 1512 OF 1998)**

****

JUDGMENT OF THE COURT

On 16th May, 2000, Githinji J (as he then was) refused to exercise his discretion in favour of ***M/S. Kays Investments Ltd*** ("Kays" or "*the appellants*") who had applied under ***Order IXA r 10*** of the Civil Procedure Rules to set aside an interlocutory judgment entered in default of appearance on 11th August, 1998. Dissatisfied with that ruling, Kays appealed to this Court but that appeal was struck out on a technicality on 11th October, 2001. Undaunted by that set back, Kays sought extension of time to mount a proper appeal and their application was granted on 30th July 2002. The appeal now before us was then filed on 19th August, 2002 but was only reached for hearing this year. That explains the nine year sojourn of the case in the corridors of justice so far.

Although the appeal before us lays out no less than twenty one (21) grounds and learned counsel on both sides ably addressed us at length for over two days, the appeal relates to an area of law that has been thoroughly trodden and we do not therefore propose to belabour the issues of law raised as they are largely common ground. The circumstances leading up to the appeal may be stated shortly:

Kays owns a large tract of land situate east of Ruiru Township and known as **LR. No. 13136/11**. After sub-division, a portion of it measuring about 60 acres and known as **LR. No. 13136/34** ("the disputed land") was offered for sale to ***M/S. Thrift Homes Ltd*** ("THL" or "*the respondents*") who intended to develop middle class residential houses thereon for re-sale. A sale agreement was signed between them on 1st March 1997 and 10% of the agreed purchase price of Shs.12 million, that is Sh.1.2 million, was deposited with Kays' advocates; **M/S. Mbugua & Mbugua** (Mbugua). **Rajinder Kapila**, Advocate, was acting for THL at the time. By letter dated 3rd September, 1998 however, Kays repudiated the agreement on the ground that it had expired by effluxion of time as provided for in the sale agreement. THL maintained that they were not in breach of any term of the sale agreement and threatened court action if the sale was not completed. True to their threat, THL placed a caveat against

the Title to the disputed land and filed suit in the superior court on 9th July, 1998 through **M/S. Machira & Co. Advocates** (Machira). They sought an order for specific performance and a declaration that the purported rescission of the agreement between the parties was unlawful, and therefore null and void. With the filing of the suit, they sought a temporary injunction to restrain Kays from alienating or dealing with the disputed land in any manner and an *ex parte* order of injunction was issued on the same day.

The summons to enter appearance, the plaint, chamber summons for temporary injunction, notice for *inter parte* hearing of the chamber summons, and the *ex parte* court order, were all handed over to a process server for service on Kays' officers on 9th July, 1998. The process server was unable to find the Directors or Secretary despite making two attempts and so, on 10th July, 1998, he served the documents on a clerk who said she would hand them over to the Directors. The process server filed his return of service in that regard.

On 16th July, 1998, Kays' Advocates filed a "*Notice of appointment of Advocates"* and Mr. Mbugua for them, attended court for the *inter parte* hearing of the chamber summons which was by consent adjourned to 22nd September 1998 and the interim injunction was extended to the same date. By 27th July, 1998, no memorandum of appearance had been filed and therefore THL applied for entry of interlocutory judgment in default. The Deputy Registrar obliged and recorded the judgment on 11th August, 1998. Machira then took a date for formal proof on 27th October, 1998. Apparently oblivious of those developments, Mbugua drew up a memorandum of appearance and defence on 11th September, 1998 and filed them on 14th September, 1998. They also filed grounds of objection and a replying affidavit to the chamber summons due for *inter parte* hearing on 22nd September, 1998. Both advocates attended court on 22nd September, 1998 when the fact of the default judgment and Formal Proof date were disclosed to Mbugua and an order was recorded adjourning the chamber summons generally.

Subsequently THL filed an application dated 29th September, 1998 seeking to strike out the defence placed on record and for confirmation of the Formal Proof. On 13th October, 1998, Kays also filed their own application dated 1st October, 1998, seeking to set aside the inter- locutory judgment. Both applications were placed before Githinji J. (as he then was) on 3rd November, 1998 and the advocates insisted that their respective applications be heard first. Githinji J (as he then was) then made a ruling that he would, on his own motion, strike out the defence on record with costs to THL as it was not validly filed. Kays advocates then applied for leave to file a further affidavit to introduce a draft defence for consideration with the application but it was agreed by consent of the parties, that the defence which had been filed on 14th September, 1998 and which had been struck out, would be treated as the draft defence for the purpose of the application. Kays' application was then partly argued through Mbugua, but **M/S. Salim Dhanji** took over the matter and instructed Mr. Regeru, Advocate, who finalized the submissions. Mr. Machira for THL was also heard at length on his submissions. The hearing of the application was fairly protracted as it lasted between 9th December, 1998 and 16th May, 2000 when the ruling was delivered. In the end, the learned Judge was not satisfied that Mr. Mbugua, who had taken all the blame for failure to enter appearance on time and had offered to pay thrown away costs in person, had shown any excusable mistake, inadvertence or error to warrant the exercise of the court's discretion in the applicant's favour. He stated: -

"**All Mr. Mbugua is saying is that because he was so busy in courts with other cases he forgot to file necessary documents. I agree with submissions of the plaintiff's counsel that the explanation by Mr. Mbugua does not show any excusable mistake inadvertence or error. Mr Mbugua appeared in court on 22.9.98 and learned that interlocutory judgment had been entered. Yet he did not file the present application until 12.10.98. Indeed, he filed the present application after being served with plaintiffs application to strike out the defence on 5.10.98. The letter heads of M/S. Mbugua & Mbugua Advocates annexed to the affidavit to (sic) support application for injunction show that there are several advocates in the firm.**

The explanation for delay is not candid. It shows deliberate inaction in favour of more urgent matters. When considered together with other submissions referred to above, it indicates deliberate delaying of the course of justice and is not excusable."

He also held that the draft defence and an affidavit sworn by a Director of Kays did not disclose any genuine triable issues to the claim for specific performance of the sale agreement. In his own words: -

"**I have perused the agreement of sale dated 1.3.97. The dispute will largely depend on the construction of that Agreement and Law Society conditions of sale. The defences raised by defendant will have to be considered in the light of the Agreement. The sale was subject to Law Society conditions of sale. By special condition no. 3 the actual amount of purchase price was to be calculated after actual subdivision of the property and was to be at the rate of Shs.200,000 per acre. Defendant does not say that this had been done by the time it rescinded the Agreement.**

There is no clause in the Agreement which requires any money to be paid before date of completion except the deposit of Shs.1.2 million which was paid before execution of the agreement. Indeed special condition no. 2 shows that the balance of purchase price was to be paid on the actual date of completion.

In short, the defence raised in paragraph 3, 4, 5 and 6, of the draft Defence and in the replying affidavit of Christine Wambui Pratt sworn on 21.9.98 in reply to the application for injunction are not supported by the agreement for sale.

The draft defence and the said replying affidavit do not prima facie disclose any genuine triable issues to the claim for specific performance of the Agreement for sale."

Finally the learned judge agreed, as submitted by Mr. Machira, that the application was fatally defective as it did not contain any prayer for leave to file defence in the event that the *ex parte* interlocutory judgment was set aside. He held: -

"**Applicants also opposed the application on ground that that the application is fatally defective in that applicants does not pray for leave to file defence in time. After Respondent's counsel exhausted his submission in reply to the application, applicants counsel made an oral application for leave to amend the application to include a prayer for leave to file defence out of time. That oral application was strongly opposed. Court has discretion to allow the oral application although it has been made belatedly. But allowing the application at this stage will prejudice the respondent in that it denies the respondent its defence to the application. It is an error which should have been discovered long before the application was prosecuted."**

In the end the applicants were left at the mercy of their advocate with the advice that they should recover damages from him for professional negligence. As a parting shot, the learned Judge stated that there would be no prejudice to either party if the sale transaction was completed since that was the intention of the parties from the very beginning. It is those findings that aggrieved Kays, hence, the appeal now before us.

As stated earlier, the principles applicable and which we must consider in this appeal are well settled. The appellant seeks of us that we interfere with the exercise of the discretion of the learned Judge of the superior court. This we can do, but only upon well defined parameters. We take them from the

predecessor of this Court in **Mbogo V. Shah** **1968 EA 93** per Sir Clement De Lestang V-P at page 94 thus: -

“**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 not have taken into consideration and in doing so arrived at a wrong conclusion.”**

And Sir Charles Newbold, P, at page 96: -

“**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.”**

The discretion exercisable by a court considering an application under ***Order 9A r 10*** of the Civil Procedure Rules was shorn of any fetters by **Legal Notice 66/73** which removed the stricture of “*sufficient cause”* hitherto required of a defaulting party under ***Order 9 r 24*** which was replaced by three new ***Orders 9, 9A*** and ***9B***. Since those amendments, the court may at its sole discretion, set aside or vary such default judgment or decree at any time upon such terms as are just. For good order and accountability however, it cannot do so arbitrarily or on whim or caprice. We opened this judgment by stating the obvious; that there is a well trodden path which counsel on both sides found necessary to guide us through by citing no less than thirty two authorities between them. We will take the summary of the guiding principles from one of those authorities; **Chemwono v Kubende** **[1982 – 88] 1 KAR 1036**, per Platt JA, page 1038: -

“**Order 9A, r 10 of the Rules confers upon the court 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 (supra) the Court of Appeal, following its previous decision in *Mbogo v Shah* [1968] EA 93 adopted the opinion of Harris J in *Kimani v McConnel* [1966] EA 547 where he said:**

“***In the light of all the facts and circumstances both prior to 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.”***

But the court went on to explain (on p 76), 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 where a regular judgment had been entered, the court would not usually set aside the judgment, unless it was satisfied that there were a triable issues which raised a prima facie defence which should go for trial. The court adopted the views expressed by the House of Lords in the case of *Evans Bartlam* [1937] AC 473,............................... Lord Atkin observed:

“***The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to***

guide them in the normal exercise of their discretion. One is that where the 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. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to be by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

I would draw special attention to the principle of stated by Lord Atkin in the last sentence. It is primarily important to ascertain whether there are merits which ought to be tried."

We may also refer to the decision of Sheridan J in **Sebei District Administration vs. Gasyali [1968] EA 300** where he stated: -

"**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, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court".**

Does the ruling of Githinji J (as he then was) warrant our interference?

Learned counsel for the appellant Mr. Regeru raised 21 grounds of appeal in his memorandum, but he argued them in clusters, thus ending up with six grounds. The first cluster relates to grounds 1,2,3,4 and 10 all relevant to the finding that there was no excusable mistake, inadvertence or error on the part of the appellants' advocates and that the advocate sought by evasion or otherwise to obstruct or delay the cause of justice. The facts that led to those conclusions are contained in Mr. Mbugua's affidavit sworn on 9th October, 1998 in support of the application to set aside the interlocutory judgment. After stating that his clients forwarded to him only the chamber summons due for hearing on 16th July, 1998 and no other document, on 14th July, 1998, Mr. Mbugua continued as follows: -

"5. That about that time, I had several hearings in different courts in Nairobi and elsewhere.

6. That the idea of entering appearance and filing defence completely escaped my mind and it was not until 11th September, 1998 I was able to draw and file the necessary defence.

7. That I was unaware that the plaintiff had entered an interlocutory judgment in the matter.

8. That the failure to file the necessary papers in court was not willful and it was solely due to tight court schedules which I then had.

9. That I verily belief (sic) the plaintiff will not suffer any disadvantage by a (sic) vacation of the said interlocutory judgment.

10. That I am ready and willing to personally bear and pay all thrown away costs."

Mr. Mbugua was however vague about the date his clients forwarded the summons to enter appearance and the plaint before he filed the Memorandum of Appearance and Defence on 14th September, 1998. No affidavit was sworn by the clients to clarify that issue. But it was Mr. Regeru's submission that the affidavit of Mr. Mbugua was forthright and candid since he took the responsibility for the delay occasioned and even offered to pay more than mere party and party costs but thrown away costs. He was human, had made a human mistake, and freely admitted it. Such candour, in his submission, should have attracted compassion, not condemnation. Furthermore, Mr. Regeru submitted, it was illogical to make a finding that the appellant was causing delay of justice by failing to file the defence in time. In his view, a party would normally delay a matter in order to gain advantage over the adversary. But the respondent here, THL, had already obtained an injunction and there was a caveat placed against the Title. The appellant could not re-sell or alienate the disputed land and so the delay had nothing to do with gaining advantage. In his submission, the learned Judge imposed an unnecessary fetter on his discretion and we ought to interfere with it on that ground.

For his part, Mr. Machira saw no ground for such interference since the Judge neither misdirected himself, applied the wrong principle, acted perversely or made the wrong decision. Mr. Machira then went through the factual history of the matter to show that there was laxity, and at times total inaction, because the documents in respect of the suit were served on 10th July, 1998 but a *"notice of appointment"* instead of "*memorandum of appearance"* was filed; there was no replying affidavit or grounds of opposition filed timeously; the advocates went on a stupor for two months before entering appearance and filing defence; perusal of the court file would have shown the entry of interlocutory judgment but none was made; and the application to set aside was not filed until after filing and service of the respondents' application to strike out the defence. In his submission, that litany of blunders betray a carefree, negligent and disinterested attitude and not genuine errors or oversight which may be pardoned. The excuse given about tight schedules and workload would not avail Mr. Mbugua as it amounted to obstruction of justice through delaying tactics. The learned Judge cannot therefore be faulted for making the assessment he did on the facts before him.

We have anxiously considered those submissions in the light of the facts and the principles stated earlier, and we think there is no firm basis for faulting the learned Judge on the conclusion he arrived at upon examining the facts on record. There is no doubt that the assessment of the learned Judge on Mr. Mbugua's role in the delay caused in this matter was fairly harsh. But there is equally no doubt, on the facts, that Mr. Mbugua was cagey and not altogether honest in explaining the delay in compliance with the rules. We ourselves may perhaps have been more charitable to Mr. Mbugua despite the obvious delay, but that is not the right application of the principles. We cannot replace our discretion for the Judge's discretion. Each case must be decided on its own peculiar facts and we think on the facts of this

case there was a proper basis for the conclusion made by the learned Judge on that aspect of the matter. We reject those grounds of appeal.

Mr. Regeru then argued the other main cluster in grounds 5, 6 7, 8, 9, 12, 13 and 14 relating to the credibility of the draft defence. His submission was that the express terms of the sale agreement between the parties were so clear that any court, properly directing its mind to the provisions, would find for the appellant that the rescission was lawful. At all events, it cannot be said that the draft defence did not raise any solitary triable issue. The main argument revolves around the completion date and whether the respondents complied. The agreement had a provision that the Law Society of Kenya (LSK) conditions would apply. But there was a fundamental qualification that these LSK conditions would only apply so long as they were not inconsistent with the express terms agreed on by the parties. The provision on completion was an express one in clause 5 of the agreement as follows: -

"**The actual completion date shall be on or before 90th day from the date of this Agreement or the fifteenth day after the date on which the Deed Plan in respect of the said portion and Letter of Consent from the Land Control Board concerned are delivered to the Purchaser's advocates, whichever is the earlier."**

The term "*earlier*" in that provision was subsequently changed by consent to "*later*". There was also clause 7 which provided that vacant possession would be given on completion, and special condition No. (2) which provided as follows: -

"**On the actual date of completion and upon payment of the balance of the purchase price and other moneys the vendors shall deliver to the Advocates for the purchaser: -**

(a) a valid Transfer duly executed by the vendors in favour of the Purchaser;

(b) a valid clearance Certificate issued by the Local authority concerned, if any;

(c) a Valid Land Rent Certificate from the Commissioner of Lands, if any;

(d) a valid Certificate of Subdivision; and

(e) a duly completed and signed Valuation Form.

(f) Consent of the relevant Land Control Board."

It is common ground that the appellants furnished the respondents with the Deed plans and the Letter of consent referred to in clause 5 on 11th August, 1997. Completion in accordance with that clause would therefore fall on 26th August, 1997, on which date the respondents ought to have complied with the provisions of Special Condition No. 2 above, that is to say, pay the balance of the purchase price and obtain release of the documents listed thereunder. Instead of paying the balance however, the respondents started asking for the title deeds of the property. That is when the appellants wrote on 3rd September,

1997 notifying the respondents that the sale agreement had expired. In Mr. Regeru's submissions, there was a lawful basis for rescission and it was erroneous, therefore, for the learned Judge to make a finding that the draft defence which pleaded the provisions of the sale agreement was shallow and unmerited. The task of the court was to enforce the terms agreed upon by parties and not to rewrite the contract for them.

On the other hand. Mr. Machira supported the decision on the ground that there was affidavit evidence and pleadings which formed the basis of the decision reached by the learned Judge. The purported rescission was a nullity because it was made without a completion notice being served on the respondents. In any event, the reason for non-completion was the appellants' own since they had refused to release the Title documents.

Once again we have anxiously considered those grounds of appeal and the submissions of both counsel and we think, with respect, that the appellants are on firm ground in making the complaint they did. There is certainly a misdirection that the sale agreement signed between the parties was subject to the Law Society of Kenya (LSK) conditions which has elaborate provisions on what entails completion and what should happen prior to or on the completion date. The LSK conditions would only apply where there are no provisions to the contrary and the agreement in issue between the parties here made that expressly clear. The issue of "*completion*" or "*completion date*" or what should happen in those respects must surely abide the terms of their agreement if those are different from the LSK conditions. In our view there is a *bona fide* triable issue in that respect which cannot be resolved on conflicting affidavit evidence and we think it was erroneous for such issue to be determined with finality in interlocutory proceedings as the learned Judge purported to do. We would, in those circumstances, allow the appeal on that ground.

It is our further view that it was erroneous for the learned Judge to uphold the contention by the respondents that the application before him was fatally defective for the reason that it made no prayer for filing a defence if the interlocutory judgment was set aside. It was readily conceded that the application did not, on the body of it, pray for time within which the defence would be filed. It would, of course, have been clinical to expressly do so in the body of the application. But courts do not act in vain and we think the inevitable consequence of setting aside the interlocutory judgment would be to revert to the stage where the parties were when the defence was due. The intention of making the application was to regularise the pleadings and that is why the court has the wide powers conferred on it under ***Order IXA r 10*** to set aside the judgment "*upon such terms as are just*". In our view, such terms would include for example, extension of time to file the defence, payment of compensation in costs or imposition of preservatory orders, whether these were requested for or not. We think the filing of the defence was a logical and inevitable consequence of setting aside the interlocutory judgment whose presence on record was itself a consequence of failure to file the defence. The omission to make a prayer for it did not therefore render the application fatal and we so find.

In the result we allow the appeal and set aside the orders of the superior court made on 16th May, 2000. We substitute therefor an order allowing the notice of motion dated 1st October, 1998 with the consequence that the interlocutory judgment entered against the appellants (the defendants in the main suit) shall be and is hereby set aside. The appellants shall file and serve their defence in the superior court, if any, within 14 days of this judgment. As the default in pleading which necessitated the application and the appeal which has now been determined was caused by Mr. ***Joseph Njoroge Mbugua, Advocate*** who freely admitted it and swore on oath that he would bear the costs thrown away, that wish is granted and we order that Mr. Mbugua shall pay to the respondents all costs thrown away in the court below. He will also pay party and party costs in the appeal. Mr. Mbugua's conduct was in any event found culpable by the superior court and we have upheld such finding.

Finally we do not disturb the order for injunction which both parties inform us is in place pending the hearing and determination of the suit before the superior court. Those shall be our orders in the matter.

Dated and delivered at Nairobi this 13th day of July, 2007.

E.O. O'KUBASU

....

JUDGE OF APPEAL

P.N. WAKI

....

JUDGE OF APPEAL

W.S. DEVERELL

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR