IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI - PCA, KARANJA & MWERA, JJ.A)

CIVIL APPEAL NO.70 OF 2005

BETWEEN

BONIFACE KIRAGU WAWERU…….APPELLANT

AND

JAMES K. MULINGE…..……..…..1ST RESPONDENT

CURIOS FACTORY (sued as a firm)..……..….2nd RESPONDENT

(An appeal from the Ruling and Order(s) of the High Court of Kenya at Nairobi (Mbito, J.), dated 8th April, 2003

in

H.C.C.C. No.3060 of 1994)

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JUDGMENT OF THE COURT

This appeal is one of the old matters awaiting determination in this Court. It was filed on 8th April, 2005, following the ruling of the High Court

(***Mbito, J.***), delivered on 8th April, 2013. The memorandum of appeal contained eight grounds which ***Mr. Mugambi Mung'ania***, learned counsel for the appellant condensed into three, namely that Order III r. 9A of the Civil Procedure Rules was not complied with when the 2nd respondent herein moved to act in person and later instructed M/S Munyasia & Company Advocates to file a notice of appointment, both steps having been taken long after judgment had been entered in the case; there was no evidence or material upon which the learned judge made the ruling of 8th April, 2003, herein impugned, and also that the said judge did not properly exercise his discretion to set aside the judgment.

The brief background to this case is that on 4th February, 2003, ***Mbito, J.*** entered judgment in H.C.C.C.

3061/1994 in the presence of counsel for the appellant and the 1st respondent but in absence of counsel for the 2nd respondent firm or itself, in the sum of Sh.2,053,330/=. The 2nd respondent was ordered to pay the decretal sum comprising rent arrears, damages and interest plus costs to the appellant. That provoked the 2nd respondent to file a chamber summons dated 26th March, 2003, through the office of Ms. Munyasia & Company Advocates invoking powers donated by ***Order IXB rule 8 of the Civil Procedure Rules*** and ***Section 3A of Civil Procedure Act***, among others, for orders including:

> ***"2. That this Honourable Court be pleased to set aside the judgment delivered before this Honourable Court on 4th February, 2003."***

The summons was predicated on several grounds including one to the effect that the 2nd respondent initially instructed M/S Mutula & Company Advocates to act for it but they did not attend court on 4th February, 2003, a day the 2nd respondent, ***Peter M. Katu*** was not aware of. The application was supported by ***Peter Katu's*** affidavit contending that the hearing went on without himself or counsel being present and in the main:

> ***"7. That, I have perused the court records and have found that there is vital evidence which was omitted by the respondent in his formal proof and I believe that it is only fair and just this honourable court deems it fit to review the judgment delivered on 4th February, 2003."***

Peter Katu added that he had a good case and so:

"…it is only fair and just that I be allowed to defend my case."

Grounds of opposition were filed by the appellant and parties were heard on 3rd April, 2003. All parties were represented: ***Ms. Kilonzo*** for the 2nd respondent; ***Mr. Gathenji*** for the 1st respondent and ***Mr. Mugambi*** for the appellant.

While ***Mr. Gathenji*** argued that the application was bad in law because there had been no application first by M/S Munyasia & company Advocates to replace M/S Mutula & Company Advocates on the record, since judgment had already been entered, ***Mr. Mugambi*** merely stated that the 2nd respondent's application, under review offended *"Order.3 rule 9(a)"* (read Order III rule 9A of

Civil Procedure Rules), because it was filed by M/S Munyasia & Company Advocates following the notice by the 2nd respondent to act in person. M/S Mutula & Company Advocates, had been served to attend court on 4th February, 2003, but did not do so. That firm did not file an affidavit to explain its absence on that day so the application stood to be dismissed. Ms. Kilonzo replied that Munyasia & Company Advocates were properly on record following the 2nd respondent's application to act in person, and therefore no application was required to change advocates.

After reviewing the proceedings leading to the subject judgment, ***Mbito, J***. observed that the applicant wished to have the judgment set aside on the basis of:

"…the failure to attend court caused by this advocate and <u>that he has a good defence</u>. The respondent contends to the contrary." (underlining supplied.)

Then the learned judge concluded that:

"Looking at the issues herein, it is possible that the applicant could not attend due to his counsel's failure to inform him. This is common occurrence. It is also observed that the award is fairly high and includes damages to a third party for which the applicant is being held responsible. If the matter is therefore reopened, the court will be able to determine whether or not the applicant was liable for damages paid to a third party. The court's discretion will not have therefore been in vain if the matter

is reopened."

With that, the prayer to set aside the subject judgment was granted – hence the present appeal.

When the appeal was called out for hearing, ***Mr. Githendu***, learned counsel holding brief for ***Mr. Munyasia*** for the 2nd respondent told us that ***Mr. Munyasia*** was not able to proceed with the hearing due to lack of instructions from the 2nd respondent and ***Mr. Githendu*** himself was not able to argue the matter at all. Accordingly, we excused ***Mr. Githendu*** and heard ***Mr. Mugambi***.

Mr. Mugambi contended that the impugned ruling be set aside because ***Mr. Munyasia*** did not comply with Order III rule 9A of Civil Procedure Rules in order to properly come on record, judgment having earlier been entered against his client. Judgment was entered on 4th February, 2003. The following day

Peter M. Katu of the 2nd respondent firm, filed a notice to act in person. Then on 26th March, 2003, ***Mr. Munyasia*** filed the notice of his appointment, followed by the application to set aside the judgment. We were told that all that offended Order III rule 9A, since repealed, which read as follows:

"9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate an record."

Counsel urged us to note that with the judgment having been delivered on 4th February, 2003, the 2nd respondent filed a notice to act in person on 5th February, 2003, followed by ***Mr. Munyasia's*** notice of appointment of 26th March, 2003. Then Mr. Munyasia filed the chamber summons to set aside judgment without an order of the court and notification to M/S Mutula & Company Advocates, as required by the rules. That in the circumstances,

Mbito, J. ought not have entertained the chamber summons to set aside the judgment of 4th February, 2003. Doing so, so to speak, was not according to the law.

Secondly, ***Mr. Mugambi*** contended that even as the learned judge had discretion to grant or refuse the orders sought, such a discretion had to be exercised judicially by basing the decision on material presented. Such material, counsel argued, could include satisfactory affidavit evidence as to why ***Mr. Mutula*** had not appeared on the trial day and also that he had failed to inform the 2nd respondent of the same. There was no material of the sort and ***Mbito, J***. should not have set aside the judgment. ***Mr. Mugambi*** added that the respondent did not file a defence to the amended plaint so the learned judge was wrong to find that there was a good defence.

As we move to determine this appeal, we are obliged to reproduce the main provisions of law under which the application to set aside the judgment was brought, beginning with Order IXB rule 8:

> ***"8. Where under this Order, judgment has been entered or suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such term are just*** (sic)."

And section 3A of the Civil Procedure Act states that:

> ***"3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

With all the foregoing in mind, we begin by finding that the learned judge did not determine the point of law presented by the appellant and the 1st respondent, that Order III rule 9A of Civil Procedure Rules had

not been complied with, namely, that when the 2nd respondent sought to act in person, and later instructed ***Mr. Munyasia*** to act for him, after judgment had been entered, no application was filed to get an order of the court to permit either step, and M/S Mutula & Company Advocates on record, were not notified of the move to replace them. The position was argued before the learned judge and thus he was obligated to rule on it. We note that he did not rule either way on that point. We conceive that the 1st respondent and the appellant were arguing that in the circumstances, the application was incompetent or other. However, the learned judge proceeded to look at all the issues before him and used his discretion to set aside the judgment on the basis that no party could be prejudiced as they could all be heard afresh on the merits of the case on reopening the same for trial.

We have also, on perusal of the file, not traced any amended defence filed by the 2nd respondent in response to the amended plaint, which means that there was only the initial defence before the judge which that litigant claimed to be good.

After all the foregoing, we have nonetheless, come to the conclusion that the order by ***Mbito, J.*** should remain on the following grounds.

First, non-compliance with Order III Rule 9A of Civil Procedure Rules did not go to the root of the proceedings. By that we do not mean to say that that provision was put on the statute book simply to decorate it. It has a purpose to serve in that the court should sanction the change of representation, in person or by advocate particularly after judgment has been entered. The lawyer to be "replaced" should be notified of the changes because after judgment has been entered, proceedings are at a crucial stage. Accordingly, we hold the view that counsel who, all along, was on record having expended money and time in the process, ought to know when a change in representation occurs in order to take course to secure his costs. And for the court, it is necessary to give an order for the change so that it is known as to the course further conduct of the case shall take and who to serve with court process. So either way, the change of representation after judgment has been entered, to us meant, ensuring the orderly conduct of further proceedings and not to expose the lawyer being replaced to the risk of loss of fees or other. All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all, otherwise ***Mr. Mugambi***, alert as he always is for his clients, could have drawn out attention to it. In sum, non-compliance did not cause any injustice and so we dismiss this ground.

Next is the exercise of discretion. As noted above, the learned judge used his discretion to set aside the subject judgment. He gave reasons for doing so, including having regard to all issues involved; the common occurrence that counsel do fail to inform their clients of things like hearing dates; the award being high and that it included damages awarded to a third party but placed on the shoulders of the 2nd respondent to carry. With that, the judge set aside the judgment he had himself delivered, allowing for the reopening of the matter so that parties could ventilate its merits, or otherwise, at the trial.

The provisions under which the application to set aside the judgment was brought, gave the learned judge discretion to make the orders he made in the interests of justice. We agree with ***Mr. Mugambi*** that when exercising discretion in circumstances such as these, a judge should do so judicially by having the material before him, to justify the exercise of the discretion in favour of the applicant. A judge exercising discretion should not do so on a whim, by caprice, or on extraneous or irrelevant grounds. Indeed, if it transpires that the discretion under review was exercised whimsically, capriciously or on extraneous grounds, this Court should intervene and interfere accordingly. In the case of ***Mbogo & Another vs Shah [1968] 93*** this Court said:

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

Bearing the foregoing in mind, and addressing Mbito, J's exercise of discretion in the present matter, we are not satisfied that he misdirected himself in some aspect leading him to arrive at a wrong decision. Or that from the whole case, it is manifestly clear that the judge was wrong in the exercise of his discretion as to cause misjustice. On the contrary, prompted by what we perceive as a higher sense of doing justice to all the parties, the learned judge was minded to set aside his judgment, which he did, thereby allowing the parties to argue their respective cases at a trial, on all aspects involved. We find no prejudice in that course and none was demonstrated to us. So we find this ground also without merit and dismiss it.

In sum, we dismiss this appeal and uphold ***Mbito, J's*** decision. The appeal is dismissed with costs.

Dated and delivered at Nairobi this 12th day of June, 2015.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR