**IN THE COURT OF AAPPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO.41 OF 2014**

**BETWEEN**

**TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY …..…. APPELLANT**

**AND**

**JEREMIAH KIMIGHO MWAKIO**

**PATRICK K. MULISHO**

**MOHAMED GODHANA**

**AMOS AMITAI ……...RESPONDENTS**

*(Being an intended appeal from the ruling and order of the High Court of Kenya at Mombasa (Khaminwa, J.) dated 8.6.2005*

*in*

*Mombasa H.C.C.No.172 of 2002)*

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## JUDGMENT OF THE COURT

Time and again, it has been said that the mistake of counsel should not be visited upon an innocent litigant. The appellant has particularly made this its central argument herein; all in a bid to convince us to set aside an *ex parte* judgment entered against it in **Mombasa High Court Civil Suit No 172 of 2002**. In the said suit, the appellant had been sued by the respondents for Kshs.4,969,440/-, being accrued dues from what the respondents termed as "*unlawful termination from employment*". The subsequent defence filed by the appellant failed to disclose all the particulars pertinent to the defence, leading to the request by the respondents for the supply of further and better particulars. The request went unaddressed, prompting the respondents to obtain a court order in this regard. However, despite having been served with the said court order, the appellant still failed to supply the particulars aforesaid, as a result of which the respondents successfully applied to the court for the striking out of the defence, with judgment being entered in the respondents' favour as per the claim.

Displeased with this turn of events, the appellant filed an application dated 10th February, 2005 in the High Court seeking orders *inter alia* that*:*

> "i) …….. (spent).
>
> ii) Pending the hearing and determination of this application, there be made an order to stay of (sic) further proceedings and or execution of the orders and judgment of this court made on the 8th day of November, 2004; (sic)
>
> iii) The ex parte final judgment entered herein against the defendant together with all consequential orders thereto be set aside and the defendant be allowed an opportunity to be heard on the applications dated 16th June, 2003 and 29th July, 2003;
>
> iv) Costs of this application be provided for."

As expected, the respondents opposed the application. On 10th November, 2004 **Khaminwa, J.** heard the application *inter parties.* At this stage, it is perhaps worth mentioning that during the pendency of the application, the appellant also filed a second application; one seeking to enlarge the time to file particulars. However, no steps appear to have been taken to have the latter application heard.

At the hearing of the earlier application, **Mr. Mouko** learned counsel for the Appellant contended that the Respondents' claim was unliquidated and as such, summary judgment ought not to have been entered. In addition, that the appellant had a merited defence. Lastly, that counsel's failure to attend court for the hearing of the application was excusable as it was occasioned by a mistake on his clerk's part; who though served with the hearing notice, failed to diarize the same. He thus concluded by saying that his errors and omissions should not be visited on his client, and asked the court to set aside the summary judgment.

In opposing the application, **Mr. Kamundi** for the respondent submitted at length that the appellant was generally guilty of laches, more so given the time it took for the application in question to be filed. It was his contention that, despite having been aware of the judgment, the appellant took over two months to file the application to set aside the same and as such, that this was just another attempt to further derail the conclusion of the suit.

By a ruling delivered on 8th June, 2005, **Khaminwa, J**. dismissed the appellant's application with costs. It is this ruling that has given rise to this appeal. The same is premised on ten (10) grounds, which **Mr. Moya,** learned counsel acting for the appellant clustered into four categories: that the learned judge failed to consider material facts before her and thus made an erroneous decision; that there was a jurisdictional issue which though raised, was never determined; that the overriding objective and interests of justice favoured the allowing of the application; and lastly, that the impugned ruling was based on factual errors.

Urging the grounds before us, **Mr. Moya** pointed out that the employment of the respondents, having been a contested issue, could only be determined at a full trial. He advanced the view that the best interests of justice demanded that the court below uphold the overriding objective by ordering that the suit be fully heard and determined on merit. He further submitted that in dismissing the application, the court erroneously failed to recognize the merit and viability of the defence. That additionally, since the claim was unliquidated, the respondents should have been denied summary judgment at the outset and ordered to prove their claim instead. In any event, he added, striking out a defence for want of particulars is a drastic measure that should only be invoked as a last resort, where no injustice is likely to be caused. Counsel concluded by stating that even if anything were to be struck out in the defence, it should have been those paragraphs shown to lack particulars and not the entire defence. With this in mind, the appellant urged this court to set aside the order of 8th June 2005. This, counsel says, will allow the appellant to defend the application to strike out the defence and also enable it prosecute its application for extension of time to file particulars.

Opposing the appeal, each of the respondents while acting in person, reiterated their counsel's submissions as made in the High Court. Accordingly, they beseeched us to stay alive to the appellant's antics, which they contend are calculated at keeping them away from enjoying the fruits of their validly secured judgment. The respondents also submitted that throughout the history of the matter, the appellant had employed every tactic imaginable to ensure that their claim does not come to fruition.

The issue for determination here is whether the High Court properly exercised its discretion in refusing to set aside the *ex parte* summary judgment. Generally, the Court of Appeal shall only interfere with the exercise of a trial court's judicial discretion if satisfied that:

- The judge misdirected himself on law; or
- That he misapprehended the facts; or
- That he took into account considerations of which he should not have; or
- That he failed to take into account considerations which he should have; or
- That his decision, albeit a discretionary one, was plainly wrong."

**(**See. **Mbogo & Another v Shah [1968] EA 93** and also **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR).** Therefore, though it is itself a matter of law, exercise of judicial discretion is dependent upon the factual circumstances of the case. As stated in Mbogo v Shah (supra).

> ***"…the discretion to set aside an ex parte judgment is intended 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 cause of justice".***

For us to determine whether the exercise of discretion by the trial court was judicious or not, we not only have to look at the decision but also at the conduct of the parties to the suit as well. In this case, the appellant sought to be excused for what it termed as a mistake of counsel. Clearly, in the appellant's view, its problems began when its then counsel failed to attend court for the hearing of the application seeking to strike out its defence. However, the record reveals that this was not the first time the appellant's counsel had failed to attend court. The record also shows that it was not the first time that the appellant was guilty of indolence. Sample this: The Plaint and Summons to enter appearance were duly served upon the appellant. On 7th May 2002, appearance was entered for the appellants. However as at 24th May 2002, no defence had been filed; prompting the respondents to request for interlocutory judgment in default thereof. This request was acceded to and summary judgment entered on 20th May, 2002 for the entire sum claimed plus, costs and interest. Curiously, the appellant never sought to set aside this summary judgment at the time. Instead, on the same day that the judgment was entered, the appellant filed its statement of defence. On their part, the respondents seem to have treated the said defence as valid, albeit vague and scant in particulars. Accordingly, on 20th November, 2002, they wrote to the appellant, requesting to be supplied with further and better particulars. This request went unanswered; forcing the respondents to file a formal application dated 11th February, 2004 for the particulars. The application was served and came up for hearing on 7th May 2003, when counsel for the appellant failed to attend court. Having satisfied itself that the said counsel had been duly served, the court proceeded to hear the respondents' counsel *ex parte*, whereupon it gave an order compelling the appellant to supply the particulars within twenty one days. The appellant was served with the order, but it still neglected to supply the said particulars. Consequently, upon the lapse of the stipulated period, the respondent filed yet another application, this time seeking to have the defence struck out, for want of particulars. As with everything else, this application was served upon the appellant who reacted by filing grounds of opposition. However, though acknowledging having been served with the relevant hearing notice, counsel for the appellant was yet again conspicuously absent at the hearing of the application. He is later seen to place blame upon his clerk, whom he says failed to diarize the hearing date, hence his non-attendance. As would be expected, this application too was heard *ex parte* as a result of which the defence was struck out vide the ruling delivered on 19th November, 2004.

By the appellant's own admission, following this ruling, its counsel on 22nd November 2004, received a

letter from the respondents' counsel informing them of this outcome and demanding payment of the decretal sum plus interest. The appellant would however have none of this. Through an application dated 10th February 2005, it instead sought to set aside the *ex parte* final judgment and the subsequent proceedings thereto. This application was opposed and heard *inter parties* on 25th February, 2005 and by the ruling sought to be impugned in this appeal the same was dismissed.

From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. **(See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101)** and also **Re Jones [1870], 6 Ch. App 497** in which **Lord Hatherley** communicated the court's expectations this way:

> ***'….I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned…'***

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case **Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38*;*** in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that

> ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings***."

Needless to say, the application to amend a defence on the basis of an inadvertent mistake by counsel was disallowed.

To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agent. ***(*see Ahmed v. Highway Carriers [1986] LLR 258 (CAK)** and also (**Myers v. Elman [1939] 4ALL E.R 484)** As stated by **Viscount Maughan** in the Myer's case,

> ***"…the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable…. My conclusion is that Elman (the solicitor) cannot dissociate himself from the acts and defaults of Osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal."***

Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled *vis a vis* the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.

Again it is settled law, that the power to strike out a pleading or any part thereof is a power that courts must exercise with a lot of restraint. ***(*see. Kisii Farmers Co-operative Union Limited v Sanjay Natwarlal Chaunhan t/a Oriental Motors [2006] eKLR)*** and also **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR.** The court will as much as possible, endavour to allow amendment of a pleading if the amendment will cure the defect complained of. This lifeline was duly extended to the appellant in this case when the court gave it time to put in particulars. It was by the appellant's own omission that it failed to comply.

So was the judge's subsequent exercise of discretion in striking out the defence and refusal to set aside the resultant judgment proper? We have no doubt at all that it was. The record undoubtedly portrays the appellant as an indolent litigant. To begin with, its defence was filed late- after the entry of interlocutory judgment. However, the respondents seem to have treated the said defence as valid, albeit vague and scant in particulars. In other words, the respondents appear to have taken this in stride though and accommodated the appellant. However, when asked to furnish particulars to the defence, the appellant once again went on one of its silent spells and failed to respond and/or furnish the same. Even when compelled by a court order, it still failed to furnish the said particulars. One year after the filing of suit in 2002, the respondents were still chasing after particulars of defence. A court of law cannot come to the aid of a party who with reckless abandon shows no respect for court orders.

Also worthy of note is that though the appellant filed an application seeking to enlarge time to bring in the particulars, no steps were taken to have that application expeditiously heard. Even if this court were to believe that failure by counsel to attend court was inadvertent, there is still no plausible reason as to why the appellant failed to pursue its own application. The record is replete with incidences of the appellant's inactivity. The court cannot help but be alive to the fact that the appellant only deemed it fit to attend court when threatened with execution. It is unfortunate that this indolence did not end even after the final judgment was entered. The application to set aside the judgment was filed three months after the judgment had come to be. Even then, the same seems to have only been spurred by the impending execution of decree. Additionally, when the court declined to set aside the judgment, the appellant applied for stay of execution pending appeal, which the respondents opposed. In the course of the hearing of that application, the appellant asked to be allowed to apply for the striking out of the respondents' Replying Affidavit. It was ordered to file a formal application to this effect within seven (7) days. Predictably, it once again failed to keep time, only for counsel to go and seek time to file yet another application for enlargement of time! He once again blamed a member of his staff (a process server) for this latest delay.

Needless to say, the application for stay of execution had at this stage taken a back burner. The respondents were basically being held at ransom by the appellant's laxity in having the matter laid to rest. Nonetheless, the court allowed enlargement of time on condition that the appellant pays Kshs.10,000/- as thrown away costs to the respondents and to promptly file the application to expunge the respondents' Replying Affidavit. It is not clear what became of that application as none appears on record. Nonetheless, on 13th June 2006, the appellant was ultimately successful in securing orders staying execution pending the hearing and determination of the intended appeal. It then filed a Notice of Appeal on 14th June 2006. Thereafter, it once again went quiet on the matter. No immediate steps appear to have been taken by the appellant towards the expeditious filing of the appeal. In fact, there appears to be no letter by the appellant at the time bespeaking proceedings. The only intimation that the appellant applied for typed proceedings lies in two letters written in 2008 and 2011. This is ***over*** **three years** after the delivery of the ruling sought to be appealed against. Accordingly, on 22nd November 2011, the respondents filed an application seeking to have the Deputy Registrar compelled to give reasons for the delay in the supply of proceedings. A ruling by **Kasango, J.** on this application was delivered on 15th December, 2011 in the following terms:

> ***"a) I direct the Deputy Registrar of this court to supply the Defendant with certified copies of the proceedings for purpose of appeal within 20 days from today on payment of necessary fees.***
>
> ***b) The stay of execution granted to the Defendant herein shall automatically be vacated within 30 days of such supply of those proceedings if the Defendant does not file and serve on the Plaintiff the appeal or an application for leave to file an appeal out of time in the Court of***

***appeal.***

***c)……."***

Further, indications given by the court registry showed that come 2012, the appellant had still not paid or collected the typed proceedings despite having been ordered by the court to do so. The respondents were by now very frustrated and were forced to file yet another application, this time seeking to have the orders of stay of execution discharged. According to the record, by a letter dated 17th July, 2012, the Deputy Registrar had informed the appellant's counsel as follows:

> ***"I have perused the record and could not find a receipt for payment for certified copies of proceedings in the above mater (sic). Please furnish us with copies of the receipt to enable us supply you with the said copies. We undertake to provide the certified proceedings as soon as you furnish us with proof of payment for the same."***

This letter elicited no reaction from the appellant. At this stage, the appellant was basically enjoying indefinite stay of execution while deliberately avoiding the pursuit of its intended appeal. The orders of stay were thus operating in a vacuum so to speak. That aside, a second ruling by **Kasango, J.** delivered on 28th August 2014, yet again accommodated the appellant, directing that the appellant shall pay for and collect the typed proceedings within fourteen (14) days, failure to which execution was to automatically issue. It was only then that the appellant filed its papers now before this court.

It is immediately apparent from the chronology of events that the appellant and its then counsel have done everything in their power to derail the conclusion of this suit. It is equally apparent that both the High Court and the respondents have time and again bent over backwards to accommodate the appellant. This being the case, the trial court cannot be faulted for finally putting a stop to the appellant's delay tactics. The appellant and its counsel failed to exonerate themselves from blame for this state of affairs. As stated by this Court in the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

It appears that the appellant fell short of this expectation. It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect. While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in **Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA.** ruled that "*mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude***."** The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.

As earlier stated, the exercise of discretion by the superior court below was pegged on the appellant's defence having been an abuse of court process owing to lack of particulars. The definition of abuse of court process was given in **BEINOSI v WIYLEY 1973 (SA 721 [SCA]** at page **734F-G)** and adopted by this court in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] Eklr,** as follows:-

> ***"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process.'*** *It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."* (emphasis added)

In relation to the appellant's conduct in this matter, this definition rings true. As we have seen, the appellant time and again craftily used court process and procedures to unduly protract the matter while damning the lifelines and accommodations extended by the respondents and the court. A culmination of these factors is what led the learned Judge to exercise her discretion and strike out the defence as well as her subsequent refusal to set aside the resultant judgment. The contention that the said judgment was unlawful as the sum claimed was unliquidated cannot stand. As indicated earlier on, the respondents' claim was for a specific and determinate amount. Coupled with the reasons already discussed above, the judge cannot be faulted for exercising her jurisdiction and entering summary judgment.

Moving on, the appellant's counsel also submitted that notwithstanding the aforesaid mistake of counsel, the superior court below should have declined to strike out the defence as the same had merit and raised triable issues. With due respect to learned counsel, this is an erroneous supposition. In their application, the respondents invoked the provisions of **Order 13 (1) (d)** of the Civil Procedure Rules**,** which is in these terms:-

**Order 13(1) (d)** then provided *inter alia*

> ***"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-***
>
> ***(a) it discloses no cause of action or defence; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d)*** *it is otherwise an abuse of the process of court* ***and may order the suit to be stayed or dismissed or*** *judgment to be entered accordingly****, as the case may be."*** (emphasis ours)

In our view, the respondents never refuted that the defence had triable issues. Indeed, their application seeking to strike out the defence was expressed to be brought solely under **sub rule (d)** of **Rule 13** above. Even the grounds laid out in support of the application show the premise of the application as being the appellant's failure to furnish particulars, which rendered the defence vague and an abuse of the court process. Had the Respondents been interested in attacking the merit of the defence, they would have invoked **sub rule (a)** above as well. Given that they did not do so, the assertion that the defence was arguable and merited is as dead as a dodo. In addition, the learned Judge appears to have based the ruling on the fact that the appellant's lethargy was delaying justice. She stated in part;

> ***"….The Defendants/ Applicants indicated that there are no records available leading to the conclusion that there was no defence to the Plaintiff's claim……. Further, it is important to note that the court ordered the particulars of Defence to be answered in 21 days. The period expired and to date the Defendant has not filed any answer to the particulars. In these circumstances I do not find it just that the Plaintiff's claim should continue being delayed. The Defendants/ Applicants are not in any hurry to sort out the matter at all. I see no reason to delay the Plaintiff's case further. The application is therefore dismissed with costs."***

To our mind therefore this is a clear case where the mistakes of counsel if at all should be laid at the doorstep of the client. Accordingly, we find no merit in this appeal and the sames is dismissed with costs to the respondents.

***Dated and Delivered at Malindi this 29th day of May, 2015.***

**ASIKE-MAKHANDIA**

**…..……..……**

**JUDGE OF APPEAL**

**W.OUKO**

**……**

**JUDGE OF APPEAL**

**K. M’INOTI**

**…….……...**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**