IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 22 OF 2018

BETWEEN

GULAMHUSSEIN F. GULAMHUSSEIN.....APPELLANT

AND

IMPERIAL BANK LIMITED (IN RECIEVERSHIP).....1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND RESPONDENT

(*An appeal from the Orders of the High Court of Kenya*

at Mombasa (Otieno, J.) dated 18th December, 2017

in

***H.C.C.C No. 44 of 2017*)**

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JUDGMENT OF THE COURT

1. The appellant herein obtained a credit facility of Kshs.12,000,000 from the 1st respondent prior to the bank being placed under receivership. The facility was secured by a charge over the appellant's property, Block XXVI/187, Flat No. 1 (suit property). As per the appellant, although it had repaid the entire amount secured by the charge, the 1st respondent refused/neglected to acknowledge the same and discharge the suit property. Consequently, it had no other option but to file suit in the High Court being H.C.C.C No. 44 of 2017 against the respondents herein seeking *inter alia,* a declaration that it had paid the entire amount under the charge and an order directing the 1st respondent to discharge the charge over the suit property.

2. According to the respondents, they were not aware of the said proceedings and only learnt of the same on 1st December, 2017 when the 1st respondent's legal officer came across the suit in the High Court's daily cause list of that day. They moved with haste to make enquiries from the court and learnt that the matter had proceeded for hearing *exparte* and scheduled for delivery of judgment on 18th December, 2017.

3. It seems that the respondents waited for the aforementioned date and appeared through their advocate before the learned Judge

(**Otieno, J**.). For some reason, the appellant was not represented on that day. Nonetheless, the respondents' advocate asked for indulgence of the court to file an application to challenge the *exparte* proceedings which request the learned Judge acceded to. The proceedings of the said day were as follows:

18/12/2017

Before Hon. Justice P.J.O. Otieno

Court Clerk: Bancy

N/A for the plaintiff

Miss Moka for Umara for the defendant

Miss Moka: Mrs. Umara has been appointed and is in the process of filing *(sic)* ***application to set aside ex-parte proceedings. My prayer is that they get time to file the application.***

Court: There being indication that the ex-parte proceedings may be challenged, I withhold the delivery of the judgment pending such an application being filed within the next 7 days. Mention on 28/12/2017 to confirm if any application shall have been filed and for further directions. Costs in the cause.

P.J.O. Otieno

Judge

4. This was the decision that sparked the appeal before us. At the plenary hearing, Mr. Gitonga appeared for the appellant while Mrs. Umara appeared for the respondents. Counsel relied entirely on the written submissions on record and opted not to make any oral highlights.

5. The long and short of the appellant's complaint was that the learned Judge erred in withholding the delivery of the judgment firstly, without a formal application on record and/or secondly, without giving the appellant an opportunity to be heard. Thirdly, that there was no provision under the law that prescribed or recognized withholding of delivery of a judgment in the manner that the learned Judge did. Besides, mere apprehension that the respondents would file an application challenging the *exparte* proceedings was not sufficient to warrant withholding delivery of the judgment.

6. On the part of the respondents, the allegation that the impugned orders were issued in contravention of the rules of natural justice does not hold water. This is because the appellant was aware that the judgement in question was scheduled for delivery on 18th December, 2017 yet failed to appear. Therefore, as far as they were concerned, the appellant had been given an opportunity to be heard but failed to utilize it hence was precluded from claiming that it was condemned unheard. In support of that line of argument, the case of ***Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji*** **- Civil Application No. Nai. 179 of 1998** (**unreported**) was cited and emphasis was made on the following sentiments of this Court:

"The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

In any event, it was the respondents who would have been condemned unheard if the judgment had not been withheld so as to give them an opportunity to challenge the *exparte* proceedings.

7. In their opinion, the learned Judge had properly exercised his discretion within the confines of the law and there was no reason for this Court to interfere with such discretion. In particular, the learned Judge paid due regard to ***Order 10 Rule 11*** of the ***Civil Procedure Rules*** which allows a party to apply for setting aside of *exparte* proceedings; and ***Sections 1A, 1B & 3A*** of the ***Civil***

Procedure Act which call upon the court to administer justice.

8. In conclusion, the respondents asserted that the appeal before us is frivolous and an abuse of the court process. In other words, the orders sought in this appeal were inconsequential since the respondents had already filed an application to set aside the exparte proceedings in the High Court which application has high chances of success.

9. We have considered the record, submissions by counsel and the law. To start with, it is common ground that what was scheduled for the material day was delivery of the judgment. As such, we respectfully disagree with the respondents' contention that the appellant had been given an opportunity to be heard concerning their application for indulgence to file an application for setting aside of the *exparte* proceedings. In our minds, a party can only be deemed to have been given a reasonable opportunity to be heard as contemplated in ***Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji*** *(supra)* on an issue if he/she is given prior notice of the said issue.

10. In this case, we find that notwithstanding the fact that there was no appearance for the appellant on the material day, the appellant still had no notice that such an application would be made. For all intent and purposes what had been slated for that day was delivery of a judgment. This being the case we agree with the appellant that it was not afforded an opportunity to be heard on the issue contrary to the rules of natural justice. The centrality of the right to be heard was succinctly put by this Court in ***Mbaki & Others vs. Macharia & Another*** **[2005] 2 EA 206, at page 210**, as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

11. It did not matter that the learned Judge would have arrived at the same decision even after hearing the appellant. This much was appreciated by Nyarangi, JA in ***Onyango vs. Attorney General*** **[1986-1989] EA 456**, at page 460:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

For that reason, we find that the learned Judge erred in withholding the delivery of the judgment in question.

12. Accordingly, the appeal herein has merit and is hereby allowed with costs. We hereby set aside the orders withholding the delivery of the judgment and direct that the same be delivered as soon as is reasonably practicable.

Dated and delivered at Mombasa this 6th day of December, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR