IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Apaloo JJA &Masime Ag JJA)

CIVIL APPEAL NO 46 OF 1986

BETWEEN

SHEIKH T/A HASA HAULIERS.............................. APPELLANT

AND

HIGHWAY CARRIERS LTD.................................. RESPONDENT

(Appeal from a Ruling and Order of the High Court at Mombasa, Aragon J)

JUDGMENT

March 10, 1988, **Gachuhi JA** delivered the following Judgment.

In this appeal the applicant has appealed to this court against the ruling delivered by the High Court in exercise of the judge's discretion in which he dismissed the appellant's application for extension of time to file defence out of time. The learned judge also refused the application for leave to appeal. The grounds of appeal are:

1. The learned judge erred in considering extraneous matters which had no relevance to matters in issue before him.

2. The learned judge erred in allowing himself to be carried away by his great hatred of the appellant's lawyers to the prejudice of the appellant.

3. The learned judge was mistaken in his finding that a delay of 7 days in filing the defence was excessive delay and further erred in ignoring the explanation offered by the appellant.

The facts of this suit are that the respondent filed suit against the appellant on 19th February, 1983 claiming the sum of shs 171,602/80 for services rendered in transporting consignment of fuel oil on behalf of the appellant for the period February to May 1982 particulars whereof were known to the appellant. Summons was served and appearance was entered on 18th March, 1983. Particulars of the claim were demanded and supplied before the filing of defence. They were forwarded to the appellant by his advocate on 29th March, 1983. Judgment in default of defence was entered on 20th April, 1983.

The appellant having defaulted in filing defence, filed on 24th May, 1983 an application for extension of

time to do so. The affidavit in support of the application sworn by the appellant himself contained a mere denial of the plaintiff's claim and claimed that particulars were supplied very late. When the application came before the Judge on 27th June, 1983 Mr Gathuku for the defendant admitted liability to the extent of shs 120,219.70 whereby by a consent order in the following terms was recorded.

1. That the *ex-parte* judgment be and is hereby set aside.

2. That the defendant do pay to the plaintiff all thrown away costs.

3. That Judgment be and is hereby entered for the plaintiff for shs 120,219.70 with proportionate costs and interest at 12% per annum.

4. That the defendant be and is hereby granted leave to file defence relating to the balance of claim not later than 11th July, 1983.

5. That the case to be mentioned on 29th July, 1983.

The defence was not filed in terms of the consent order but was filed on 18th July, 1983. On the 29th July, the mention date in the consent order, there was no representative for the defendant. The representative for the plaintiff was present. The court record does not appear to be complete but it is recorded:-

"Court: Defence not properly filed by due date. Hence I enter judgment in default for balance of claim of shs 51,383/10 with costs plus interest at 12%."

The appellant filed a further application on 16th September, 1983 seeking an order of the court that the *ex-parte* judgment entered herein on 29th July, 1983 against the defendant be set aside and defendant be allowed to defend within such time as the honourable court may deem fit and that the execution proceedings be stayed. The application was supported by the affidavit of Joyce Nuku Khaminwa sworn on 13th September, 1983, and supplemented by an affidavit of Gervase Buluma Kafwa Akhaabi Sworn on 11th October, 1983.

In her affidavit Mrs Khaminwa stated that she dispatched the defence and counter claim under a certificate of posting on 6th July 1983. She verily believed that the defence could have reached Mombasa on or before 11th July, 1983. She further stated that the defence reached the court in time but the delay was caused by the court. A letter forwarding the defence and counter-claim also claimed to have enclosed blank cheque to cover fees is dated 6th July, 1983 but didn't.

Mr Akhaabi stated in his affidavit that Mr Gathuku on leaving Mombasa on 27th June, 1983 was assigned to proceed to Kakamega on the same day on a criminal case fixed for hearing from 28th June, 1983 for two weeks. He did not at the time, leave instructions with him to prepare and file defence before 11th July, 1983. Mr Gathuku relayed the information on telephone from Kakamega on 4th July, 1983. He then prepared defence to the balance of the claim together with a counterclaim and sent it off. Mr Akhaabi never doubted the defendant had a good defence and if the defendant would fail on his defence, he would succeed on the counterclaim.

According to Mr Akhaabi unlike Mrs Khaminwa the defence was duly posted under certificate of registration on 8th July, 1983. According to him, there was still three clear days to the deadline. Since it takes only one day between Nairobi and Mombasa, the registered letter cover ought to have been received and was in Mombasa on 9th July, 1983. According to him, the Post Office advised the High

Court Registry of the registered parcel well within time. Ruling on this application was delivered on 11th July, 1985 which is the subject of this appeal.

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Portions of the ruling complained of are:

"As I was not entirely satisfied myself as to the genuineness of the reasons given by the defendant as I had had a long and sad previous experience of the dilatory tactics used by, and of the rather low level of efficiency of the defendant's firm of advocates. I decided to order that the case be mentioned on the 29th July 1983.

My apprehension turned out to be correct since by that date the defence had not been properly field with the result that I entered judgment in default for the balance claimed with costs and interest."

and the other is:

I must also stress what I consider to be a deliberate omission in sending the cheque in payment of the filing fees. I have said earlier that I have had previous experience of the level of efficiency and devotion to duty towards clients evidenced by the defendant's firm of Advocates. In fact on 3 separate occasions when I was stationed in both Eldoret and Nairobi I have had documents sent by post at the very last moment under a covering letter in which it was always stated that the relative cheque was enclosed when in fact it was not. This is the fourth time in my experience this has happened. I believe this is a deliberate tactic used by those advocates to gain time for their clients.

On the complaint that the appellant was refused leave to appeal against the ruling, leave was not required under order 42 r 1(1)(a). This should not necessarily be a ground of appeal.

It is true that the learned judge introduced, some extraneous matters and made derogatory remarks as to his past knowledge of this firm of advocates of its inefficiency in other matters. Such innuendo and dilatory remarks are unfortunate. He must have been influenced by those remarks in delivering the ruling. The learned judge should not have made those remarks. Even though he introduced those remarks in the ruling, if they are expunged from it, would the remaining part render the ruling operative to be relied upon in the exercise of the discretion as the learned judge did" The law and the facts have to be looked into.

During the hearing of the application on 11th March, 1985, there was not much said as borne out by the record. Mr Gathuku who appeared for the defendant/applicant stated that he was relying on the affidavits and the defence filed. Mr Maosa who appeared for the appellant in this appeal also relied on the affidavits and the purported defence filed. He maintained before us that a letter sent under a registered cover would within three days reach Mombasa from Nairobi. Even if it took seven days, that delay is not inordinate. Extension should have been granted to cover those seven days. He maintained that the defence contained triable issues and that the appellant should not be made to suffer due to the mistake of the counsel. He also submitted that the ruling does not lie with established principles. He referred to *Pithon Waweru Maina v Thuku Mugira,* Civil Appeal No. 27 of 1982, which I shall refer to it later.

Mr Inamdar for the respondent submitted that the appeal is against the exercise of the discretion by the Judge and it cannot be said that the Judge exercised his discretion wrongly without looking into the facts of the case. In totality, on the record, discretion should not be interfered with because it ought to have

been exercised in any other way.

The application was for setting aside the *ex-parte* judgment and that the defendant be given leave to file defence out of time and for the stay of execution and an order for costs for the second time. Previous similar application resulted in consent order being recorded which set aside an *ex-parte* judgment already entered. Judgment was entered for the admitted amount. The appellant was given 14 days to file his defence for the balance of the claim. The defence was not filed within the prescribed time. An *exparte* judgment was entered for the balance of the claim.

The affidavits relied upon were sworn by counsel. These affidavits are quite firm on their contention that a registered letter would take three days from Nairobi to Mombasa. This is based on their belief. No proof was produced on this. May be an affidavit from an official from the post office would have cleared any doubt.

There is also a further delay in preparing the defence. The affidavit of Mr. Akhaabi stated that Mr Gathuku did not leave behind any instructions regarding the preparation of defence before he proceeded to Kakamega on a criminal case hearing. At the time of filing the application and the hearing of the same, Mr Gathuku was a member of the firm, yet he did not file an affidavit himself to confirm what Mr Akhaabi had stated in his affidavit was in fact the true position. In actual fact what Mr Akhaabi stated would be hearsay which no court would accept in the light of the person offering information is still available to offer the explanation himself. Mrs Khaminwa's affidavit is contradicted by that of Mr Akhaabi on the posting of the letter. The covering letter is alleged to have enclosed a blank cheque for fees.

Mr Inamdar has pointed out, which has not been challenged before us, that there was no cheque enclosed and no filing fee has ever been forwarded to date. This is quite clear from the court file. Even if it could be said that the purported defence was properly filed, it could not have been filed as such without the payment of fees. It was received by the registry on 18th July, 1983 seven days out of time. It was on the file when the judgment was entered. In order to succeed the applicant must show that the entry of judgment was wrong in that it was entered while the defence was validly on the file and the judge did not consider it. Once it was on the file the judge ought to have looked at it to see whether it had raised any triable issue unless he heard submissions on it and if so extend time for filing. Other allegations in the affidavit that files are missing and/or that the registry staff failed to place the defence on the file before judgment was entered could not possibly be proved. As such no need to deal with them. The powers of the court in dealing with application under Order IX A rule 10, is to do justice to the parties. In *Pithon Waweru Maina v Thuku Mugiria*, Civil Appeal No 27 of 1982 (*ibid*) (Potter, Kneller JJA and Chesoni Ag JA) Potter JA in quoting Duffus P in *Patel v EA Cargo Handling Services Ltd.*, [1974] EA 75 stated at page 1 of his judgment:

"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" ....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 to it by the rules."

In the same appeal Kneller JA quoting Harris J in *Shah v Mbogo and Another* [1967] EA 116 at 123 BC on the principles governing the exercise of the court's discretion to set aside a judgment obtained *ex-parte* stated:

"The discretion is intended to be exercised to avoi**d** injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice."

Looking at this, the purpose of the whole object of the application is to get the defence on the record. Thereafter the suit to proceed to hearing on its merit. Whether the defendant will succeed on his defence to the claim or on his counter-claim cannot be adjudicated at the time of the hearing of the application. It will depend on the evidence. Of course the applicant must be penalized in costs for the delay caused by the extension of time.

Dealing with the affidavit of the defendant claiming of good defence, he originally denied the claim of shs 171,602/80 and further stated that he was wrongly sued. He claimed to have been an agent of Shell Ltd but claimed from the plaintiff 15% commission on the plaintiff's earnings. However, he admitted that the amount due to the plaintiff under the contract was shs 35,732/40 and not shs 171,602/80. Surprisingly, without any averment or indication from the defendant Mr Gathuku consented to judgment being entered for the plaintiff in the sum of shs 120,219/70 leaving a balance of shs 51,383/10. The affidavit of the defendant was then washed away on entering consent judgment to that amount. The defence for the balance of the claim of shs 53,383/10 is a denial of the amount or any other sum. He admitted that the plaintiff rendered services at the instigation of the defendant but the defendant acted as agent for a known principal. He alleges that the plaintiff had been paid in full. He continued stating in the defence that the plaintiff's claim is in excess of the agreed amount and/or rates of payment to which the defendant denied the plaintiff was entitled to. The defendant introduced a counter-claim which was not in the affidavit referred to earlier and stated that the defendant rendered services to the plaintiff in Sudan which payment were to be made in Kenya. The plaintiff had paid some amount leaving a balance of shs 136,000 which the plaintiff has refused to pay. No particulars of the claim could have been demanded for since the defence and the counterclaim was not filed.

Looking at these claims and the defences the appellant appears to set up possible defence he could rely upon when the suit comes up for hearing. There are possible triable issues. If he cannot raise these issues in his defence then he may well be shut out. The defendant feels strongly that he has a good counter-claim for services in Sudan and a claim for commission which cannot be pursued independently because having been introduced in these pleadings, it could be caught by the doctrine of *resjudicata* or if not taken now, it may be caught by limitation. It may be that the sum of shs 35,732/40 admitted in the affidavit was merged with the sum of shs 120,219/70 for which judgment was entered. That being the position there are defences shown to the plaintiff's claim.

The issue of setting aside judgment is a daily occurrence in the courts. Each application has to be dealt with on its merit. Harris J considered steps to be taken in the hearing of the application and stated in *Jesse Kimani v McConnell & Another*, [1966] EA 547 at 555 F & G:-

"It seems to me that a reasonable approach to the application of these rules to any particular case would be for the court, first to ask itself whether any material factor appears to have entered into the passing of the ex-parte judgment which would not or might not have been present had the judgment not been ex-parte, and then, if satisfied that such was or may have been the case, to determine whether in the light of all the facts and circumstances both prior and subsequent and if 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 appreciate Mr Inamdar's arguments in opposing the application which he heavily relied on the two authorities he had relied in the High Court and referred to in the ruling namely, *Patel v E.A. Cargo Handling Services Ltd.* [1974] EA 75 particularly quotation in *Evans v Bartlam* [1937] AC 437: [1937] 2 All ER 647 and *Shah v Mbogo* (1968) EA 93 which I have commented on.

The whole ruling appealed against was vitiated by extraneous matters and particularly derogatory

remarks of hatred directed to the firm of advocates which remarks were uncalled for. These remarks cannot be expunged due to their tone in the whole ruling whereby injustice is reflected therein. Had the judge not been carried away by his emotional conduct which tone dominated the whole ruling and had he considered the interest of the appellant independently from the conduct of his advocates and considering the authorities on the subject, to my mind, he could have come to a different conclusion. In entering the judgment, the judge was still carried away by his emotion because the defence was on the file. It does not appear from the record that judgment was applied for. The words recorded imply that it was entered on the judge's own motion.

It must be clear that the court is to administer justice through the procedure laid down. It is important in administreing justice that the suit in court is between two litigants and the counsel is merely putting the case for his client forward. The litigant, may not be aware of the failure of his advocates in complying with rules. He is at the mercy of his advocate. It is the law of agency that the principal is bound by the acts of his agent. Yet in administering justice, why should the litigant suffer due to the mistakes and errors of his advocate.

If the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights. Mr Maosa relied on *Pithon Waweru Maina v Thuki Mugiria*(*ibid*) as an authority that a litigant should not be punished through the mistake of his counsel. This is what was referred to by Harris J in *Shah v Mbogo,* (*ibid*) so as to avoid miscarriage of justice. The judge misdirected himself in importing matters which caused miscarriage of justice.

I would allow this appeal with costs. I would set aside the order of the High Court dismissing the application and the judgment entered for the plaintiff for the balance of the claim and substitute thereof with an order granting the defendant leave to defend the balance of the claim and direct that the defence already be taken as filed subject to the payment of fees and be served out of time within 14 days from the date of this judgment. I would award the costs in the High Court on the application to the respondent.

As Masime Ag JA agrees, the order now is that the appeal is allowed with costs. Costs in the High Court is awarded to the respondent in this appeal.

Apaloo JA (Dissenting).. The only question in this case is whether the learned Judge below exercised his discretion judicially in refusing to set aside a Judgment by default entered against the appellant. It is not suggested that the learned Judge misconceived or mistated the principles of law which should guide him in the exercise of that discretion. There is no dispute about the facts. So whether the Judge ought to have exercised his discretion for or against the appellant, depends on the facts. If any theory is well settled in this branch of the law, it is that it is not for an appellate Court to substitute its discretion for that of the trial Court or set aside the Judge's discretion because if it had been the trial court it would have exercised it differently.

What then are the facts" On the 19th February, 1983, the respondent brought a plaint against the appellant and sought judgment for the sum of Shs 171,602.80 being freight due from the appellant to the respondent. The appellant, by Counsel entered appearance on the 19th March, 1983. But before doing this, sought particulars of the plaint.

These were supplied on the 21st March, 1983, Thereafter, the appellant appeared to have gone to sleep. He filed no defence to this somewhat straight forward claim. So the respondent requested for judgment in default of defence. This was duly entered in its favour on the 29th April, 1983.

Just over a month afterwards, the appellant sought to have that judgment set aside by a chambers

summons. On the 23rd May, 1983, the appellant swore a 20 – paragraph affidavit in which he sought to explain the reason why defence was not lodged on his behalf in due time. In paragraphs 14 and 15 of the affidavit, he deponed to what the kernel of his defence to the action was, namely,

14. I believe that I am wrongly sued in this case.

15. The agreement to transport the fuel oils was between the Plaintiff and Shell Ltd. with me acting merely as the agent of Shell Ltd.

If the matter deponed to in paragraph 15 of the affidavit is true, it provides a complete answer to the respondent's claim because the appellant acted as agent for a known principal and incurs no personal liability on the contract. The appellant was then acting with full professional assistance and it is a reasonable inference that this affidavit was prepared by his legal advisers.

But barely five weeks after this, when the chamber summons came for hearing before Aragon J, Counsel appearing on behalf of the appellant, admitted liability in the sum of Shs 120,219.70. That amounts approximately to three-fourths of the sum claimed. An admission of this nature, throws discredit on the averment that the appellant was merely a *conduit pipe* through which the contract was concluded and that the real debtor was Shell Ltd. But as the admission fell short of the total sum claimed, there was still a balance of Shs 51,383.10 in contention between the parties.

The respondent accepted that the appellant be granted leave to contest that sum. In view of what appears to be a *volte face*, on the part of the appellant, it would not take a great deal of perspicacity to see that the genuineness of the whole defence was suspect. The judge felt that way and in order to prevent the appellant again going to sleep, granted him leave to file a defence to the contested sum not later than the 11th July, 1983. As the order was made on the 27th June, it gave the appellant no fewer than 14 days to lodge this defence. The Court ordered that the case be mentioned on the 29th July, 1983.

It is common ground that this defence was not received before the 18th July, that is 7 days after the time fixed by the Court. Further more, although a letter accompanying the defence stated that a blank cheque was being enclosed to meet the cost of filing, no such cheque was sent. So the appellant was again in default. The case was duly mentioned before the Court on the 29th July. The respondent was present by Counsel. Neither the appellant himself nor his Counsel appeared. It was brought to the notice of the Court that the defence was not filed by the date ordered by the Court. The position then was that there was no proper defence before the Court, not only because it was filed in breach of the order limiting the time, but that fees due to the Court for such filing have not been paid. The Court then proceeded to give judgment for the balance of Shs 51,383.10 with costs.

In September, 1983, the appellant returned to the Court and prayed the Judge for yet another indulgence to set aside the judgment he entered in the respondent's favour on the 29th June. In a supporting affidavit, he sought to excuse his failure to comply with the earlier order, on what can only be described as ineptitude in the conduct of the firm's business. No explanation was proferred why the cheque which was supposed to be sent with the defence to meet filing fees was not included. As I said, whether the Judge was wrong or right in declining to exercise his discretion in the appellant's favour depends on the facts presented to him.

In sum, those facts amount to this: The respondent prayed for judgment against the appellant for a liquidated sum on what appears a simple contract debt. The appellant made default in filing defence and *ex-parte* judgment was given against him. He asked the Court to exercise its discretion in his favour to

enable him contest the claim. Before then, he deponed that he did not personally owe one cent of that debt. The respondent did not resist this application, and was agreeable to the Court exercising its discretion in the appellant's favour.

During the hearing of the chamber summons, the appellant recoiled from the position he took in his affidavit and admitted personal liability for about three-fourths of the debt and submitted to judgment for that amount. The Court in the exercise of its discretion, granted him leave to file a defence to contest the balance on terms that were fair and reasonable. The appellant again breached those terms. The Judge then declined to exercise his discretion yet again in the appellant's favour. On the basis that justice is not a one-way street and that the Judge was obliged to look at the claims to justice of the appellant as well as that of the respondent, the learned Judge's decision to deny the appellant the exercise of his discretion a second time, seems to be eminently just.

But the appellant says, we should set that exercise of discretion aside in his favour on two main grounds formulated as follows:

1. The learned Judge erred in considering extraneous matters which had no relevance to the matters in issue before him.

2. The learned Judge further erred in allowing himself to be carried away by his great hatred of the appellant's Lawyers to the prejudice of the appellant.

If in truth the learned Judge introduced into his consideration of this application, extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. What then are the extraneous matters to which the appellant took exception" First, the appellant points to an observation by the Judge that:

"As I was not entirely satisfied myself as to the genuineness of the reasons given by the defendant and as I had a long and sad previous experience of the dilatory tactics used by and of the rather low level of efficiency of the defendant firm's advocates, I decided to order that the case be mentioned on the 29th July."

This passage was also pointed out as evidence of the Judge's hatred of the appellant's advocates. One must look at these observations carefully and objectively. There is evidence on the record to justify the Judge's feeling that the genuineness of the defence was open to suspicion. And that is, that shortly after swearing to an affidavit in which the appellant disclaimed any personal liability for the debt or any part thereof, his advocate admitted liability for a very substantial portion of that debt. On the basis on which the whole liability was sought to be repudiated, it was, to put it mildly, open to the gravest doubt whether the "agency story" put up in the affidavit can be sustained in relation to the small portion of the debt sought to be contested. There is nothing extraneous in this observation.

In the same sentence, the Judge also related his own personal experience with regard to this firm in two respects namely, first, the firm had, in the past, used dilatory tactics. It is not suggested that the Judge did not, in truth incur that experience or that if the defendant's firm had adopted dilatory tactics in the past, it was not relevant for him to bear this in mind when the firm prayed for the exercise of his judicial discretion. Second, the Judge thought very little of the firm's efficiency. That is an expression of opinion which may or may not be shared by other Judges. The fact that the Judge had grave reservation about the firm's efficiency, was not the reason why he declined to exercise his discretion in favour of the appellant. Rather, that was one of the reasons which decided the Judge to grant leave to the appellant on terms that the defence be filed by the 11th July and that the case be mentioned on the 29th July. The

appellant or his legal advisers breached both conditions and in the process, put paid to the to the Judge's suspicions. The defence *ex concessis*, was not filed by the 11th July and neither the appellant nor his legal advisers turned up in Court on the 29th July.

There was no suggestion that the Judge denied the appellant a fair hearing on his application to set aside the *ex-parte* judgment or that while hearing that application, the Judge showed hostility or exhibited any attitude or conduct which shows ill-will towards the appellant or his advocates. Throughout all this saga, the respondent was entirely blameless and was, in the circumstances, peculiarly deserving of the exercise of the Court's discretion. It would be odd if a discretion exercised in his favour to reject the application, can justly be upset regardless of the facts of this case only because of the way in which the Judge chose to deliver himself when declining to exercise his discretion in the appellant's favour.

The Judge also felt that the omission to send the cheque was deliberate and then proceeded to relate his experience in these words:

"In fact on three separate occasions when I was stationed both in Eldoret and Nairobi, I have had documents sent by post at the very last moment under a covering letter in which it was always stated that the relative cheque was enclosed when in fact it was not . This is the fourth time in my experience the same thing has happened. I believe this is a deliberate tactic used by those advocates to gain time for their Clients."

Unless the learned Judge was relating falsehood or unless a Judge ought not to relate relevant experience or be guided in the performance of his duties by it, it is difficult to see that any valid exception can be taken to this observation. It is not denied that although the covering letter forwarding the defence states that a blank cheque was being enclosed to meet the cost of filing, no such cheque as enclosed. And no explanation of any sort was offered. If the omission to include the cheque was due to oversight, it was clearly the firm's duty to say so. Having proferred no explanation of any sort for what can only be a misleading or inaccurate statement, there is no basis for taking unbrage at the Judge's belief, borne of past experience that this was a deliberate delay tactic. Yet this perfectly legitimate observation, was pointed to as evidence of the Judge's error in considering extraneous matters or as evidence of the Judge's hatred of the appellant's firm of advocates. What is extraneous about this" It seems to me extravagant and entirely fanciful to suggest that this observation evidences the Judge's hatred for the appellant's advocates.

One's experience teaches one, that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocates' conduct is deserving of Judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor, in my judgment, does it justify an appellate Court in substituting its discretion for that of the trial Court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it.

Some oblique criticism seems to have been directed at the Judge because he fixed the case for mention without an application by the parties and when the matter was mentioned on the 29th July, he proceeded to give judgment without being formally requested to do so. It was implied therefore that this might justify a complaint of bias or hatred of the appellant's advocates. Such imputation is less than fair to the learned Judge. The Judge made no secret of the fact that he was suspicious of the genuineness of the defence. He had, as I have shown, valid reason for so feeling. It was he who gave his blessing for setting aside a judgment what was regularly obtained by the respondent. Instead of setting the judgment aside unconditionally, he felt it right to impose a condition that the defence be filed by a named date and he

fixed yet another date to satisfy himself that this condition was met. So when on the 29th July no defence was properly filed and neither the appellant nor his advocate was present to offer any explanation, he must have felt it right to restore in favour of the respondent that part of the judgment which was still in contention between the parties and which he had, in the exercise of his discretion, set aside at the appellant's instance.

Such a course, was, in my opinion eminently just. The Judge himself was under a statutory duty to do justice to the parties without "undue delay." (See section 3 of the Judicature Act). It was not and cannot be suggested that the Judge cannot properly do this. It was not suggested that in taking this course, he infringed any procedural rule or indeed any principle of justice. By what stretch of imagination can this normal judicial action be interpreted as bias or hatred of the appellant's Counsel" At all events, the judgment was not given against lawyers. It was given against a party whom the Judge believed, with good reason, was seeking to employ tactics of delay to avoid or postpone the payment of what seems, a just debt.

Attention was also drawn to the fact that without evidence, the Judge said that in 1983, a registered letter posted in Nairobi cannot reach Mombasa earlier than five days. The Judge said "this was a well known fact". True, there is no evidence of this, but I have always thought a Judge is always entitled to take judicial notice of notorious facts. The Judge said this fact was well-known. It is not suggested that this was wrong or if it was a well-known fact, it could not be within judicial knowledge.

What is so esoteric about the time a registered letter posted from Nairobi takes to reach Mombasa that it cannot be well-known to a Judge or can only become "known" to him by the adduction of formal evidence" In *Shah v Allu* (1947) EACA 45 51 Graham Paul C.J thought the difficulty of obtaining possession of premises could be taken judicial notice of. As he put it.

"I am confirmed in this belief, by the fact <u>well within judicial knowledge</u> (Emphasis is mine) that at the present time, possession of premises is valuable and difficult to obtain.

I think the time it takes for a registered letter posted from Nairobi to reach Mombasa in 1983, is a fact that can well be within judicial knowledge. In my opinion, therefore, the veiled criticism of the learned Judge for stating this, is injustified

It is conceded that Aragon J did not mistate or misapprehend the legal principles which govern the exercise of his discretion in this matter. He stated and applied them to the facts and reached a result which many fairminded Judges would reach. It is impossible to say, to borrow the words of the Privy Council in *Shah v Allu* (1947) 14 EACA 46 that:

"<u>there has been an unjudicial exercise of discretion or an exercise of discretion at which no Judge could reasonably arrive whereby injustice had been done to the party complaining (Emphasis is mine)."</u>

That being so, well settled judicial authorities of which the *Allu* case cited *supra*, *Shah v Mbogo* [1968] E.A 93, *Patel v E.A Cargo Handling Services Ltd* [1974] E.A. 75 are typical, preclude this Court from interfering with that result.

I think on the facts, Aragon J exercised his discretion correctly or at the very least, the appellant has failed to show that he exercised it unjudicially. Accordingly, I do not feel it right to substitute my own discretion for his. I would therefore, for my part, dismiss this appeal costs.

Masime Ag JA. This appeal concerns an order made in the exercise of discretion in application under

Order IXA rule 10 of the Civil Procedure Rules refusing to set aside a judgment obtained in default of the filing of a defence by the due date. The facts of the case appear clearly in the ruling appealed against and in the judgments of Gachuhi and Apaloo JA (which I have had the advantage of seeing in draft). In the course of his ruling the learned trial Judge made the following unfortunate remarks:-

“As I was not entirely satisfied myaself as to the genuineness of the reasons given by the Defendant and as I had a long and sad previous experience of the dilatory tactics used by and of the rather low level of efficiency of the defendants firm of advocates I decided to order that the case be mentioned on the 29.7.83. My apprehension turned out to be true since by that date the defence had not been properly filed with the result that I entered judgment in default for the balance claimed. With costs and interest.”

He then goes on to make observations for which no evidence was adduced as follows:-

“It was impossible in 1983 for a registered letter posted in Nairobi to reach Mombasa earlier than five days after the date of posting. That was a well know fact and I find it difficult to believe that Mr Akhaabi did not know that. In any event why if the letter was written on 6.7.83 did he wait until 8.7.83 to post it. Why should the letter remain for two days in the office of M/s Khaminwa & Khaminwa unposted"

He goes further:-

“When I was in private practice. I often went upcountry to conduct cases but I always kept someone in the headquarters office informed of what was going on. Had I not done so I would soon have been on the first ship back to U.K from Calcutta.

I must also stress what I consider to be a deliberate omission in sending the cheque in payment of the filing fees. I have said earlier that I have had previous experience of the low level of efficiency and devotion to duty towards clients evidenced by the defendants’ firm of advocates. In fact on three separate occassions when I was stationed both in Eldoret and Nairobi I have had documents sent by post at the very last moment under a covering letter in which it was always stated that the relative cheque was enclosed when in fact it was not. This is the fourth time in my experience the same thing has happened. I believe this is a deliberate tactic used by those advocates to gain time for their clients.”

He then went on to consider and hold that the defence raised has no real substance and that even if the application were refused the defendant would not really suffer. He then refused the application.

The memorandum of appeal has two main grounds: that the learned Judge erred in considering extraneous matters in reaching his decision and that he permitted himself to be carried away ‘by his great hatred of the appellants’ lawyers to the prejudice of the appellant.

I have carefully considered the history of the whole case. It is true as the learned Judge says in his ruling that the suit had been characterized by delays throughout. In the preamble to his ruling the learned Judge sets out the law correctly. However, I agree with learned counsel for the appellants that the entire ruling was a criticism of the conduct of appellant’s counsel and the alleged dilatory and inefficient tactics than a consideration of the application and affidavits in its support. I have perused the original court record from which it is apparent that (1) the learned Judge fixed the case for mention of his own motion without an application being made by the parties. (2) when the case was mentioned he again of his own motion entered judgment against the defendant without an application being made by the plaintiff though there was a defence on the record admittedly not filed properly, (3) when on 11.7.1985 he dismissed the application he refused an application erroneously made for leave to appeal though no leave to appeal is necessary – see Order 42 r 1(1) (a) of the Civil Procedure Rules. In the fact of these incidents and the

remarks in the ruling it is not surprising that the appellant's counsel has alleged bias and that the learned Judge has great hatred of the appellant's counsel.

On consideration of these matters I am of the respectful view that they have far reaching effect on and indeed vitiate the exercise of discretion of the Learned Judge. Not only has his attitude to defendants' counsel prevented him from really dealing with the application before him but it has made him wander so far away from it that it cannot be said that he has exercised his discretion judicially. In my view this appeal should be allowed and the ruling of the learned Judge be set aside. I would extend the time for filing the defence of the date when it was received in the registry subject to necessary filing fees being paid within seven days of to-day. I would also grant to the appellants the costs of this appeal.

Date and delivered at Mombasa this 10th day of March , 1988

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL

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