



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

Civil Suit No. 142 Of 2014

AMIR KHIMJI.....PLAINTIFF

FARIDA BHANJEE (as administratrix of the estate of

Amin Mohamed Rahim.....DEFENDANT

RULING

1. On 3rd July 2014 the court entered judgment in favour of the plaintiff after the defendant had failed to file a Defence to the suit. The defendant has now filed an application to set aside the said judgment.
2. It is common ground that when the court was called upon to set aside a judgment, the court would determine that application through the exercise of its unfettered discretion.
3. The plaintiff pointed out that the court ought to give due consideration to all the circumstances prevailing both prior to and subsequent to the time when the court entered the default judgment.
4. In every respect, as was reiterated by the plaintiff;

“... the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised”.

5. Those words were quoted, with approval, by Briggs J.A in the case **SHABIR D.N. VS RAM PARKASH AND (1955) 22 EACA 48**, at 51, when the learned Judge of Appeal made reference to the decision of Greene M.R. in the case of **GATTI Vs SHOOSMITH (1939) 3 A.E 916, at page 919**.

6. The plaintiff went on to explain as follows;

“The very wide and unfettered discretion of the court is not for nothing. It is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. While considering an application, and exercising the discretion, the concern of the court is to do justice to the parties, without imposing conditions on itself or to fetter the wide discretion given to it by the law”.

7. Those words were paraphrased from the Judgment of William Duffus P. in **PATEL Vs E.A CARGO HANDLING SERVICES LIMITED [1974] E.A 75**, at page 76.

8. I have no doubt at all about the accuracy of the above-quoted decisions. And in any event, the said

decisions would be binding on this court as they were made by the Court of Appeal.

9. The plaintiff further reminded this court as follows;

“At all levels of courts, it has always been emphasized, that discretion is in terms unconditional, or that it is a discretion untrammelled in terms; and that it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run. As it is well known, discretion necessarily involves latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae (once the facts are ascertained)”.

10. In the Court of Appeal for Eastern Africa, Pickering C.J. had the following to say about the manner in which discretion ought to be exercised;

“Wide though that discretion is, it is a judicial discretion and must be exercised on fixed principles, and not according to private opinion, sympathy or benevolence”.

11. Although in that case of **MULJI JETHA Vs PARTAB SINGH CIVIL APPEAL NO. 2 of 1931 (1931) 13 KLR 1**, at page 2, the court was dealing with the issue of costs in Bankruptcy proceedings, I find that the principle laid down by that court remains sound in a case such as the one I am now handling.

12. I believe that the main reason why the court’s discretion is unfettered when determining an application for setting aside a default judgment is that the said judgment was not pegged upon a consideration of the merits of the case itself.

13. The foregoing is the law applicable to applications for setting aside default judgments. I will now delve into the facts of this case, to ascertain whether or not the judgment should be set aside.

14. The Plaintiff was filed on 14th April 2014. The said plaintiff was served upon the defendant on 27th May 2014.

15. The Memorandum of Appearance was filed in May 2014. At that time, the defendant’s lawyers were messrs **LUTTA & COMPANY ADVOCATES**.

16. After the defendant entered appearance, the parties decided to give a chance to a possible negotiated settlement.

17. On 3rd June 2014 the parties filed a consent letter in court, in which it was agreed that the plaintiff would not request for judgment in default of defence until after the plaintiff would have served a 14 days Notice upon the defendant, requiring the defendant to file a defence.

18. On 18th June 2014 the plaintiff’s advocates, messrs **PHILIP MUOKA & CO. ADVOCATES** served a 14 days’ Notice on **LUTTA & COMPANY ADVOCATES**.

19. By my calculations, the 14 day period lapsed on 2nd July 2014.

20. Therefore, when the plaintiff requested for judgment in default of the defence, on 3rd July 2014, that action was, *prima facie*, regular.

21. However, prior to the plaintiff requesting the court to enter judgment, his advocates had already been informed by **MR. SHIRAZ MAGAN ADVOCATE** that he (Mr. Magan) had taken over the conduct of the defendant’s case.

22. MAGAN had phoned **MR. PHILIP MUOKA ADVOCATE** on the morning of 27th June 2014, and the 2 lawyers had a chat. Magan wrote to Muoka on the same day, making reference to the discussions

that they had had.

23. I deem it necessary to set out herein, a portion of the letter dated 27th June 2014, as follows;

“I have confirmed that it was agreed between us that the status quo, meaning the letter of consent dated 26th May 2014, would remain for the time being. I also suggested, and you agreed, that once I have received full instructions in the matter, your Mr. Muoka and I will have an initial meeting for the purpose of examining the possibilities of resolving this matter without resulting to further litigation, given that the present parties to the suit and/or any others that may be joined in, are all members of the same family”.

24. The defendant’s lawyers responded to that letter on 2nd July 2014. By the said response, the plaintiff’s lawyers made it clear that they were under strict instructions to proceed with the matter in court.

25. That letter dated 2nd July 2014, was delivered to **MAGAN** on 4th July 2014, at about 12.57 p.m.

26. In effect, the plaintiff, who had agreed to maintain the *status quo* for the time-being, thereafter requested for judgment one day before telling the defendant that he had decided to proceed with the case.

27. By acting in that manner, the plaintiff had stolen a march on the defendant. He had misled the defendant’s advocates, during the phone discussion on 27th June 2014. I say that he had misled the defendant because if the terms of the consent letter dated 26th May 2014 had remained in place, it would mean that the plaintiff would not request for judgment until after serving a 14 days’ Notice.

28. If the plaintiff’s advocate did not agree with anything which Magan had said in his letter of 27th June 2014, he would have said so, expressly, to Magan. But Muoka did not do so.

29. That therefore implied that Magan’s letter was factually accurate. In effect, a Notice would have been necessary, after 27th June 2014, before the plaintiff could apply for judgment. But no such Notice was served upon the defendant’s advocates after 27th June 2014.

30. In the circumstances, the plaintiff was wrong to have requested for judgment on 3rd July 2014.

31. That alone is sufficient ground to warrant the setting aside of the default judgment.

32. Meanwhile, if the Notice served upon **LUTTA & COMPANY ADVOCATES** on 18th June 2014 were deemed to have been binding on the defendant, I find that the failure by the said Law Firm to bring the Notice to the attention of the defendant, is an error which ought not to be allowed to prejudice the defendant.

33. More significantly, even if Lutta & Company Advocates had erred by failing to inform the defendant about the Notice issued by the plaintiff on 18th June 2014, the plaintiff’s lawyers continued to communicate with the defendant’s lawyers, after 3rd July 2014, as if there was no development in the court case. I simply cannot comprehend why the plaintiff and his lawyers remained tight-lipped about the fact that they had requested for judgment and that the court had granted the said judgment on 3rd July 2014.

34. The conduct of the plaintiff and his lawyers is not consistent with transparency. If anything, it would appear that the plaintiff kept the defendant in the dark, concerning the default judgment, whilst appearing to be interested in a negotiated settlement.

35. No wonder the defendant and his lawyers were shocked, when, on 15th October 2014, the lawyers were served with a Notice of the Formal Proof.

36. That explains the reason why the defendant could not have moved to court earlier, to seek the setting aside of the judgment. In other words, the application herein, was filed without any undue delay.

37. I also note that the proposed Defence and Counter-claim raises issues which cannot just be ignored. The issues would require appropriate consideration, after evidence is led by the parties.

38. For all those reasons, there is merit in the defendant's application dated 23rd October 2014. Therefore, I do now set aside forthwith the *ex-parte* judgment which was entered against the defendant on 3rd July 2014.

39. The defendant has unconditional leave to file his defence within the next 14 days.

40. The costs of the application dated 23rd October 2014 are awarded to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Oyuke for Muoka for the Plaintiff

Mulandi for Magan for the Defendant.

Collins Odhiambo – Court clerk.