REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 29 of 2004

ATHI RIVER STEEL PLANT LTD ……..……..……..APPELLANT

VERSUS

PAUL NZUSYO ……... RESPONDENT

[Appeal from the original ruling in Chief Magistrate's Court Machakos CMCC No. 392 of 2002 by J.R Karanja, C.M on18.3.2004]

JUDGMENT

1. The Appeal herein arises from a Ruling delivered on 18.3.2004 by the Chief Magistrate Machakos in CMCC No. 392 of 2002 in which the learned magistrate declined to set aside the ex-parte interlocutory judgment entered on 24.6.2002 in favour of the Respondent, Paul Nzusyo.

2. To put matters into context, the suit before the subordinate court was filed on 23.5.2000 and summons issued thereafter. On 24.6.2002, there being no appearance on behalf of the Appellants interlocutory judgment was entered. Upon formal proof, an award of Kshs. 82,000/= plus costs and interest was given to the Respondent on 3.6.2003. On 30.1.2004, the Appellant sought orders under Order IXA Rule 10 and 11 and Order L Rules 1 and 2 to set aside the interlocutory judgment and the Ruling dismissing that application is the subject of this Appeal.

3. In the Ruling aforesaid, the learned Chief Magistrate found the explanation for non – appearance inadequate and the delay inexcusable and for the record the reasons given were ;

    a. that there was delay in communication between the Appellants and its insurance brokers and;

    b. once judgment was entered against the Appellant, its advocate's court clerk failed to bring up the file on time to enable the Application to set aside the judgment to be filed expeditiously.

4. The learned magistrate in dismissing the explanations rendered himself inter-alia thus;

    "***The delay and misplacement are signs in indolence and carelessness on the part of those***

involved i.e the Defendant and party"

5. From the Memorandum of Appeal filed on 30.4.2004, the Appellant states that;

i. the learned magistrate erred when he failed to hold that the draft Statement of Defence raised no triable issues.

ii. the learned magistrate failed to appreciate that the reasons for delay in filing defence were plausible.

iii. the learned magistrate erred when he failed to hold that failure to set aside the interlocutory judgment would cause prejudice to the Appellant.

6. I appreciate the submissions made by the advocates for the parties but in my mind the issue before me can only be addressed by initially setting out the law on the subject. Order IXA Rule 10 of the Civil Procedure Rules Provides as follows:-

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

7. The wording of the Rule is of course that setting aside is discretionary and that being the case, discretion must always be exercised fairly so that no prejudice is caused to an innocent party and also not to aid the indolent. In Kehar Singh Kalsi Ltd vs Associated Steel Ltd [1982] KLR E.A. 242 at 244, Masime J. quoted with approval the statement by *Harris J*. in Kimani vs McConnel [1966] E,A. 547 where the learned judge had this to say.

" a reasonable approach to the application of the rules (as to, setting aside of ex-parte judgments) 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 and the judgment to have 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 of 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."

8. In furtherance of that point and on the merits of the case for each party, the Court of Appeal in Philip K. Chemwolo vs Mumias Sugar Company Ltd [1982 – 1988] 1 KAR held that;

"where a regular judgment had been entered, the Court would not usually set aside the judgment unless it was satisfied that there was a triable issue."

9. In this case, can it be said that the explanation for delay in entering appearance was reasonable and are there triable issues?

10. On the first point, the advocate for the Respondent has raised the issue that the Supporting Affidavit to the Application for setting aside was sworn by the advocate for the Appellant and having descended to the arena of

contested facts, the issues deponed to were of no use to the Appellant. With respect to the advocate for the Appellant, I have to agree with that proposition. In that Affidavit the learned advocate makes reference to an unnamed "***broker"*** unnamed "***insurers"*** and an unnamed "***court clerk"*** to whom the delay should be attributed. It is also unclear what ***"communication problems***" existed between the ***"broker"*** and ***"insurers"*** and in the end, the explanation was vague, hollow and wholly inadequate. Granted, one Fredrick Malinda, a court clerk also swore an affidavit on 29.1.2004 attributing part of the delay to loss of a file in his office. However, that explanation is outrageous because he states that he misplaced the file on 26.6.2002 and he ***"continued to trace it until [he] got it on 10.1.2004."*** The period of close to 2 years that he took to ***"trace"*** the file reeks of clear indolence by the Appellant as stated by the learned trial magistrate and the attempts by the advocate and his clerk to wish the matter away cannot be countenanced by this court.

11. But having so said, are there triable issues disclosed in the draft Statement of Defence? In that document, the Appellant denied being the Respondent's employer; denied having any contact with him; denied any negligence on its part but in the alternative averred that as regards the accident leading to the suit, the Respondent was solely and/or substantially, the negligent party. In his evidence before the trial magistrate, the Respondent gave evidence to the effect that he was injured on his right foot on 25.3. 2002 while working as a loader with the Appellant company and he attributed the negligence thereof to the Appellant, because he was not provided with appropriate working appliances. To my mind, those facts are uncontested and once the Appellant denied them, no triable issue has been raised and the belated attempt at partly or wholly attributing negligence on the Respondent only confirms that fact.

12. I am clear in my mind, that there is nothing to be said of the Appellant's case on all fronts and the Appeal is without merit and is dismissed with costs to the Respondent.

13. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19th** day of **March 2010.**

H.P.G. WAWERU

JUDGE