



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 190 of 2003

CMC MOTORS GROUP LTD.....APPELLANT

VERSUS

GLORY CAR HIRE TOURS & SAFARIS LTD.....RESPONDENT

JUDGMENT

This is an appeal by CMC Motors Group Limited (hereinafter “the appellant”) the defendant in the original action, from the ruling of the Senior Principal Magistrate of Mombasa whereby the Learned Magistrate dismissed the appellant’s application to set aside a default judgment. The said application was brought under the provisions of Order IXA Rule 9 and 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The former empowers the court to set aside or vary a default judgment decree or order upon such terms as are just. As the appellant’s application clearly came under the purview of the said rule the inherent powers of the court should not have been invoked.

The appellant’s application arose from a judgment which had been entered against it in default of appearance and defence. The appellant had been served through its Mombasa Branch Office on 15th July 2003 which office then consulted its Nairobi office in order to be able to instruct counsel. The Nairobi office delayed in giving instructions and by the time instructions were received on 29th July 2003, the court file could not be traced and before appearance could be entered, the default judgment was entered on 6th August 2003. The appellant argued before the Learned Magistrate that the delay in making the application was not inordinate and that the same had been adequately explained. Besides, it contended that its defence raised bona fide triable issues as disclosed in the draft defence annexed to the application. Those arguments were in consonance with the averments contained in the affidavits filed in support of the said application.

The application was opposed and in that regard one E. Muriu Kamau counsel for the plaintiff filed a replying affidavit on 12th September 2003. Learned counsel discredited the reason for referring the matter to Nairobi by the appellant’s Mombasa office and contended that the appellants’ defence had no merit. In the premises, it was contended for the plaintiff that the appellant had failed to establish any ground to merit setting aside the default judgment.

The Learned Senior Principal Magistrate considered counsel’s submission and expressed himself as follows:-

“The defendant/applicant acknowledges having received the summons and copy of the plaint. The defendant/applicant is not an individual. It is a limited liability company. It cannot be said to

be ignorant of the Civil Procedure Rules. It ignored the court process without any justifiable cause.

I find no merit in the defendant's application."

The Learned Senior Principal Magistrate then, dismissed the appellant's application to set aside the default judgment and allowed the plaintiff to proceed with execution of the decree. That is the decision against which the appellant has appealed and has set out 5 grounds of appeal as follows:-

- 1) That the Learned trial Magistrate erred in both fact and in law in not appreciating the basic principles applicable in setting aside judgment.
- 2) That the Learned trial Magistrate erred in both fact and law in failing to appreciate that the reasons given by the appellant for failure to file appearance within time were reasonable and good enough to persuade the trial court to set aside the aforesaid ex-parte judgment.
- 3) That the Learned trial Magistrate erred both in fact and in law in failing to note that the appellant has a good defence which raises serious triable issues.
- 4) That the Learned trial Magistrate erred both in fact and in law in exercising his discretion and dismissing the appellant's application.
- 5) That the Learned trial Magistrate erred both in law and in fact in failing to appreciate the need to determine matters on merit instead of sticking unduly to procedural technicalities.

Counsel for the appellant argued those grounds in three clusters. Grounds 1, 2 and 5 were argued together and grounds 3 and 4 separately. In a nutshell the first cluster deals with the delay involved and the argument is that the same was not inordinate and was adequately explained factors which the Learned Senior Principal Magistrate did not sufficiently appreciate. The 3rd cluster i.e. ground 3 attacks the trial Magistrate's silence on whether the proposed defence raises serious triable issues and the last cluster is on the trial Magistrate's improper exercise of discretion. That cluster in effect is deduced from the first and second cluster. Reliance was placed upon various cases to buttress the appellant's position.

Counsel for the respondent on his part contended that there is no doubt that the judgment sought to be set aside was a regular one and the refusal to set the same aside by the Learned Principal Magistrate was a proper exercise of discretion. In his view the question as to whether the proposed defence raises bona fide triable issues was considered by the Learned Senior Principal Magistrate and decided in favour of the respondent. Counsel therefore urged that the appeal be dismissed.

I have considered the appeal, the submissions of counsel and the authorities cited. I must state from the outset that this appeal is against the decision of the Learned Senior Principal Magistrate who no doubt was exercising his discretion given him under the provisions of Order IXA Rule 9 and 10 of the Civil Procedure Rules. That being the case, I cannot interfere with the Learned Magistrate's exercise of such discretion unless it can be shown that the Learned Magistrate erred in principle or that his decision is plainly wrong. Otherwise that discretion is unfettered, the main concern of the court being to do justice to the parties (See **Patel – v – E. A Cargo Handling Services Ltd [1974] EA 75**).

In considering an application to set aside an ex parte judgment **"the nature of the action should be considered, the defence, if one has been brought to the notice of the court, however irregularly, should be considered the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court."** (See **Sebei District Administration – v – Gasyali and Others [1968] EA 300** cited with approval in **Keys Investments Limited – v – Thrift Homes Limited [Nairobi C.A. No. 210 of 2002 (UR)**).

In **Shah – v – Mbogo [1969] EA 116** it was held that 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 is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

The record of the Senior Principal Magistrate does not show that those principles were fully brought to his attention by both counsels who appeared before him. I am afraid that the Learned Magistrate's own ruling does not disclose a proper appreciation of those principles. The Learned Magistrate found that the appellant as a company cannot be said to be ignorant of the Civil Procedure Rules and ignored the court process without justifiable cause. With all due respect to the Learned Magistrate, the appellant did not claim to be ignorant of the Civil Procedure Rules. That finding had no foundation in what was before the Learned Magistrate. The applicant explained the cause of delay: It had to consult with its Nairobi office and by the time Nairobi responded, its counsel could not trace the court file. Its counsel swore an affidavit to that effect. The record does not reflect that the respondent contested the position given by the appellant's counsel in his affidavit. There is therefore in my view no basis for rejecting the explanation for the delay. In any event the delay involved was of less than one month. The appellant cannot be said to have deliberately sought to obstruct or delay the course of justice.

The appellant submitted before the Learned Magistrate that the defence raises viable issues. The record shows that although he recorded that he had considered counsel's submissions he made no specific finding on whether indeed the proposed defence raises bona fide triable issues. It does appear as if the Learned Magistrate was more concerned with the appellant's explanation for the delay which he found wanting rather than whether the proposed defence raises bona fide triable issues. I have perused the proposed defence and am of the view that the same raises issues relating to the property in the subject motor vehicle and whether and when the same passed from the appellant to the respondent; who has possession and on what terms? What are the terms of the contract of sale of the subject motor vehicle and who is or is not in breach of the said terms or any of them? and so forth.

At the hearing of the application to set aside the ex parte judgment a conclusive finding as to whether or not the defence would succeed was not necessary. All the appellant needed to do was to demonstrate that its proposed defence raised bona fide triable issues and in my view it did so.

The record does not also show that the Learned Magistrate considered whether the respondent could not be compensated by costs for any delay that would have been occasioned by setting aside the ex parte judgment. He does not seem to have been alive to the principle that to deny a subject a hearing should be the last resort of a court.

I am therefore of the opinion that the Learned Magistrate appears to have exercised his discretion improperly. Had he considered all the principles discussed above, I have no doubt that he would have come to a different conclusion. I find that the Learned Magistrate erred in principle and arrived at a decision that I find manifestly wrong. I therefore allow this appeal and set aside the ex parte judgment entered against the appellant herein.

The appellant is allowed to file and serve its defence within 14 days from the date hereof.

The appellant shall have the costs of the appeal.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Wameyo H/B for Makone for the appellant.

F. AZANGALALA

JUDGE

25TH APRIL 2008