



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 981 OF 2003

LAL CHAND SHAH 1ST PLAINTIFF

RAMBHAH SHAH 2ND PLAINTIFF

VERSUS

KENINDIA ASSURANCE

COMPANY LIMITED DEFENDANT

RULING

The application dated 19th November 2003 brought under Order 1XA Rule 10, 11 and O 21 Rule 22 of the Civil Procedure Rules and S 3A of the Civil Procedure Act.

It seeks a stay of execution pending the determination of the application and further seeks to set aside an exparte judgment entered against the defendant/applicant on 5th November 2003 and all consequential orders and that the defence filed on 7th November, 2003 be duly deemed filed and served.

The application is supported by an affidavit of one Emily Omondi sworn on 19th November, 2003 and the grounds appearing in the body of the application. The grounds include that at the time judgment was entered a defence had been filed and that the defence does raise serious triable issues and that the plaintiff is not likely to be prejudiced by the setting aside of the exparte judgment.

The respondents grounds are set out in the affidavit of Peter Mwendwa Maloza sworn on 12th January 2004. Two of the grounds which I wish to single out is the assertion by the respondent in para 3 of the affidavit that the defendant was served with the summons on 1st October 2003 and that the defendant did not enter appearance at the expiry of 15 days and only entered appearance on 23rd October, 2003.

Firstly as regards service of summons the same was on a clerk of the defendant company. The service violated Order v rule 2 in that service on a corporation ought in the first place to be on the secretary, director or other principal officers of the corporation.

A clerk is not any of these officials in the defendant company. I therefore hold that service was defective for the reason.

Turning to the issue of appearance, Order IX rule 1 provides that a defendant may appear any time before final judgment and file and serve the memorandum within 7 days – as per Order IX rule 2 (3).

The memorandum had been served on the plaintiff's advocate as per Ex EOB on 3rd November, 2003 two days before the exparte judgment was entered against the defendant although according to the court stamp the defence was filed on 7th November 2003 and served on 18th October, 2003.

It is therefore clear that even on this ground there was appearance 2 days before the judgment was entered. For this reason I hold that the judgment was irregular (in fact and this is not a credit to the court registry because there is no record of the memorandum and it had to be exhibited by the applicant in order to unravel the mystery.

There was also purported entry of a declaratory judgment by the registry on 3rd November, 2003 the same day the Memorandum of appearance was served on the plaintiff's advocate. There is a purported cancellation and a subsequent declaratory judgment entered on 5th November, 2003.

These judgments are patently irregular and constitute a very bad reflection on the court officials especially the executive office of the registry. All these is clear from the court record itself.

Again there was no defence on the court record except that exhibited by the applicants.

Finally the defence filed raises several triable issues.

For the two reasons indicated above I find and hold that the ex parte judgment entered on 5th November 2003 is irregular. In view of this finding this court would like to save its valuable time in not going into the other points raised because they are not capable of altering the final verdict concerning the fate of the judgment. Under Order IXA the discretion of this court is unfettered however in order not to lose the bearings the case of PATEL v EA CARGO HANDLING SERVICES [1974] EA 75 comes in handy.

Duffus P had this to say:

“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. I agree that where it is a regular judgment as is the case here the court will not ... set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view a defence that must succeed, it means as Sheridan J put it ‘a triable defence’, that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Ringera J in MWALA v KENYA BUREAU OF STANDARDS EA LR [2001] 1 EA 148 (CAT) found a lot of wisdom in the words of Ainley J as adopted by Sheridan J in SIBEI DISTRICT ADMINISTRATION v GASYALI 1968 EA 300:-

“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.”

Mr Justice Ringera in his characteristic clarity added:-

“To all that I should add my own views that a distinction is to be drawn between a regular and an irregular ex parte judgment. Where the judgment sought to be set aside is a regular one, then all the above considerations as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito iustitiae for a court should never countenance an irregular judgment on its record.”

In all humility it must always be remembered that all the rules of procedure have one noble aim in our system of justice and that is to ensure fair play in the proceedings and to ensure that the rules of natural justice are applied in the pursuit of justice and above all to assist the courts in ensuring that there is equality of hearing to all the parties appearing before them.

Denying the subject an opportunity to articulate his defence would be an affront to this priceless principle in the administration of justice. With the above beacons of light, I have no hesitation in holding that the exparte judgment obtained in this matter is an irregular one in that there was no proper service and also appearance had been filed before its entry and therefore ought to be set aside without further ado, as a matter of right “ex debito justiacie”.

It is accordingly set aside. Ordinarily thrown away costs ought to be awarded but in the special circumstances described above including a very shadowy role of the court officials including the missing documents, I order that costs occasioned be costs in the cause. Defence on record to be deemed filed and served.

DATED and delivered at Nairobi this 25th day of March, 2004.

J G NYAMU

JUDGE

Editorial Note

CIVIL PROCEDURE

- Setting aside exparte judgment
- Principles for setting aside
x where judgment
irregular
x where judgment
regular
- Defence on
record not to be ignored
- Case reviewed