



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI
CIVIL CASE 1237 OF 2002

FURSYS (K) LIMITED..... PLAINTIFF

-VERSUS-

SYSTEMS INTERGATED

LIMITED T/A SYMPHONY..... DEFENDANT

RULING

The application dated 27th February, 2004 and now before the court seeks several orders, the main one of which is that the ex parte judgment entered herein on 5th February, 2004 in favour of the plaintiff and all the consequential orders be set aside. It is brought by Chamber Summons under O.IXA Rules 10 and 11 of the Civil Procedure Rules, S3A of the Civil Procedure Act and all other enabling provisions of the law.

The main grounds upon which the application is based are that the ex parte judgment sought to be enforced herein is irregular having been obtained during the pendency of a binding agreement between the parties through their respective advocates, by which the time limited under the Civil Procedure Rules requiring the defendant to file its statement of defence was to start running upon the plaintiff duly notifying the defendant on record. At the time of the entry of the said ex parte judgment, the defendant's advocates on record had not been expressly or otherwise notified to file their statement of defence within the period agreed upon. These grounds are more than adequately amplified in the supporting affidavit of SHIRAZGULAMHUSEIN MAGAN, the advocate having the personal conduct of this matter on behalf of the defendant.

The application is opposed and MR. KIM BYUNG TAE, the managing director of the plaintiff company has filed a replying affidavit. His response to the applicant's main ground of application is that he knows that there was no agreement between him and the defendant not to file its defence and that he has also been informed by his advocates on record, which information he verily believes to be true, that even if there was such an agreement between the plaintiff's previous advocates and the defendant's advocates, the same would be illegal as its purpose was to defeat the provisions of statute. Furthermore, such agreements can only be on a without prejudice basis and purely for negotiation purposes. Negotiations having failed due to insincerity on the part of the defendant, the latter ought to have filed its defence before the expiry of the stipulated time.

After reading the application together with its supporting documents and the respondent's replying affidavit, and having heard the rival submissions of Mr. Magan for the applicant and Mr. Odhoch for the respondent, this court is of the humble view that the success or otherwise of this application depends on

whether the judgment sought to be set aside was regular or irregular. If it was irregular, it ought to be set aside ex debito justitiae, together with all the consequential orders. But if it was regular, the court has a discretion to set it aside if the defendant has demonstrated that it has some justifiable cause for not having filed the defence in time and that it has a reasonable defence to the action, which raises some triable issues.

The plaint by which the suit was commenced is dated 10th December, 2002 and was filed in court on the same date by M/s Mohammed & Muigai, advocates for the plaintiffs. By a memorandum of appearance dated and filed in court on 19th June, 2003, M/s Mohammed Madhani & Co., advocates, entered appearance for the defendants. On 27th June, 2003, the consultant in the firm of advocates for the defendant, Mr. S.G. Magan, wrote to the plaintiff's advocates along the following lines-

"Dear Sirs,

MILIMANI HCCC 1237 OF 2002 FURSYS (K) LIMITED v. SYSTEMS INTEGRATED LIMITED T/A SYMPHONY

We refer to the telephonic conversation the writer had with your Mr. Majanja. We confirm that you agreed to extend time for filing defence herein by fifteen (15) days from the date of notification by you to us that the same be filed.

The purpose of this extension is to enable the parties to carry out without prejudice negotiations for an amicable settlement of this matter.

Yours faithfully, MOHAMED MADHANI & Co.

S.G. MAGAN."

M/s Mohammed & Muigai, advocates for the plaintiffs, responded by a letter dated 30th June, 2003 which was marked for the attention of Mr. Magan and in which they said-

"Your letter dated 27th June, 2003 is acknowledged and contents therein confirmed.

We now await your response to our letter of 23rd June, 2003

Yours faithfully,

MOHAMMED & MUIGAI

DAVID MAJANJA

"On the same date, M/s Mohamed Madhani & Co. wrote to Mohammed & Muigai acknowledging receipt of the latter's letter reference No. F006/004/L/2000M of 23rd June, 2003. They then said they would refer the said letter to their clients and would revert to the plaintiff's advocates as soon as they had instructions in the matter.

Pausing there for a moment, it is clear that as at that time, the plaintiff's advocates indulged the defendants' advocates to forego the filing of the latter's defence pending negotiations, on a without prejudice basis, for a settlement. If the negotiations failed for whatever reason, the plaintiff's advocates were at liberty to request the defendant's advocates to file their defence within 15 days of a date to be specified.

On 23rd January, 2004 M/s Aloo & Company, advocates, filed a notice of change of advocates dated 19th January, 2004 by which they came on record as advocates for the plaintiffs in place of M/s Mohammed & Muigai, advocates. From the bundle of documents filed in court, copies of this notice would seem to have

been received by M/s Mohammed & Muigai on 5th February, 2004 and by M/s Mohamed Madhani & Co. on a date in February, 2004, which date is not very clear.

Meanwhile, on 19th January, 2004, M/s Aloo & Co., the plaintiff's new advocates, signed a request for judgment which request was filed in court on 3rd February, 2004. It is noteworthy that their Notice of change of advocates was also dated 19th January, 2004. This means only one thing - that immediately they were instructed by the plaintiffs, the first act of the plaintiff's new advocates was to draw a notice of change of advocates simultaneously with a request for judgment. The latter was accordingly granted. The 15 days within which to file a defence after notification went with the wind. In my view, the plaintiff was bound by the act of its erstwhile advocates, who were its agents, in agreeing to negotiate with the advocates for the defendants towards an amicable settlement on a without prejudice basis. In those circumstances, it was neither fair nor proper for the new advocates to ambush the defendant's advocates with a request for judgment not only without giving them 15 days notice within which to file their defence, but also without any warning at all. A court of equity, such as this one, is bound to frown upon such conduct as it amounts to the advocates for the plaintiff in effect leading those for the defendant up the garden path.

Responding to this state of affairs, the plaintiff's managing director states in paragraph 12 of his replying affidavit that an agreement such as the one entered into between the former advocates for the plaintiff and those for the defendants is illegal as its purpose was to defeat the provisions of statute. With profound respect, that is not the case. The matter at hand is governed by the Civil Procedure Rules, and it is well settled that rules are the handmaids of the law. O.XLIX r. 6 states-

"The time for delivering, amending or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or of their advocates without application to the court" That is what the parties' advocates did in this case, and that is why the plaintiff was bound. This was not illegal as alleged or at all.

The application for judgment was therefore premature. Purely obiter, if the negotiations had been successful, it is highly unlikely that the plaintiff would have claimed that the settlement was illegal as being contrary to statute. This court therefore finds that the judgment obtained herein was irregular.

If the court is wrong in so finding, there is a preponderance of case law to the effect that in an application to set aside an ex parte judgment, there are no limits or restrictions on the judge's discretion.

That discretion is totally unfettered except that it should be exercised judicially, and that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

In JESSE KIMANI v. MCCONNELL [1966] E.A. 547 it was held that some of the matters to be considered in such applications are the facts and circumstances, both prior and subsequent and all their respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment upon terms to be imposed. And in JAMNADAS SODHA v. GORDANDAS HEMRAJ (1952) 7 U.L.R. 11, the court was of the view that 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... and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. These principles have been upheld in subsequent cases including MAGUNGA GENERAL STORES v. PEPCO DISTRIBUTORS LTD. [1987] 2 KAR, and SHAH v. MBOGO [1967] E.A. 116 to which this court was referred.

Mr. Odhoch for the plaintiff/respondent argued that the proposed defence is a sham. However, a glance at paragraph 6 of that proposed defence shows that the same raises such triable issues as did the

plaintiff supply all the goods agreed upon? Were the goods supplied defective and unfit for the purpose for which they were ordered, or, put conversely, were the goods delivered reasonably fit for their purpose? Did the plaintiff install the goods as provided for in the contract? These issues arise in addition to those of a counterclaim and set off which are also pleaded.

Mr. Odhoch had some unkind words over Mr. Magan's affidavit saying that the same was fatally defective as it was not dated, and that it also contained very contentious issues. With due respect to Mr. Odhoch, a close look at Mr. Magan's affidavit discloses that it is very well guarded. He deposes to matters which he himself did as a counsel for the defendant and which the defendant would not personally know about. With regard to the date, the affidavit is clearly undated. To that extent, it offends s.5 of the Oaths and Statutory Declarations Act. However, Mr. Magan showed the court a copy of the affidavit in his file which was duly dated. This, in my view, points to some inadvertence in the filing of the undated affidavits while retaining the dated one(s). It is, in my view, an irregularity which is curable under O.XVIII rule 7.

I therefore order that the affidavit in question be and is hereby received under the said order.

In total, being of the persuasion that the judgment which is the subject matter of this application was obtained irregularly, the same is hereby set aside *ex debito justitiae* together with all the consequential orders thereon. Even if this view is mistaken and it turns out that the judgment was regular, there was justification for non-filing of the defence on time, and the proposed defence raises triable issues. The defendant is accordingly hereby granted leave to defend. In either event, the defendant is granted 15 (fifteen) days from today to file and serve its proposed defence.

While canvassing the application orally, Mr. Odhoch said that even if the court allows the defendants to file the proposed defence, the plaintiffs will move for summary judgment. It was not clear whether this was said by way of a threat or a promise. In either case, the plaintiff is at liberty to apply. In the meantime, seeing that it was the plaintiff's premature request for judgment which has precipitated the irregular state of affairs, the plaintiffs will bear the costs of this application. It is so ordered.

Dated and delivered at Nairobi this 27th day of April 2004

L. NJAGI

JUDGE