



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 29 OF 1994

ARAPAN WOOD & EQUIPMENT

SUPPLIES LTD.....PLAINTIFF

VERSUS

APPOLLO INSURANCE CO. LTD.....DEFENDANT

RULING

This is the Defendants application for orders that the Judgment entered against defendant on 20.5.2002 and the order dated 6.5.2002 dismissing the defendants counter claim be set aside on the ground that failure to attend court was as a result of accidental, inadvertent or excusable mistake on the part of defendants counsel.

The suit was fixed for hearing for 6th and 7th may, 2002. The defendants counsel admits that he was served with a hearing notice on 20.11.2002. His explanation is that failure to attend court on 6.5.2002 was due to the fact that he had inadvertently diaries the matter for 7.5.2002 only.

Defendants counsel did not attend the hearing of the suit on 6.5.2002. The defendants counterclaim was dismissed for no attendance and plaintiff proceeded with the suit. Judgment was given in favour of the plaintiff on 2.5.2002.

Plaintiffs counsel deposes that defendants failure to attend on the hearing date was due to willful inaction and not due to inadvertent mistake.

The principles applicable in an application for setting aside exparte judgment are set out in the case of Pithon Waweru Masna versus Thuka Mugiria (1982-1988) !KAR 171. The applicants counsel emphasized the holding in Shabir Din versus Ram Parkash Anand (1955) 22 EACA 48 that the mistake or misunderstanding of plaintiffs legal adviser, even though negligent may be accepted as a proper ground for setting aside exparte judgment.

This court has unfettered discretion to make any order as it may deem just to avoid injustice. An in exercising its wide discretion the court considers all the relevant circumstances of the case before it.

I have considered the supporting affidavit of Mr. Donald B Kipkorir and his supplementary affidavit. I have also considered the grounds of opposition filed by plaintiff, and plaintiffs counsels replying affidavit.

Firstly, this is a case where the defendants advocate were served with a hearing notice correctly stating the two dates when suit would be heard..

The hearing notice was served in good time – 5 months before the hearing date. So, the dismissal of the

defendants counterclaim and the entry of judgment against defendant were regular. In those circumstances applicant should give a plausible reason for non attendance and also a show that it has a good defence or counter claim on the merits.

This is a case where upon service, defendants advocates conveyed the correct hearing dates to the defendant(their client). But defendants advocate explains that they recorded the hearing date in the Diary as 7.5.2002 thus inadvertently omitting the first day – 6.5.2002. The defendants advocates had in their clients file a hearing notice containing the two hearing dates. So, this is a case where the defendants advocates had two documents containing the correct hearing dates.

But there is no explanation as to what happened to the defendant on 6.5.2002 Did the defendants representative talk to defendants advocates before 6.5.2002? There is no affidavit from a representative of the defendant that defendant was interested in attending court.

If defendants advocate had made an error in diarising the suit defendant could have corrected him as defendant had the correct hearing dates.

It appears from Mr. Kipkorir's affidavit that even when he found that the suit was not listed for hearing on 7.5.2002 he took no action to find out what had happened. He did not send his court clerk to the High Court Registry to find out why the suit was not listed or contact plaintiffs counsel. According to Mr. Kipkorir, he became aware of the decree in this case on 10.7.2002 when he was served with notice of taxation He did not however take any positive action to get the record. He did not for instance go to the Registry and apply for authority to peruse the court file. He did not pay for handwritten proceedings. It is apparent that both on 7.5.2002 defendants and on 16.7.2002 counsel did not take any reasonable steps to peruse the court record. Had he taken any reasonable steps he would have discovered that the suit was infact heard on 6.5.2002.

The present application was filed on 19.9.2002 – over 2 months since defendants counsel became aware that judgment had already been entered against the defendant.

Lastly, the court heard the evidence. Plaintiffs claim was based on a building contract. It was a case depended on documents. The Architects certificates no 1, 2, 3, were produced as exhibit (4, 5, 6) Architects certificate no. 3 (Ex 6) particularly showed that plaintiff had performed 95% of the works and was entitled to payment.

Invoices regarding extra works were produced. The Architects certificates were issued by defendants own Architect. Defendant has not shown that it has a good defence on the merits or a good counter claim on merits. In particular, defendant has not show why the documents cannot be relied on or that there are other counter documents.

In the circumstances of this case, the explanation given by defendants counsel is not plausible. Defendant has not shown that it intended all along to defend the suit and prosecute the counterclaim and that it has a good defence on the merits and good counter claim.

In the circumstance, it would be unjust to plaintiff to exercise courts discretion in favour of defendant.

I dismiss the application with costs.

E. M. Githinji

Judge

11.2.2003

Mr. Issa absent

Mr. Kithinji holding brief for Mr. Mboroki present