IN THE REPUBLIC OF KENYA

IN THE HIGH OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CIVIL CASE NO.223 OF 2002

KABIRO NDAIGA & CO. ADVOCATES.....PLAINTIFF

V E R S U S

KENYA TEA DEVELOPMENT AGENCY LTD .....DEFENDANT

RULING

This is an application by chamber summons under O.9A rr 10 & 11 and 021 r 22 of the Civil Procedure rules for orders that exparte judgement entered on the 19th day of March 2002 in default of defence and all consequential orders thereon be set aside unconditionally together with other prayers.

The main reason in support of the application is contained in the supporting affidavit of JEREMY M. NJENGA where he says that defence was filed on 13-3-02 but on the same day application for default judgment for failure to file defence in time was filed and six days later on 19-3-2001 ex-parte default judgment was entered. It is the contention of Mr. Njenga learned counsel for the defendant / applicant that judgment ought not to have been entered as defence was already filed but the decree holder plaintiff says that defence on the file was filed out of time and needed leave of court to be acceptable. Secondly that the defence which was not served on the firm of plaintiff`s lawyers in time was also late. It is the submission of Mr. Mutungi learned counsel for defendant that the twin defaults are fatal and without leave of court the ex-parte decree must subsist.

Ord 9A rule 10 says:-

> "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 and are just".

I think here the court always has a discretion but before I discuss this I think it is pertinent to adopt a procedural cause that is systematic. First, where there is a late defence already entered the court may not properly just ignore it because the party against whom it is filed late may still accept it and waive any rejection of it.

If the party complains or wants to enter judgment he ought to make a twin application to strike out the late defence and ask for entry of judgment simultaneously.

The commentary in the Supreme Court practice 1995 on a relevant (order 19 r 7 RSC) says:-

> "A defence served after expiration of the prescribed time but before judgment has been given cannot be disregarded and will generally prevent the plaintiff from entering judgment, even

> though it is not served until after the plaintiff has served his summons …….for judgment under this rule ……but the defendant may be ordered to pay costs".

A default judgment is not a judgment on the merits and is a consequence of a failure to comply with a rule of procedure. This is why on an application to set aside the court expects applicant to expose the merits of the case so as to enable the court to set its side of the case. The principle was restated by Harris J in Shah Vs Mbogo (1967) EA 116 and also by LORD ATKIN LJ earlier in EVANS V BATRTHAM (1937) AC 437 thus:-

> "The principle obviously is that unless and until the court has pronounced judgment upon the merit or by consent it is to have the power to revoke the expression of its coercive power when that has only been obtained by a failure to follow any of the rules of procedure".

However the application to set aside must be made promptly. I have looked at the copy of late defence filed herein and I see it raises triable issues of law and fact and was filed without too much delay being filed on 4-4-2002 against judgment signed exparte on 19-3-2002. Harris J. said in Shah v Mbogo 1967 EA 116 that :-

> "The principles governing the exercise of the courts discretion to set aside judgment obtained ex-parte. This discretion 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".

Considering all these points I think this is a proper case where I may exercise my discretion to allow the application and I so order but the defendant has not really stated the reasons that occasioned his delay to file defence in time. Nevertheless as it was said I think the judgment might no have been regular judgment but this was not adequately argued before me with particular reference to the facts of this case and though the judgment in MAGON V OTTOMAN BANK 1968 EA 156 was cited the facts there are distinct from the case here. I therefore set aside the ex parte judgment, but the defendant shall pay costs of the judgment and of this application to the plaintiff.

Delivered at Nairobi this 222nd day of April 2002

A. I. HAYANGA

JUDGE

Read to Mrs. Angulu