



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.2617 OF 1997

TRANS-NATIONAL BANK LTDPLAINTIFF

V E R S U S

RISPER ADHIAMBO OWINODEFENDANT

R U L I N G

This is an application by way of Notice of Motion made under O.35 r 10, O.50 r17, O.9B r8, O.6A rr.3 and 8 and S.63(e) of the Civil Procedure Rules and Act respectively for orders that this court do stay decree issued on 29-8-2000 pending the determination of the application and to set aside the summary judgment made on 11-12-98 and all consequential orders, and lastly leave to amend the defence.

The supporting affidavit by Risper Adhiambo Owino sworn on 30-1-2002 shows that the applicant was adjudged to pay some money particularly as set out in the plaint by the plaintiff dated 26-5-98 being a claim of KSh.4,643,591.20 as money lent to the plaintiff and by Notice of Motion under O.35 rules 1, and 2 of the Civil Procedure Rules the court gave judgment to the plaintiff for the claimed amount. On 11-12-98 the court found that there were no triable issues raised by the defendant in her defence so no cause shown for leave to defend. In her affidavit the applicant now says that this judgment was given ex-parte because the advocate on record did not exercise diligence to apply in good time to set the judgment aside. She says she has made various payments in the amount of KShs.1,700,000/= and also that at one point the plaintiff accepted in payment BM W KAD 316X which fetched KShs.700,000/=. That the original loan was infact KShs.1,500,000/=. She had discussion with plaintiff which she relied on.

In opposition to the application the respondents` bank legal and resources manager in affidavit dated 11-02-03 says the application under O.35 was heard inter-parties and that the applicant has filed another application cognate to the present one which is still pending and that the application being filed 4 years late is guilty of inordinate delay.

Basically summary judgment is controlled by O.35 of Civil Procedure Rule and courts have powers as limited by the wordings of that order. The purpose of the order to enable plaintiff to obtain a quick judgment where there is plainly no defence to the claim. Under that order the plaintiff obtained judgment. Now the defendant says that the judgment was given ex-parte.

Under O.9B r8 it is provided that where judgment has been entered in default of attendance the court can set aside or vary that judgment upon such term as the court sees fit. Was this ex-parte judgment? On that day 10-12-98 counsel for the applicant applied for adjournment through a brief holder who said:-

“Mrs. Odero is bereaved. She has gone to the mortuary along with other relatives to collect the body of her bereaved cousin.”

Counsel for the plaintiff replied:-

“I oppose the application. On 27-11-98 when this application came up for hearing. Mrs. Odero sought adjournment and I indulged her. She had then not filed grounds of opposition or replying affidavit. I have to-day been served with grounds of opposition filed to-day out of time and which are liable to be struck off. So Mrs. Odero would in any event have no audience. The alleged deceased is not an immediate family member. Mrs. Kimani was asked to hold brief by Mrs. Odero`s Clerk just outside these Chambers in my presence. Mrs. Odero has not communicated to me .”

As this application was refused the matter proceeded without Mrs. Odero and Mrs. Kimani naturally having been given limited instructions outside the Chambers could have not gone on. So Mr. Lubulela for applicant proceeded without opposition. An ex-parte application has been described as “one brought for the benefit of one party only without Notice or challenge by an adverse party.” There was no challenge by an adverse party.

Under O.9B r8 suit could be dismissed or judgment entered by the court where:-

- (i) Neither party attends on the hearing day
- (ii) Where only plaintiff attends and notice of hearing was served
- (iii) Where only defendant attends and denies the claim

In such dismissals the court on application can set aside the judgment. In the Indian provision which is similar to our O.9B it is only when a decree is passed ex-parte that an application is maintainable under this rule and a decree is passed ex-parte only when defendant did not appear when the suit was called for hearing when the defendant did not appear for a sufficient cause.

Appearance means appearance through a pleader or personally and in Indian provision a party is deemed to have appeared on the day of the suit if he does so through a plead. Appearance of a party by a plead. Is appearance by a pleader duly instructed and able to answer all questions relating to the suit hence a pleader who comes and says he has not got full instructions and he cannot go on with the suit or where a pleader has no instructions other than to apply for adjournment and on the adjournment being refused withdrawn from the suit stating that he has no further instructions to go on with the suitsuch pleader is not duly instructed and able to answer all material questions relating to the suit.

I find that the ruling was made ex-parte. Since the lawyer who held the brief for Mrs. Odero had only limited instructions .

I have read the attached purposed amended defence. It raises issues of fact whether the defendant has paid the claimed amount and whether the acceptance of BMW KAD 316X was as a result of agreement and between the parties.

The principle of application is contained in the Harris J`s decision in the case of SHAH v MBOGO & ANO. [1967] EA 116 wherein he said that this jurisdiction is discretionary and is exercised when the court exercises its powers to set aside ex-parte judgment it is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who had deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice.

In this application there is evidence of delay but there was evidence that the file actually got misplaced and indeed the respondents also were obstructed in making their application for summary judgment. Otherwise I do not think the application is to delay justice.

There was the prayer also of leave to amend the defence whose copy was attached to the application. Normally under the Civil Procedure Rules amendment to pleadings is not restrictive O.6A r.3 provides:-

- 3(1) Subject to O.1 ee9 & 10, O.23 rr 3, 4, 5 & 7 and the following provisions of this rule, the court may at any stage of the proceedings on such terms as to costs or otherwise as may be just and in

such manner as it may direct allow any party to amend his pleadings.

This discretion the court exercises notwithstanding that the period of limitation has expired, or after the certain considerations or that effect of such amendment will be to substitute a new party, or that its effect will be to add or substitute a new cause of action.

The purpose of amendment is to enable parties to ventilate their cases sufficiently to enable the court to determine the real question between the parties.

But the court will not allow amendment where there is great injustice to the other party which costs cannot compensate. See *EASTERN BAKERY v CASTELLO* [1958] EA 461

For these reasons I am persuaded to allow the application. I set aside the ex-parte ruling herein and I also allow the amended defence to be filed in 14 days of this order giving the plaintiff leave to file reply if necessary within 14 days of service upon them of the amended defence.

I also order that the defendant pays cost of the application for amendment to the applicant but cost of application for summary judgment to be cost in the cause.

Read in Nairobi this 9th day of May 2003

A. I. HAYANGA

J U D G E

Read to Mr. Ondieki