Chomba v Kabutha & another (Civil Case 1622 of 1998)
[2001] KEHC 171 (KLR) (Civ) (11 June 2001) (Ruling)

LAZARUS CHOMBA vs ZAKAYO GITONGA KABUTHA & ANOTHER[2001] eKLR

Neutral citation: [2001] KEHC 171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 1622 OF 1998

ARM VISRAM, J

JUNE 11, 2001

BETWEEN

LAZARUS CHOMBA ..... PLAINTIFF

AND

ZAKAYO GITONGA KABUTHA & ANOTHER & ANOTHER & ANOTHER ..... DEFENDANT

RULING

1. This is an application by the 2nd Defendant to set aside an ex parte judgment. Mr. Mwangi for the Plaintiff opposed the application on the grounds that no reasons for the application were given and that the granting of the application would be futile since no application for leave to file defence out of time had been made. He also argued that the application had been made after an inordinate delay and in any event, the same has not been prosecuted expeditiously. Finally, Mr. Mwangi sought that the defence which had been filed out of time without leave should be expunged from the court's record.

2. The power of this court to set aside an ex parte judgment is donated by order IXA rule 10 of the civil Procedure Rules (hereinafter referred to as "the Rules". That rule provides as follows:-

> "(O. IXA r.) 10 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 as are just."

3. The power of the court to set aside or vary an exparte judgment has been the subject of important judicial consideration and I was disappointed by Counsel who argued this application that they did not refer to court to any case law. I had an opportunity to consider this question in Tabaki Freight Services

International Ltd. V. Margaret Mwihaki Kiarie NAIROBI HCCC NO. 2027 of 1997 (Unreported) and I can do no better that reproduce what I said there.

> " The court's power to set aside an ex parte judgment is very wide and is exercised without limits or restrictions except that if the judgment is set aside or varied it must be done on terms that are just. The power is exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but it will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice (see Shah v. Mbogo [1969] E.A. 116.) The matters to be considered in deciding the application were discussed in Jamnadas V. Sodha v. Gordandas Hemraj (1952) ULR 7. In that case, AINLEY, J. said as follows:-
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> > " "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 Plai ntiff 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 the court."

4. In brief, the matter to be considered by the court are as follows:-

   (a) The reason for failure to appear;

   (b) The merits of the case proposed to be set up if the application is allowed; and

   (c) that the application is not motivated only by a desire to obstruct or delay the course of justice.

5. However, these matters do not in any way affect the discretion which as was seen earlier has no limits or restrictions. These are only matters which the Judge hearing the application may apply his mind to but they do not in anyway limit or restrict the discretion. In Patel v. E.A. Cargo Handling Services Ltd. (1974) E.A. 75 (sir William Duffus, p., Law, Ag. V.P. & Musoke, J.A.) Sir William Duffus, P. said as follows at p. 76:-

> " There are no limits or restrictions on the Judge's discretion except that if he doe s vary the judgment he does so on such terms as may be just.....(T) he 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 by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merit. 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 issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

6. Sir William Duffus, P. also quoted the following statement with approval as considered by the House of Lords in Evans v. Barllam (1937) A.C. 437, (1937) 2 All E.R. 647 at p. 651:-

> " It was argued by Counsel for the Respondent that, before the court or judge could exercise the power conferred by this rule, the Applicant was bound to prove
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> (a) that he had some serious de fence to the action, and
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> (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved, the

door was closed to the judicial discretion, in other words, that proof of those two matters was a condition precedent to the xistence or, (what amounts to the same thing) to the exercise, of the judicial discretion. For myself I can find no justification for this view in any of the authorities which were cited in argument, no r if such authority existed, could it be easily justified in the face of the wording of the rule.It would be adding a limitation which the rule does not impose. The contention no doubt contains this element of truth, that from thenature of the case, no ju dge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose couldbe served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action and (b) how it came about that the Applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance....."

7. None of the matters to be considered should be looked at in isolation. In Jamnadas Sodha case Supra, Ainley, J. held that lack of reasonable excuse was not the only matter to be looked at. Where the Applicant fails to satisfy the court with reasons for the default, the court still has to look at the other matters. Is there a good defence? Is the Applicant only motivated by a desire to delay or obstruct the course of justice? We have already seen that a good defence is one which "raises triable issues". To determine the Applicant's motivation, the court has to look at his conduct both prior and subsequent to the action and at his conduct at the hearing of his application"

4. Counsel for the 2nd Defendant admits responsibility for the default in this matter and freely offered to pay costs. There is no evidence whatsoever that the 2nd Defendant is only motivated by a desire to obstruct or delay the course of justice. His Advocate is guilty of the default and this court will not visit the Advocate's mistake upon the party. This application is, therefore, allowed. The 2nd Defendant's Advocate shall pay the Plaintiffs thrown away costs before filing the defence.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE, 2001.

ALNASHIR VISRAM

JUDGE