REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 142 of 1995

KENYA PORTS AUTHORITY.....…..……
….....APPELLANT

AND

KUSTRON (K) LIMITED.....……..
…….....RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Machakos (Hon. Justice Osiemo) given on the 13th day of June, 1995

IN

H.C.C.C. NO. 93 OF 1995)

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JUDGMENT OF THE COURT

The appellant, Kenya Ports Authority (KPA), was served with the summons in Machakos H.C.C.C. NO. 142 of 1995 by registered post and the said summons and the copy plaint were admittedly received by KPA on 15th March, 1995. KPA filed its memorandum of appearance at the Machakos High Court registry on 17th March, 1995. The defence was therefore due for filing on 3rd April, 1995, 2nd April, 1995 being a Sunday. What is referred to as a "holding defence" was allegedly prepared and the court clerk to Mr. Dulu was directed to travel to Machakos on 3rd April, 1995 to file the defence. Mr. Dulu who is an advocate of the High Court of Kenya and is employed by KPA as an in-house lawyer, deponed in his affidavit sworn on the 21st day of April, 1995 that the court clerk was unable to travel to Machakos due to "transport inadequacies in that he was not able to get booking till 10th April, 1995".

It is indeed a matter of concern for us that KPA did not seriously consider the effect of not filing its defence, even the so called 'holding defence' until the last day to do so and that it did not (nor did its advocate Mr. Gitau) seek extension of time to file defence either from the advocates for the plaintiff or by an application to court. One telephone call to the advocates for the plaintiff might have served the purpose. Neither Mr. Gitau nor KPA thought fit to do so.

It is equally a matter of concern for us that a court clerk who was unable to travel to Machakos on 3rd April, 1995 was not able to get a booking to travel to Machakos until 10th April, 1995.

The learned judge in the superior court (Osiemo, J.) was not impressed with KPA's reasons for not

filing the defence in time and on that score we agree with him. However the learned judge did not go to the extent of totally rejecting the reasons given for the delay. What he did was to say that it would be futile to set aside the judgment as no triable issues were raised in the two defences. That is where, in our view, the learned judge erred. This court did say in Civil Application No. NAI. 162 of 1995 (which was an application under rule 5(2)(b) of the Rules of this Court, by KPA, for stay of execution of the decree in the superior court) that the intended appeal (the present appeal before us) was not frivolous. The Court said:

"Mr. Kiage for the applicant, submitted that there are serious points of law to be canvassed in the intended appeal. He submitted, and we think with some justification, that it will be contended on behalf of the applicant that the respondent was not entitled to compensation because it did not give Notice of its claim to the Managing Director of the applicant authority as is Mandated by section 65 of Cap. 391. Mr. Kiage further argued that the applicant's defence disclosed several triable issues and that the learned judge was in error to deny the applicant the right to ventilate its defence at a full hearing. Moreover, Mr. Kiage went on, the applicant had shown reasonable explanation for the delay in filing its defence."

The learned judge in the superior court considered several authorities as to the principles involved in setting aside ex-parte judgments and these authorities were also referred to us by Mr. Muigua for the respondent.

The guiding principle that emerges out of all the authorities quoted is in the oft-quoted case of Pithon Waweru Maina vs. Thuku Muginia [1982-88] 1 K.R. 171 in which Kneller, J.A. (as he then was) said:

"The matters which should be considered, when an application is made, were set out by Harris, J. in Jesse Kimani vs. McConnel[1966] E.A. 547, 555 F which included, amongst other matters, the facts and circumstances both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have been 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. This was approved by the former Court of Appeal for East Africa in Mbogo vs. Shah [1968] E.A. 93, 95F.

There is also a decision of the late Sheridan J. in the High Court of Uganda in Sebei District Administration vs Gasyali [1968] E.A. 300, 301, 302 in which he adopted the wise words of Ainley, J. as he then was, in the same court in Jamnadan Sodha vs. Gordhandas Hemraj [1952] 7 ULR namely:

"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 plaintiff 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 a subject a hearing should be the last resort of a Court".

Keeping in mind these principles we are of the view that KPA ought to be allowed to put forward its defences in the superior court at least to let it be heard on the merits of its defence, also on the values of the items claimed to have been stolen, also on the issue as to whether the goods in question were stolen whilst in the custody of KPA or other bodies referred to in the defences which were attempted to be filed after judgment was entered, also on the issue raised on the requirement of section 65 of Kenya Ports Authority Act (Cap, 391), also on the issue of fluctuations in value of Kenyan Currency against US. Dollar, and also on the issue of general damages etc.

We therefore allow this appeal and set aside the ex-parte judgment entered on 5th April, 1995. The appellant is allowed time to file its defence within the next 30 days. The respondent's costs of the application to set aside the ex-parte judgment in the superior court including costs occasioned and thrown away by the application will be taxed and paid by the appellant to the respondent. The respondent would, however, pay costs of the successful appellant in this appeal.

Dated and delivered at Nairobi this 24th day of January, 1997.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR