REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & PALL, JJ.A.

CIVIL APPEAL NO. 55 OF 1996

BETWEEN

KENWOOD TRADING COMPANY LIMITED.....APPELLANT

AND

LEONARD MUTUA.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Mr. Justice H.K. Githinji) dated 18th July, 1991

in
H.C.C.C. NO. 1498 OF 1991)
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JUDGMENT OF THE COURT

This appeal has rather an unfortunate history. On or about 25th March, 1991 the respondent (hereinafter referred to as "the plaintiff") filed a suit against the appellant (hereinafter referred to as "the defendant") claiming a sum of shs.2,500,000/=. The cause of action pleaded in the first instance is based on sale of goods, the claim being the balance of the agreed price of goods sold and delivered by the plaintiff to the defendant at the request of the defendant, during the month of March, 1989. The alternative cause of action pleaded in the plaint is based on three dishonoured cheques totalling shs.2,500,000/=.

An appearance was filed by Mrs. Rawal for the defendant. A defence and counter-claim was filed by her on behalf of the defendant on 9th May, 1991. A "reply to defence and counterclaim" was filed on 30th May, 1991. It ought to have been titled "Reply to Defence & Defence to Counterclaim".

We must point out at the outset that the pleadings are not model pleadings by any stretch of imagination. We think that the defendant is trying to say that it was not obliged to meet the cheques it had drawn as after the same were drawn, accounts were verbally stated and settled and cash payments of shs.1,662,303/= were made in lieu of the cheques sued on.There is a counter-claim of shs.9,192,068/50. The defendant is attempting to say, as we see it, that it paid a sum totalling shs.9,192,068/50 to the plaintiff for the plaintiff to supply goods to the defendant which goods were allegedly never supplied thereby occasioning total failure of consideration and the defendant seeks payment of that sum.

We expect that claims of this magnitude would be particularized properly, that is to say whether, the sum of shs.9,192,068/50 was paid in one lump sum for specified goods, or was paid in instalments for different goods on each occasion, spelling out the contract(s) with date(s) of payment(s), date(s) of anticipated deliveries and date(s) the breache(s) took place etc.

Equally we would have expected the plaintiff to properly deny having entered into contract(s) for delivery of goods or having received any payments thereof. A little effort in looking up books on precedents of pleadings would have made the pleadings more understandable and elegant.

Be that as it may, there was no issue raised on the inadequacy of the pleadings in the superior court. After close of pleadings a Notice of Motion was taken out by the plaintiff, seeking summary judgment on his claim, under Order 35 rule 1 of the Civil Procedure Rules. That Notice of Motion (dated 12th June, 1991) was served on Mrs. Rawal for the defendant on 13th June, 1991 at 2.20 p.m. The application is blank as regards date of hearing but bears a serial number 0668. It is of interest to note that the application reads as follows:

> "TAKE NOTICE this Court will be moved on the .....day of ..... 1991 at 9.00 o'clock in forenoon on the hearing of an application on the part of the plaintiff for ORDERS." The application therefore does not set out the date of hearing. We would have expected the application to be worded as follows: "TAKE NOTICE that this Honourable Court will be moved on a Friday at a time and on a date to be shown on the relevant FRIDAY LIST as against the Serial Number appended hereon on the hearing of an application on the part of the Plaintiff for ORDERS:"

We are not saying that the application as worded was defective. It is simply misleading. A junior advocate who is not aware of the intricacies of the working of a Friday List in the superior court at Nairobi may even take it to mean that the hearing date may be communicated to the advocate for the respondent, as it happens indeed in this Court.

As it transpired in this instance, Mrs. Rawal was scheduled to travel overseas on 14th June, 1991. She briefed a very new junior advocate in her office to take care of the application after she (Mrs. Rawal) had prepared and signed grounds of objection and draft affidavit in response to the application for summary judgment. Mrs. Rawal left instructions with Flavia Rodrigues (the junior newly admitted advocate) to keep an eye on the Friday list and appear to seek an adjournment should the application be listed on 21st June, 1991. A request for an adjournment (had it been made) in these circumstances would not have been an unreasonable one as Order 35 rule 1(3) reads:

> "Sufficient notice of the motion shall be given to the defendant which notice shall in no case (emphasis supplied) be less than seven days".

This sub-rule envisages a minimum hearing notice of seven clear days. The application appeared in the Friday List of 21st June, 1991, eighth day after service, so that the defendant had seven clear days when its advocate had to go overseas the very next day after she was served with the application. Had Miss Rodrigues been able to reach the Chambers of the learned judge in time and made the application for an adjournment, in all probability she would have obtained the adjournment. What Miss Rodrigues had deponed to in the superior court was not challenged. She looked for Chamber 55 (where the learned judge was sitting) and arrived there one minute after 11.00 a.m. The application was listed before the learned judge at 11.00 a.m. as second on the list.

Miss Rodrigues was informed by persons sitting outside chamber 55 that the first matter on the list was being heard by the learned judge - she thought it would be impertinent on her part to check what was going on in chambers and waited only to see plaintiff's advocate coming out after the judge's clerk had come out and on inquiry she was told by the learned judge himself that he had already heard the matter and that he could not therefore grant her an audience.

What had been deponed to by Miss Rodrigues was not challenged in any manner. In these circumstances we are of the view that there was no inaction on her part as to enable the learned judge to take any

adverse view of her conduct.

The learned judge however was not happy with Mrs. Rawal's absence. He said:

> "Mrs Rawal's absence is not a good judicial reason for exercising the discretion in favour of the defendant for she had left instructions to her assistant."

That is where, in our view, the learned judge erred. Exercise of discretion not to set aside an ex-parte judgment requires an overall view of all circumstances which lead to non-appearance of the defendant or counsel. The court has also to bear in mind the interests of the litigant in taking the overall view of the circumstances. Those circumstances have been adequately explained by Miss Rodrigues and Mrs. Rawal's absence was not deliberate. She was served with the application just one day before she was scheduled to go overseas; yet she prepared grounds of opposition and instructed her junior who did all she could as a raw junior.

A Notice of Motion in the superior court ought to be heard in open court. If for any reason a judge decides to hear a Notice of Motion in chambers, then the door of the chamber should be left totally ajar so as to enable the parties or Counsel to know which particular matter is being heard at the relevant time.

We think that the learned judge ought to have considered the circumstances leading to non-appearance of Miss Rodrigues or Mrs. Rawal in a more favourable light when it came to the application for setting aside the judgment. Cogent and acceptable grounds were presented to the learned judge to enable him to exercise his discretion to set aside the exparte judgment. Whilst the learned judge was fully aware of and did appreciate that he had unlimited jurisdiction to set aside an ex-parte judgment he was primarily motivated by absence of counsel at the hearing of the summary judgment application. The learned judge correctly set out the principle to the effect that one ought not to be shut out from defending a claim if possible. Yet the learned judge declined to set aside the ex-parte judgment saying:

> "There are two conducts of the defendant which should be examined. First failure to file grounds of objection and replying affidavit and second none attendance (sic) on the hearing date".

As we have already pointed out the reasons for non-filing of grounds of objection and replying affidavit were advanced without demur by the plaintiff. These reasons were sufficient, in our view, to enable the learned judge to exercise his discretion. Order IXA rule 10 of the Civil Procedure Rules is worded so as to give an almost unfettered discretion to the judge, subject only, in our view, to the requirements of justice to both sides. It has been stated on many occasions that a litigant ought to be given a chance to defend or prosecute his suit if he has an arguable defence or claim which can be sustainable even after amendment of pleadings. If a defendant cannot put forward his defence because of a slip or oversight by his counsel, the court should, if possible, give a chance to that client to put forward his defence.

In the case of Patel V.E.A. Cargo Handling Services Ltd [1974] E.A. 75 Duffus P pointed out at Page 76 C & E:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just..... The main concern of the Court is to do justice between the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

We think Harris J correctly pointed out in the case of Shah v. Mbogo [1967] E.A. 116 at 123 B as follows:

> "This discretion is intended to be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

What Harris J said in Shah v. Mbogo (supra) was confirmed by the predecessor or this court in Mbogo v.

Shah (1968) E.A 93. In Shabir Din v. Ram Parkash Anand (1955) EACA Briggs JA said at page 51:

> "I consider that under order 9 rule 20, the discretion of court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

Having said all this we revert to what we have stated in regard to what Miss Rodrigue's and Mrs Rawal's explanations were and we are of the view that this is one instance where we ought to interfere with the discretion as exercised by the learned judge.

We were informed that the execution of the decree in the superior court has been stayed on condition that a sum of shs.2,500,000/= is deposited in a banking institution. That condition, we are informed, has been complied with.

Considering all the circumstances of this matter, we allow the appeal with the result that the ex-parte judgment entered by the superior court on 27th June, 1991 is set aside and the plaintiff's application for summary judgment is dismissed with costs. The defence is restored and the defendant is given leave to defend the suit and prosecute its counterclaim. The condition of stay of execution imposed by this court pending the hearing or determination of this appeal is extended until the hearing and the determination of suit in the superior court. The appellant will have costs of this appeal. These are our orders.

Dated and delivered at Nairobi this 22nd day of October, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR