REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, SHAH & PALL, JJ.A.)

CIVIL APPEAL NO. 75 OF 1997

BETWEEN

KENYA CEMENT MARKETING LIMITED.....APPELLANT

AND

JAMES G.K. NJOROGE T/A BARAKA TOOLS AND HARDWARE...RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi

(Mr. Justice S.E.O. Bosire) dated 23rd day of May, 1996
in
H.C.C.C. NO. 3737

JUDGMENT OF THE COURT

The appellant, Kenya Cement Marketing Limited, was the defendant in H.C.C.C. NO. 3737 of 1995. The suit in the superior Court was filed by the respondent Mr. James G.K. Njoroge trading under the firm name or style of Baraka Tools & Hardware. We will refer to the appellant as the defendant and the respondent as the plaintiff for the sake of convenience.

On the 29th day of December, 1995 the plaintiff filed a 15 page plaint against the defendant claiming the following reliefs:

> "(a) Declarations in terms of paragraph 13 `above' and directions and judgment for loss and for damages as per paragraphs 8,9,12 `above' and loss of profit at the rate of shs.375,000/= per month.
>
> (b) An order do issue restraining the defendant its servants or agents from realizing the security issued by the Standard Chartered Bank Ltd by way of Bank guarantee for the due performance of contract until determination of suit.
>
> (c) Judgments for sums found due to the plaintiff after discovery.
>
> (d) An order that pending determination of suit the plaintiff do deposit in Court shs.200,647/60 security for release of guarantee.
>
> (e) Costs and interest

(f) The Honourable Court be pleased to make any orders deemed fitting within its inherent jurisdiction.

At the same time the plaint was filed the plaintiff filed a Chamber Summons under "Order XXVI rules (sic) 5 Civil Procedure Rules as amended (sic) and Order XXXIX rules 1, 2 & 3 Civil Procedure Rules as amended (sic) and section 3A Civil Procedure Act Laws of Kenya." By that chamber summons (which with the affidavit and annextures amounted to some 134 pages) the plaintiff sought Orders to restrain the defendant from realizing the guarantee issued by the Standard Chartered Bank Limited for shs.1,040,000/= for due performance of the agency contract between the plaintiff and the defendant, by which contract the plaintiff was appointed a selling agent of the defendant's cement. The same Chamber Summons also sought an Order for deposit of Shs.200,647/= in a "sound" bank as "security for sums claimed due to the defendant under the said agency contract". This second prayer is most inelegantly worded as follows:

"2.That upon the plaintiff deposit in an interest earning joint account in the name of the Registrar of the High Court with a first class Bank a sum of shs.200,647/60 as security for sums claimed due to the defendant under the said agency contract the defendant do release and discharge wholly the guarantee issued by the Standard Chartered Bank Ltd for Shs.1,040,000/=."

On 2nd January, 1996 Mr. Wamalwa's clerk obtained a date for the hearing of the chamber summons. That date was 6th February, 1996. On this date counsel for both the parties appeared before Bosire, J. They again appeared before him on (1) 13th February, 1996 (2) 29th February, 1996 and (3) 14th March, 1996 when (on the later date) a consent order in terms of "the caveat letter dated 4th March, 1996" was recorded. So for the whole of the month of February, 1996 and half the month of March, 1996 Mr. Wamalwa and Mr. Ibrahim were concerned with the Chamber Summons application filed along with the suit.

Mr. Ibrahim stated, in the superior court, that he did not see the summons to enter appearance by reason of his own oversight when his client sent to him all the suit papers. This may well be so because the letter of 15th January, 1996 addressed to Mr. Ibrahim by his client the defendant opens up as follows:

"Enclosed please find a copy of chamber summons and plaint received from M/s F.N. Wamalwa Advocates."

This letter does not say if the summons to enter appearance was sent to Mr. Ibrahim along with the copy plaint and the chamber summons. The only relevance of this factor here is that Mr. Ibrahim may really have overlooked the summons in the bundle of all the papers sent to him. Mr. Ibrahim's said oversight is also manifest in his letter of 12th March, 1996 addressed to Mr. Wamalwa by which letter Mr. Ibrahim was asking Mr. Wamalwa to serve the suit summons upon him. Such a request can only come as a result of a genuine oversight on part of Mr. Ibrahim. This belief by us is further strengthened by the fact that Mr. Ibrahim did file in court, a Notice of Appointment of Advocates dated 25th January, 1996, on 30th January, 1996.

Mr. Ibrahim had invited the superior Court (Bosire, J.) to consider the Notice of Appointment of Advocates as a "Memorandum of Appearance". In that Mr. Ibrahim was clearly wrong and the learned judge quite properly declined to accept that invitation. But a Notice of Appointment of Advocates is generally filed by advocates to enable them to conduct interlocutory proceedings on behalf of their client(s) prior to service of summons. Such a document gives the relevant locus standi to advocates to appear for their client(s) prior to service of summons. In fact it would be prudent for an advocate to file such a Notice which Mr. Ibrahim did. Again this factor is gone into by us simply to show that Mr. Ibrahim's said oversight must have been a genuine oversight.

However as summons was served on the defendant, and as no appearance was entered, the interlocutory judgment entered on 15th March, 1996 was a regular judgment and Mr. Ibrahim quite properly conceded this issue before us as a result of which concession he abandoned grounds 1, 2, 3 and 4 of his Memorandum of Appeal. A few comments at this stage on service of summons by registered post, on

corporations, would be apt. The Rules Committee, in its wisdom was, at the time the summons in the suit in the superior court was served, considering the efficacy of such service and in fact by legal Notice No. 5 of 1996 dated 9th February, 1996 amended Order 5 Rule 2 (b) of the Civil Procedure Rules (service of summons on Corporations) to provide for, in the first instance, personal service on relevant officer(s) of the Corporation.

Whilst the hearing of the Chamber Summons was not yet concluded Mr. Wamalwa requested entry of Interlocutory judgment by letter dated 2nd February, 1996 filed on 5th February, 1996. He did not respond to Mr. Ibrahim's aforesaid letter of 12th March, 1996. We think that courtesy demanded, at least, that Mr. Wamalwa should have put Mr. Ibrahim on guard rather than keeping quiet. This is a matter of courtesy amongst advocates and we hasten to add that whilst there is no legal obligation on part of an advocate to so warn his opponent, this courtesy is relevant as all advocates are officers of Court and it befits them to be so courteous. Stealing a march on one's opponent is not to be and must not be encouraged by this court.

We think that the learned judge should have excused Mr. Ibrahim's oversight and allowed him to file defence proper. But the learned judge proceeded to say:

> "Clearly learned counsel had no basis for believing that summons to enter appearance [and the plaint] had not been served on his client. He himself has stated that he perused among other documents, the summons to enter appearance and the plaint. He received all documents per his client. His story is not that his client did not give him some of the documents. He had all of them with him but in effect he says that although he read them he did not appreciate that they were what they stated they were. It is incredible."

We think the learned judge's finding of incredibility of Mr. Ibrahim's version was not called for and the learned judge could well have come to the conclusion that we have come to in regard to Mr. Ibrahim's oversight discussed hereinbefore. We are of course aware that we ought not to interfere with the exercise of discretion by a judge or substitute our own discretion instead. We have to be careful when differing with a judge who has exercised his undoubted discretion not to set aside an ex-parte judgment. We can only interfere when we are satisfied that the judge has misdirected himself in some manner and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion as to result in injustice. Keeping this principle in mind we can only say that the learned judge could have, had he properly considered Mr. Ibrahim's version of events, seen the slip or inadvertence or oversight on part of Mr. Ibrahim. When the learned judge said that Mr. Ibrahim's version was incredible, in our view, with respect, he erred.

Having come to the conclusion that Mr. Ibrahim has explained the reason for not entering appearance in due time we come to the defence itself. The learned judge quite properly looked at the defence as in fact he was bound to do. However improperly a defence may be on record, a judge in considering an application for setting aside an exparte judgment, has to look at the defence and consider its merits or demerits to enable him to decide whether or not there are arguable issues raised by the defendant to entitle him to obtain leave to defend, or put in another way, to entitle him to have the ex-parte judgment set aside in order to enable him to properly defend the claim.

The claims by the plaintiff as formulated in the plaint can be put in a summary or precis form as follows:

> (1) The defendant was in breach of contract between the parties by which contract the plaintiff was appointed the defendant's agent for marketing, wholesaling, distributing and retailing of products manufactured by Bamburi Portland Cement Company Limited and Athi River Portland Cement Company Limited.
>
> (2) The said breach on the part of the defendant came by as a result of failure by the defendant to undertake to supply cement products to the plaintiff.
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> (3) The defendant had supplied cement to V.M. Halai Limited and debited the value thereof to the

plaintiff.

(4) The defendant had raised various erroneous debits against the plaintiff thereby occasioning losses to the plaintiff.

(5) The defendant had in various instances undersupplied cement to or on behalf of the defendant and charged therefor in full thereby occasioning losses to the plaintiff. (The particulars of such undersupplies are set out in five a half pages).

(6) The defendant having brought the contract to an end failed to release the plaintiff from the plaintiff's obligations under the guarantee aforesaid thereby occasioning losses to the plaintiff.

What we have set out above are some of the claims made by the plaintiff against the defendant. All these claims are denied in the defence. The alleged breach of contract is denied. Erroneous debits are denied save for inadvertent errors made bona fide. Such erroneous debits, the defence alleges, have not occasioned any loss or damage. Alleged under-deliveries are denied. Alleged refusal to carry out reconciliation of accounts is denied. Delay if any, in releasing the bank guarantee provided by the plaintiff is sought to be explained in the defence. In addition there were very many factors involving accounting disputes (not admitted). All these factors show, at least, that there are arguable defences that the defendant can put forward and we cannot say at this stage that the defences are sham.

However, we are far from saying that in order to enable a judge to exercise his discretion to set aside an ex-parte judgment the two factors so far gone into by us that is (1) that the court should be satisfied that there is a good defence and (2) that the court must be further satisfied that delay in entering appearance must be satisfactorily explained, are the only requirements to be considered by the judge. There are other factors to be considered as was stated in the English Case of Evans v. Bartlam [1937] AC 437 and as accepted in our case of Patel vs. E.A. Cargo Handling Services Limited [1974] E.A. 75. 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 the 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 (supra) 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 of this court in Mbogo v. Shah (1968) E.A 93. In Shabir Din v. Ram Parkash Anand (1955) 22 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 Mr. Ibrahim's explanation was 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 superior court has granted an order for stay of execution or further proceedings pending the hearing and determination of this appeal on condition that two cement manufacturing companies earlier referred to by us have undertaken to pay to the plaintiff, in the event of the plaintiff eventually succeeding, any judgment sum that may be decreed. Mr. Ibrahim stated that that condition may remain in force pending the hearing and determination of the suit in the superior court.

The upshot of all this is that this appeal is hereby allowed with the result that the exparte interlocutory judgment entered by the superior court on 15th March, 1996 is set aside. The defendant may file its defence within the next 15 days. In view of factual circumstances which led to the non-filing of the appearance the plaintiff will have costs of the application to set aside the ex-parte judgment in the superior court but the defendant will have costs of this appeal. The condition imposed by the superior court, as stated hereinbefore, shall continue to remain in force until the hearing and the determination of the suit in the superior court. Those are our orders.

Dated and delivered at Nairobi this 15th day of October, 1997.

P. K. TUNOI

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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