



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Gachuhi, Gicheru & Akiwumi JJ A)

CIVIL APPEAL NO 100 OF 1994

BETWEEN

RUTH WANJIKU NJOROGEAPPELLANT

AND

HENRY KATUME MUTUGWARESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 20th May, 1994

in

HCCC No 4424 of 1993)

JUDGMENT

On 9th September, 1993, the respondent filed a suit against the appellant in the superior court wherein he sought from the respondent the return to him of a motor vehicle and its log book and damages for the loss of use of the vehicle. His main ground for this was that instead of paying himself, directly the installments of the purchase price of the vehicle, he had paid them into the Barclays Bank account of the appellant in whose name the vehicle became registered, and who in turn, paid the vendor. A memorandum of appearance was filed on behalf of the appellant on time. On 25th September, 1993, when no defence had been filed, the respondent applied for judgment in default of defence. On 10th November, 1993 an interlocutory judgment was entered for the respondent and formal proof hearing also ordered. Subsequent to this, the respondent applied on 1st December, 1993, for orders that pending the formal proof hearing, the appellant should deliver and transfer ownership of the vehicle to the respondent and that the appellant should be restrained from transferring or disposing of the vehicle. This prompted the appellant to file grounds of opposition and a replying affidavit on 14th February, 1994, *inter alia*, to the effect that the application was misconceived in that it was seeking orders which the respondent had unsuccessfully sought in an earlier suit namely HCCC No 6405 of 1992, which he had brought against the appellant involving the same subject matter and that the defence which had prepared as far back as 7th October, 1993, had, because of the reprehensible conduct of the clerk of the appellant's advocate, deliberately not been filed within time.

The defence which was annexed to the replying affidavit and only filed on 22nd December, 1993, denied that it was the respondent's money which had been used in paying for the vehicle and averred that it was

her, the appellant's own money, from her Barclays Bank account which had been used to pay the installments of the purchase price of the vehicle, which not surprisingly had been transferred to her and registered in her own name, and not to or in the name of the respondent. The defence also averred that when the respondent had in the earlier suit already referred to, failed to obtain similar orders like the ones he sought in his application of 1st November, 1993, he had abandoned the earlier suit and as it were, embarked upon abusing the process of the court by bringing the present suit. Annexed to the appellant's replying affidavit are also the order in the earlier suit dismissing the respondent's application therein, and the log book of the vehicle showing that it is registered in the name of the appellant.

Whilst the respondent's application of 1st December, 1993, was still pending, the appellant by an application of 18th February, 1994, applied for two orders, firstly, to have the *ex-parte* judgment entered on 10th November, 1993, set aside and secondly, for the defence which had been filed out of time on 22nd December, 1993 to be deemed to have been filed within time, so that justice might be done in the particular circumstances of the case. It was deponed in the supporting affidavit as had been done in the earlier affidavit of the appellant, that the delay in filing the defence which had been prepared as far back as 7th October, 1993, was not due to the actions of the appellant, but that of a delinquent clerk of the appellant's advocate. It was further deponed that the delay in filing the defence which was annexed to the supporting affidavit, was not inordinate. It was averred in the defence that the respondent's plain disclosed no cause of action against the appellant and that the defence raised triable issues. More importantly, it also seems from the averments contained in the defence and which we have already observed, that the filing of the plaint was an abuse of the process of the court.

In the respondent's replying affidavit, much emphasis was placed on the inordinate delay that had elapsed before the defence was filed, and the lack of credible and reasonable explanation for this. It is noteworthy however, that this replying affidavit was silent on the implicit allegation contained in the defence which had been annexed to the appellant's supporting affidavit, that the present suit filed by the respondent was, in view of the earlier suit brought by the respondent against the appellant on the same subject matter an abuse of the process of the court.

When both applications namely, the one by the respondent dated 1st December, 1993, and the one by the appellant dated 18th February, 1994, came before the learned judge of the superior court he, having noted that an injunction in terms of the first application had been granted and which the parties by consent agreed should in the meantime, be maintained, decided to hear the second application. The learned judge of the superior court then heard arguments on this application and having also considered the affidavits in support and in opposition thereof, dismissed it. But in doing so, he seemed to have confined himself only to one aspect of the application namely, whether the delay in the filing of the appellant's defence deserved his sympathy or not. He ignored in his consideration the other important aspect of the application namely, whether the defence that had been filed albeit late, should be admitted because it raised triable issues or other grounds which in the particular circumstances of the case, would make this necessary for the ends of justice or to prevent abuse of the process of the court. Not surprisingly, therefore, he made no finding or decision on this which is wrong.

Aggrieved by the dismissal of her application, the appellant has appealed to this Court. The main ground that was pressed before us by counsel for the appellant was that the learned judge of the superior court erred in not considering the defence filed by the appellant which had raised triable issues and that if he had done so he would, in the exercise of his inherent jurisdiction, have set aside the interlocutory judgment obtained in default of defence. Learned counsel referred to three authorities among them the case of *Girado v Alam & Sons (U) Ltd* [1971] EA 448 although a decision of the High Court, where it was held that even though no sufficient cause for non-appearance had been shown, judgment obtained in default, would be set aside in exercise of the court's inherent jurisdiction so as to ensure that there was no possibility of injustice to the applicant.

Counsel for the respondent whilst urging us to dismiss the appeal on the ground that the defence was filed out of time and that the delay had not been satisfactorily explained, conceded that the merits of the defence had not been argued before or considered by the learned judge in his ruling.

In our view, and we have already hinted to that effect, the defence raised triable issues. What is more, and this was not controverted at all in the respondent's replying affidavit, there is *prima facie* evidence disclosed in the defence that the present suit brought by the respondent is an abuse of the process of the court. Having regard to the fact that the appellant's application was also brought under section 3A of the Civil Procedure Act invoking the inherent jurisdiction of the superior court, it is our view that the learned judge should also have considered the orders sought from this point of view. If he had, he would, we think, have come to the view which we have come to, that the defence being one that raised triable issues and the plaint having all the ingredients of an abuse of the process of the court, the appellant's application should not have been dismissed, the unsatisfactory explanation of the delay in filing the defence notwithstanding. See the *Girado* case (supra). In the particular circumstances of this case as is set out above, this would be in line either with the necessity for the ends of justice or to prevent abuse of the process of the court or both.

In the result the appellant's appeal succeeds; the *ex parte* judgment entered on 10th November, 1993, is hereby set aside and the defence filed on 22nd December, 1994 is hereby deemed to have been filed in time. Each party to bear his own costs of this appeal.

Dated and delivered at Nairobi this 7th day of June, 1995.

J. M. GACHUHI

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JUDGE OF APPEAL

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR