REPUBLIC OF KENYA

Njoroge v Prestige Air Services Ltd

High Court, at Mombasa
August 15, 1991

Wambilyangah J

Civil Case No 204 of 1990

Civil Practice and Procedure *– setting aside - default judgment – judgment in default of defence – discretion to set aside such judgment – principles on which this discretion is exercised – where delay in filing defence was out of the defendant's advocate's mistake – whether justice required that default judgment be set aside in such a case.*

The plaintiff applied for and was granted interlocutory judgment after the defendant had failed to file a defence to the claim. The defendant's advocate was allowed to withdraw from acting for his client on account of lack of adequate or appropriate instructions. The succeeding advocate then filed an application asking the court to set aside the default judgment so that the defendant could file its defence.

Held:

1. The application concerned the exercise of judicial discretion under order IXA rule 10 and 11 of the Civil Procedure Rules even though these provisions were not shown in the chamber summons application.

2. There are no limits to the judge's exercise of discretion except that if he does vary the judgment he does so on terms that are just; the main concern of the court being to do justice to the parties and the court will not impose conditions on itself that will fetter its discretion.

3. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who deliberately seeks to obstruct or delay the course of justice.

4. In exercise the discretion, the court should consider the nature of the action, the defence, however irregularly it may have been brought to the notice of the court and the question of whether the plaintiff can be reasonably compensated by costs for to deny a subject a hearing should be the last resort of the court.

5. The defendant's advocate had failed to alert his client of the consequences of delay in giving him instructions for filing a defence. Justice had to be done to the parties to this action and the mistakes of advocates should not be visited on their clients.

6. The ends of justice dictated that the default judgment in this case should be set aside.

Cases

1. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75

2. *Shah v Mbogo* [1967] EA 116

3. *Sebei District Administration v Gasyali* [1968] EA 300

4. *Mwangi v Mugiria* [1983] KLR 78

5. *Chumo, K Samson v Kipkerena Koech* Court of Appeal (NKU) Civil Appeal No 135 of 1989

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order IXA rules 5, 10, 11

2. Civil Procedure Act (cap 21) section 3A

Advocates

Mr Taib for the Defendant.

August 15, 1991 **Wambilyangah J** delivered the following Ruling.

The plaintiff's claim relates to alleged wrongful summary dismissal from his employment by the defendants. He instituted the suit for general damages for that alleged dismissal in addition to other reliefs which are listed in the plaint. So much so that even if the defendant had failed to file its defence after being served with summons, it would be necessary for a formal proof of the claim for general damages to be done before a final decree could be entered in the matter (see order IXA rule 5 of the Civil Procedure Rules).

There is no dispute that there was proof service of summons to enter appearance on the defendant. As a matter of fact the defendant through his earlier counsel did enter appearance in the suit. But that was all. No defence was filed, and as a result thereof the plaintiff applied for and was duly given the interlocutory judgement. The defendant earlier counsel was later on allowed to withdraw from acting for his client after he cited lack of appropriate or adequate instructions from his client as his sole reason for so doing. The defendant has in the end instructed another advocate to file this application praying that the interlocutory judgment to be set aside so that it can file its defence to the suit.

This application thus concerns the exercise of my judicial discretion under order IXA rule 10 and 11 of the Civil Procedure Code even though the same order and rules were not shown in the chamber summons filed by the applicant. This is a substantial defect which can only be overlooked or remedied by me by the invocation of the powers set out under s 3A of the Civil Procedure Act. I am prepared to do so.

As regards the exercise of discretion I must bear in mind the fundamentals which govern it.

Firstly, in *Patel v EA Cargo Handling Services Ltd [*1974] EA 74 at 76 C and E.

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on terms that are just ……….The 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 it by the rules." Secondly, in *Shah v Mbogo* [1967] EA 116 at 123B it was said: "This discretion is intended to so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstract or delay the course of justice."

In *Sebei District Administration v Gasyali* [1968] EA 300 it was said:

> "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 whether the plaintiff can be reasonably compensated by costs for any delay occasioned should always be remembered that to deny a subject a hearing should be the last resort of the Court."

The discretionary power should be exercised judicially and in selective and discriminatory manner, not arbitrarily or idiosyncratically. (see the judgment of Kneller JA in the case of *Mwangi v Mugiria* [1983] KLR 78.

In the instant case Mrs Chris Crounchey swore the applicants' supporting affidavit in which she blames the defendant's company secretary one Mr Ali Timmany or else the defendant's first counsel Mr Taib for the situation in which the defendant now finds itself. Mr Taib in his affidavit deponed that he could not have filed a defence without the relevant instructions which were not forthcoming from Mr Issa Timmany who is said to be an advocate. But it is also plain that Mr Taib did not alert (as he was expected to have done) his client of passage of the crucial period within which the defence could have been filed. In fact the interlocutory judgment was obtained in April, 1990, and Mr Taib does not seem to have brought that aspect to the notice of his client until 6 months later on when he filed his application for leave to withdraw from acting for the client in the matter. Mr Wahome contended that Mrs Cronchey should have tried to see her advocate earlier. The converse of that statement seems to me to be more practical and reasonable. The advocate should have contacted his client and alerted her or else Mr Issa Timmany of the consequences of more delay in giving him those instructions which he needed for the purpose of filing the defence. Justice has to be done to the parties in the action. The mistakes of their advocate should not be visited on the clients (see *Samson K Chumo v Kipkera Koech* Court of Appeal Civil Appeal No 135 of 1989 NKU). The defence is that the plaintiff's dismissal from employment was proper and does not provide him with a cause of action in the suit. That is certainly an arguable point. Moreover, the plaintiff has not formally proved his claim as required.

I am satisfied that this is a case in which ends of justice dictate that the interlocutory judgment be set aside.

It is accordingly set aside. The defence should be filed within 12 days from the date hereof. The defendant will pay plaintiff's costs in this application as well as his costs incurred in obtaining the interlocutory judgment.