IN THE COURT OF APPEAL

AT KISUMU

(CORAM: PLATT, GACHUHI & APALOO JJA)

CIVIL APPEAL NO 24 OF 1986

MUGUNGA GENERAL STORES ……..……..…….APPELLANT

VERSUS

PEPCO DISTRIBUTORS LTD ……..……..…..DEFENDANT

JUDGMENT

The appellant in this appeal was the original defendant. The latter had been sued by the plaintiff firm for Kshs 91,170 being the amount due and owing by the defendant to the plaintiff in respect of goods sold and delivered to the defendant at his request in Kisumu during the year 1983.

The defendant filed a defence in the terms:

> "The defendant further denies the contents of paragraphs 3 and 4 of the plaint and will put the plaintiff to strict proof of their claim."

Sometime later on January 8, 1985, the plaintiff moved the court on notice for judgment to be entered for the plaintiff as prayed in the plaint. Mr Rajnikant Shah, representing the plaintiff firm, filed an affidavit on or about January 8, 1985 stating the reasons for summary judgment to be entered under order XXXV of the Civil Procedure Act. He said that the sum of KShs 91,170 was due upon nine dishonoured cheques, drawn by the defendant payable to the plaintiff upon Barclays Bank Ltd and Kenya Commercial Bank Ltd, Kisii, Branch. Mr Shah gave the dates of each cheque, and the sums involved. The defendant had notice of dishonour. Section 57 of the Bills of Exchange Act, as pointed out allowed 12% interest. The copies of the cheques were attached. The plaintiff continued to point out that the goods had been sold and delivered to the defendant in response to which the defendant had issued the cheques in payment. Consequently the defendant was truly indebted to the plaintiff in the sum of Kshs 91,170.

In the supplementary record of appeal the nine cheques have been set out. They support the sum claimed exactly, which is not what the details of the cheques in the affidavit can show. The affidavit is inaccurate. Probably the cheques attached clarified the position. At any rate the position is now clear. There was no affidavit in opposition.

Schofield, J entered judgment on June 25, 1985 *ex parte* for the plaintiff in the sum of Kshs 91,170 together with costs and interest on the decretal amount at court rates from the date the suit was filed. That was substantially in accordance with the plaint, and not section 57 of the Bills of Exchange Act. But the interest will probably be the same.

The defendant took a chamber summons to apply for the *ex parte* judgment to be set aside, and for execution in the said case to be stayed.

Porter, J heard that application. The defendant explained that he had travelled from Sotik to Kisumu, arrived at 9.15 am and found *ex parte* judgment entered. There was no reason for the delay apart from this. Then the defendant merely alleged in a bald statement as follows:

> "I am prepared to defend myself as I have triable issues to raise at the hearing,"

and that was all. The plaintiff repeated his claim and asked that the defendant should deposit all the money in court. Porter, J noted that Mr Bwokora, for the defendant at that stage, had explained that the defence was to be amended from its state as a mere general traverse. But there was still no of defence put forward against the plaint. No useful purpose would be served by setting aside the judgment. The learned judge noted the reason for the delay, but dwelt mainly on the lack of merit in the defence.

The appeal lies against Porter, J's exercise of his discretion. The formal shape of the appeal as appears from the memorandum, is that the judge was wrong to conclude that the defendant/appellant did not have a good defence. On the other hand, if there were no defence on the face of the record, it was wrong to conclude that there could not be one, because counsel had indicated that he would amend the defence. Indeed the appellant had been unable to answer the replying affidavit which had been filed late.

In this court, however, an argument concerning the nature of the claim was put forward. Mr Mainye supposed that Mr Rajni Shah's affidavit sworn in support of his motion, was based on a different cause of action to that relied on in the plaint. In the affidavit the cause of action was based on dishonoured cheques; whilst in the plaint, the cause of action was the breach of contract due to non-payment. It is of course true that there can be a different cause of action based on dishonoured cheques from that based on the breach of contract, but that analysis is not well illustrated by this case.

It is plain that the cause of action on the plaint is based on a breach of contract in non-payment.

The learned judge had as he said, a discretion whether or not to enter summary judgment under order XXXV of the Civil Procedure Act. As laid down in *Shah v Mbogo* [1967] EA the duty of this court on an appeal against the exercise of that discretion, is not to interfere unless the judge has exercised his discretion wrongly in principle or perversely on the facts of the case. The principle under which the judge principally acted was that taking into account the reason for the delay, he emphasized that there was no merit in the defence.

First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

Secondly it is for the defendant to put forward his defence, and when faced with a motion for summary judgment under order XXXV the defendant must heed rule 2 of that order.

> "The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit."

For rule 6 provides that if it appears to the court that any defendant has a good defence, then he may be allowed to defend, while if there is not a good defence, the plaintiff shall be entitled to judgment. In this case the defendant had put no defence upon the record by affidavit or otherwise. The *ex parte* judgment was regularly ordered by Schofield, J as a consequence.

Thirdly, the decision to be taken by Porter, J whether or not to set aside that regular judgment depended on a review of all the circumstances and the merits of the case. There was no particular reason why the defendant/ appellant was late. He did not set off from Sotik in time, for there was no hindrance enroute.

Porter, J looked carefully at the merits. He was told the defence would be amended. What good was that to him? How could he judge the effect of the amendment when the proposed amendment was not put before him, let alone any reasons for the amendment?

In *Evans v Bartlam* [1937] 2 All ER 646 at page 650 Lord Atkin stressed the importance of the consideration of the merits on the ultimate consideration in these memorable words:

> "The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

But, on the contrary, where there are no merits, the coercive power will stand unabridged.

There is no fault of principle exhibited by the learned judge, nor was the exercise of his discretion perverse. Consequently there is no ground on which the court can interfere with his discretion. The matter was plain during the hearing of the appeal and consequently we did not call upon Mr Rajni Shah to reply. The appeal will be dismissed with costs.

Dated and Delivered at Kisumu this 8th Day of June, 1987

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL