IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi & Apallo JJA)

CIVIL APPEAL 103 OF 1984

BETWEEN

1. PHILIP KEIPTOO CHEMWOLO

2. MUMIAS SUGAR COMPANY LIMITED…… APPELLANTS

AND

AUGUSTINE KUBENDE ……..…..... RESPONDENT

(Appeal from the High Court at Nairobi, Mbaya J)

JUDGMENT OF PLATT JA

This appeal was brought against the decision of the High Court of Kenya given on March 28, 1984 by which the learned judge refused to exercise his discretion derived from Order 9A Rule 10 of the Civil Procedure Rules. The defendants in the case, Philip Keipto Chemwolo and the Mumias Sugar Company Limited had applied to set aside a judgment by default entered for the plaintiff, Mr Augustine Kubende on February 27, 1984. The Defendants had not appeared before an interlocutory judgment was entered under Order 9A rule 5 of the Civil Procedure Rules, but they did appear before assessment of damages.

The chronological order of events appears to have been that the motor vehicle accident in which the Plaintiff was seriously injured occurred on June 14, 1982. At the time, the Plaintiff was riding a motor-cycle, while Mr Chemwolo was driving a motor vehicle in the course of his employment with the Mumias Sugar Company Limited. There was affidavit to the effect that on August 24, 1983 Mr Wamalwa Nakhulo, the plaintiff's advocate addressed a letter of demand to the Lion of Kenya Insurance Company Limited, who insures the Mumias Sugar Company Limited for motor vehicle and Workmen's Compensation claims.

On September 20, 1983 Daly & Figgis Advocates representing both defendants, requested a medical report and alleged that both parties were at fault. On November 15, 1983, Mr Wamalwa Nakhulo supplied a medical report and proposed terms of settlement. The report suggested that the plaintiff suffered permanent brain damage and consequential epilepsy and other difficulties.

In the meantime Mr Chemwolo had been charged with careless driving contrary to section 49(1) of the Traffic Act (cap 403) and proceedings commenced on June 18, 1982, some 4 days after the traffic

accident. The trial proper commenced on October 25, 1982 and was concluded on December 16, 1982 with the conviction and fine imposed upon Mr Chemwolo. On November 15, 1983, Mr Wamalwa Nakhulo notified Daly & Figgis that Mr Chemwolo had been convicted of careless driving and on November 23, 1983, he sent to those advocates copies of proceedings and judgment. He then says that he understood from his client that the client was being harassed so that it was necessary to bring proceedings, and that he filed these proceedings on January 9, 1984. Mr Wamalwa Nakhulo then explained that as there was no indication from Lion of Kenya Insurance Company Limited that they would receive summons on behalf of their insured, he served the summons directly on the two defendants who received service on February 3, 1984. There is no doubt that that date is correct. A copy of the summons has been put before this court and it is clear that 10 days was allowed for an appearance to be entered. Appearance was only entered on March 12, 1984 as Mr Noad of Daly & Figgis explained in his affidavit, dated March 16, 1984. The appearance was entered a month late. Whilst the appearance was being entered an application was made for entering judgment under Order 9A Rule 4 of the Civil Procedure Rules for liquidated damages, and interlocutory judgment under Rule 5 of those Rules. The application was granted on February 7, 1984 and the date for the assessment of damages fixed for March 20, 1984. On March 19, 1984 Mr Noad appeared in court having applied to set aside the default judgment, and the matter was argued before the learned judge on March 20, 1984.

The learned judge correctly appreciated the powers that he had under Order 9A Rule 10 of the Rules and that his discretion had been explained by the Court of Appeal in *Patel v East African Cargo Handling Services Limited* [1974] EA 75. Having then studied the affidavits of Mr Noad and Mr Wamalwa Nakhulo and their submissions, he refused to exercise his discretion, because Lion of Kenya Insurance Company Limited had never bothered to enter an appearance; indeed they had ignored or at least treated the correspondence from plaintiff's counsel casually. In those circumstances he did not consider that

> "reasonable cause had been shown for the defendant's failure to enter an appearance within the stipulated time."

Neither had it been demonstrated to his satisfaction that there was a good defence especially in view of the conviction of the first defendant in Kakamega Magistrate's Traffic Case No 1820 of 1982.

The learned judge had earlier referred to the question of contributory negligence in the light of the opinion expressed in *Queen's Cleaners and Dyers v E A Community and others* [1972] EA 229. Inspite of that authority, the learned judge came to the conclusion that having studied the lower court's proceedings in the Traffic Case, he was of the view that not even a *prima facie* case of contributory negligence could be established against the first defendant, Mr Chemwolo. Consequently he dismissed the application.

The appeal to this Court concerns purported misdirections of fact and law which are alleged to appear in the ruling of the learned Judge. Perhaps a suitable summary of the grounds of appeal would be that Lion of Kenya Insurance Company Limited was in itself at fault for the delay in entering an appearance, and certainly it was quite wrong for the learned Judge to have expressed the view that the Lion of Kenya Insurance Company had never bothered to enter an appearance. Secondly, there was a good defence on liability as to contributory negligence and of quantum of damages. The plaintiff would make a major claim for possible brain damage, and taking all the circumstances into account, despite the delay of four weeks in entering an appearance, it was not just in the circumstances to preclude the defence from being heard. I should perhaps say that the defendants, Mr Chemwolo and the Mumias Sugar Company Limited are the present appellants and Mr Kubende is the respondent. But it is just as convenient to refer to the parties as they appear in the suit.

There is one further matter to which I l must refer and that is that at the hearing of this appeal, Mr Wamalwa Nakhulo had disappeared to the Western Part of Kenya, and Mr Nagila stepped in and thus enabled the Court to keep to the list and hear the appeal. The court was grateful to Mr Nagila, who, I am satisfied, advanced every argument that could be advanced on behalf of the respondent.

It is right to commence a consideration of the issues which arise, by setting out the proper approach which this Court must adopt. Order 9A Rule 10 of the Rules confers upon the Court an unlimited discretion to

set aside or vary a judgment entered in default of appearance upon such terms as are just. In *Patel v EA Cargo Handling Services Limited* [1974] EA 75 (*supra*), the Court of Appeal, following its previous decision in *Mbogo v Shah* [1968] EA 93 adopted the opinion of Harris J in *Kimani v McConnell* [1966] EA 547 where he said:

> "In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

But the court went on to explain (on page 76), that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the Rules. On the other hand, where a regular judgment had been entered, the Court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a *prima facie* defence which should go for trial. The Court adopted the views expressed by the House of Lords in the case of *Evans v Bartlam,* [1937] AC 473, and while the quotations from Lord Russell's speech were relevant to Mr Inamdar's particular argument, the views expressed by Lord Atkin at page 480 are of greater relevance to the present appeal – Lord Atkin observed:

> "The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. 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 only been obtained by a failure to follow any of the rules of procedure."

I would draw special attention to the principle as stated by Lord Atkin in the last sentence. It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice. (See *Mbogo v Shah* [1968] E A 93(*supra*).

In the light of these principles, I turn to consider whether there were issues which merited ventilation in a trial. Mr Noad submitted that there were grounds upon which a defence at least of contributory negligence could be advanced. He pointed out that there were some grounds for thinking that the plaintiff had been driving his motor-cycle at a high speed without wearing his crash helmet. These facts appear to emerge from the evidence recorded in the traffic case. On the part of Mr Noad it was reasonable to indicate the source of the evidence which might be relied on in the trial. The learned judge went much further. He held that in view of Mr Chemwolo's conviction and in view of the lower court's proceedings, it would be concluded that not even a *prima facie* case of contributory negligence could be established.

On the basis of *Patel's* case, the question was whether a triable issue arose. If the plaintiff was not wearing a crash helmet and was riding his motor-cycle at a high speed, surely a triable issue arose as to contributory negligence, which might affect the overall position of liability and quantum on damages. With respect, it was not for the learned judge to read proceedings in the traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well-known that both

parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even a *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case.

Now, it was correct for the learned judge to refer to Mr Chemwolo's conviction because section 47A of the Evidence Act (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter, because it may also be that Mr Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in *Queen's Cleaners and Dyers Ltd. v EA Community and others* (*supra*); and despite Mr Chemwolo's conviction, the issue of contributory negligence may still be alive if the facts warrant it. In the present case there was a triable issue in contributory negligence which would affect the quantum of damages.

If this be true, then I have to consider all the circumstances in the case to ascertain whether it would be just to set aside the judgment by default.

To begin with, the facts in the Replying Affidavit of Mr Wamalwa Nakhulo do not support the charge that Daly and Figgis were delaying the matter. If Mr Wamalwa Nakhulo commenced correspondence on August 24, 1983 and that in September 1983 a medical report was requested which was supplied on November 15, 1983, it was a matter which Lion of Kenya Insurance Company Limited had to consider in the light of the proceedings and judgment in the Traffic Case forwarded on November 23, 1983. Mr Noad replied on December 22, 1983 that the matter was being considered which must be reasonable. On these facts it must be an exaggeration to complain that Daly & Figgis had not replied to letters of the Plaintiff's counsel, and to have made it impossible for negotiations for a settlement. Indeed it must be that the condition of the plaintiff, medically speaking, had not become clear until Professor Ruberti had reported his findings on November 8, 1983.

On the other hand, what might strike the casual observer as strange, is Mr Nakhulo's decision to serve the summons directly on the defendants. The negotiations had since August 1983 been conducted with Daly & Figgis on behalf of the Lion of Kenya Insurance Company Limited, and a letter to Daly & Figgis inquiring whether they would accept the summons, would appear to have been a logical result from correspondence. As it was, the defendants were given ten days to enter an appearance from Mumias, which was a very short period for allowing an entry of appearance for persons so far away in Western Kenya. The usual practice is to allow even up to 21 days for persons so far away. As Mr Nagila wishes to point out, an extra eleven days would not have covered the time taken up to March 12 to enter an appearance. That is quite true. But it is an indication that the defendants were being asked to enter an appearance within a period of time which they might find difficult to comply with. That is one of the reasons which must be considered when the court might wish to stay its coercive power, to employ Lord Atkin's lucid phrase.

Considering these facts in the light of the ruling, it is clear that the learned judge misdirected himself. It is not a case where the defendants ignored the summons. The defendants sent the summons to their insurer's Agent, Minet ICDC Limited, who then forwarded the summons to Lion of Kenya Insurance Company Limited and the latter forwarded them to Mr Noad. All of this would have been avoided if Mr Wamalwa Nakhulo had enquired from Daly & Figgis whether it would accept service of the summons, since Mr Wamalwa Nakhulo was in correspondence with the Advocates of the Insurance Company. Had the learned judge looked at all these facts, he could not possibly have come to the conclusion that no explanation had been shown for the defendants' failure to enter appearance in time.

The result is that the misdirections both on the question whether there were triable issues, and the reasons for the delay were such that they affected the way in which the learned judge exercised his discretion. In all the circumstances, it would be just that the default judgment should be set aside, and allow the parties

to go for trial on the issues in this suit. I would therefore allow the appeal.

As Gachuhi and Apaloo JJA both agree, there will be an order that the appeal will be allowed with costs in this Court and in the High Court in the matter of the application to set aside the judgment by default in the High Court. The ruling of the High Court is set aside, and there will be substituted therefor an order setting aside the judgment by default with costs and of the application and all thrown away costs. The remaining costs in the High Court will abide the event.

Gachuhi JA. I also agree with the judgment prepared by Platt JA that the judge ought to have rightly exercised his discretion in setting aside the *ex-parte* judgment. The effect of setting aside the judgment is to regularize the position so that the applicant/defendant could file the defence. Appearance may be entered at any time before the entry of judgment notwithstanding that the time limited in the summons has expired, *Robinson v Oluoch* [1971] EA 376. The interlocutory judgment for liquidated damages was entered on February 1984. The suit was to be set down for assessment of damages later. Appearance was entered before assessment. Hearing date for the assessment of damages had been listed and damages may not be the only issue. According to Mr Noad, negligence is also in issue, there being the possibility of raising contributory negligence. There are triable issues which should not be shut out.

Where an advocate is acting for his client and has had exchange of correspondence with the other side, it is up to him and without being asked by the other side, to obtain his client's instructions to accept the service of the process. He should notify the other side that he has instructions to accept the service on behalf of his client. If that is not the case, then immediately they learn that a statutory notice has been served on their client, the advocate should write to the advocates for the plaintiff demanding a copy of the plaint or make a search at the court registry for the court file where he could take a copy of the plaint and enter appearance at once to safeguard his clients' interest. Equally the same the advocate for the plaintiff could enquire from the advocate for the defendant whether he has instructions to receive the process. There is no reason why the counsel for the applicant could not take either of these steps. Again, there is no reason why the defendant could not send the summons by express means to their advocate. There is, somehow a confusion somewhere between the counsels. I cannot understand why there was this rush or the fear entertained by the plaintiff while the limitation period was not running out.

I would allow this appeal and set aside the order of the High Court. I also agree with the proposed order for costs.

Apaloo JA. I agree that the judgment entered against the appellant in default of appearance should be set aside. Like Platt JA I am unable to agree that it was competent for the learned judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. The defendants say that the plaintiff was himself the author of his own misfortune because he drove at great speed and as a motor-cyclist failed to wear a crash helmet. If they establish these averments at the trial, the court may well feel that the plaintiff was in part to blame for the accident. The court would then come under a duty to assess his own degree of blameworthiness. Depending on the court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way.

Whatever it is, there is a triable issue on the plea of contributory negligence. That being the view of the matter that commends itself to me, it would seem to me to be opposed to principle to shut out the defendants from putting forward their version of the facts. As to the strictures the judge made with regard to the defendants' alleged indifference in entering appearance or their casual treatment of correspondence, I agree with what has fallen from the lips of Platt JA and I need say no more on it.

True, there was some delay in entering appearance but I cannot accept it was an unreasonable delay, or it was the type that disables a plaintiff from relief in equity. At all events, such delay was satisfactorily explained. When I asked counsel for the respondent what loss or damage would result to him if this suit were admitted to a hearing on the merits, he said nothing that I think should inhibit the court from allowing this suit to be heard on its merits. I recorded counsel as saying that a court's discretion should not be exercised in favour of a negligent applicant. I think the charge that the appellants were negligent is

one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.

I think a distinguished equity judge has said:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.

I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were permitted a hearing, the quantum of the liability to pay damages may be much less.

The learned judge claimed on the authority of the *Patel v EA Cargo Handling Services Co Ltd* (1974)EA 75, that he has wide discretion: True, he has but his exercise of the discretion, was, in my opinion, coloured by his faulty appreciation of the evidence on the question of delay and the appellant's so-called casual attitude to the correspondence. In these circumstances, it seems to me entirely just that subject to paying the costs thrown away, the appellants should be let in to defend. For my part, I accept the contention of the appellants in paragraph 7 of their memorandum of appeal that precluding them from entering appearance because of the four weeks delay, judged against the facts of the case and the surrounding circumstances, would be an extreme penalty and would, to my way of thinking be wrong, and unjust.

Accordingly, as I said, I agree that the appeal be allowed and an order be made in terms proposed by Platt JA.

Dated and delivered at Nairobi this30th day of October , 1986

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

I certify that this is a true copy of the original

DEPUTY REGISTRAR