IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL 68 OF 1982

BETWEEN

PRICE & ANOTHER ....APPELLANT

AND

HILDER...RESPONDENT

JUDGMENT BY HANCOX JA

This is a quite an extraordinary case. The former plaintiff, Mr Trevor Price, now deceased, sued the respondent to this appeal on January 19, 1970, for the rent due and owing, and money lent, under the terms of a lease of March 1, 1963, of his farm at Naivasha. As Griffiths J (as he then was) said in his ruling when the subsequent default judgment of Mosdell J was sought to be registered (and was registered) in England under Section 9 of the Administration of Justice Act, 1920, this was in essence a claim for sums due to the plaintiff under terms of a lease on termination, plus, of course, the repayment of the loan referred to in clause 4 of the lease (£3,500), and interest at the stated rate of 8% per annum.

The respondent did not defend the claim, and did not appear before the Court (indeed, as is manifest from the record he has kept out of the way until, as Scriven J graphically put it, the judgment was about to bite in England because of a garnishee order *nisi* on a legacy or other similar asset, of the respondent). Accordingly, Mosdell J gave judgment on formal proof on the deceased plaintiff's evidence for that which I may call the blanket sum of Shs 414,500, without troubling to specify how it was made up. The decree reflected this amount.

When the matter came before Griffiths J on October 23, 1975, the respondent's then counsel displayed considerable ingenuity in resisting the application for registration under the provisions of sub-section 2 of section 9 of the Act of 1920. These arguments did not succeed, and Griffiths J was under no illusions as to what the respondent was doing, for he said:

"It stands out a mile that the Defendant was deliberately getting out of the country in the hope of avoiding payment. When the claim came before the judge in the absence of the Defendant, it is quite clear that a considerable amount of evidence was put before the judge by Major Price to substantiate the plaint and letter."

But he did express disquiet that Mosdell J had appeared to give to the plaintiff approximately £5,000 more than was due because of the provision in the lease (clause 12) which enjoined the plaintiff to buy the

respondent's cattle at the conclusion of the term, and because there was evidence that the plaintiff had in fact sold cattle for Shs 96,000 and had recouped himself to that extent.

It was this factor, I think, which impelled Scriven J to set aside the default judgment as to that which he held was the non-liquidated part of the claim, namely Shs 189,000, for I do not think for one moment that paragraph B at the end of Scriven J's ruling meant that he was giving leave to defend as to the whole claim of Shs 414,500. The judge specifically ordered the respondent to pay Shs 225,000, in effect, to the order of the plaintiff's advocates, and he was therefore upholding Mosdell J's judgment to that extent.

It will be observed that the application to set aside was not made until April 7, 1978, when it was supported by an affidavit of the respondent in which he alleged, *inter alia*, that the *Daily Nation*, in which the appropriate notice had been inserted for the purposes of service of the summons, was not available in the Republic of South Africa where the respondent then was. But that affidavit does not explain why the application was not made earlier, for instance, immediately after the hearing before Griffiths J so that the proposed counterclaim (which Scriven J purported to give the respondent leave to file when allowing in part of the application to set aside on September 27, 1979), would have been filed before the period of limitation expired, for not even the respondent could be heard to say that he was unaware of the proceedings by then, having instructed counsel to appear for him. Indeed, it is obvious from the letter from the Rhodesian attorneys of September 21, 1971, that the respondent knew of them as early as September, 1971.

Scriven J appeared to be in no doubt as to the lack of *bona fides* of the application, and Mr Le Pelley, for the present appellants, who are the deceased plaintiff's trustees, referred us to several passages which showed that the judge was in full agreement with the opinion of Griffiths J which I set out earlier. In a further passage, Scriven J said:

"……. it is somewhat of an understatement to say in that affidavit "(ie the supporting affidavit to the application)" he "(the Respondent)" gives no solid reason for the 8 years delay in making this application".

and later:

"I find it hard to escape the conclusion that the application is devoid of true merit but that rather it has all the characteristics of the last move by a debtor who has hitherto scorned the courts of Kenya for redress, but who now has no other hope but (to) fling himself on the mercy of the very court he has so far eschewed."

Mr Le Pelley emphasized that the judge having made the findings he did, which were amply justified on the material before him, it was an improper exercise of his discretion to go on and give (in effect) leave to defend any part of the claim. Once he had done that, Mr Le Pelley submitted, it opened the door to a counterclaim for any amount (whether or not the judge gave leave to file it) and which, due to the operation of section 35 of the Limitation of Actions Act, cap 22 predated the counterclaim to the date of the commencement of the action.

I prefer to express no opinion as to the extent of the operation of section 35, because in my opinion this is a case where we can and should say that the judge's discretion was not properly exercised in accordance with the accepted principles, see in particular Brandon LJ in *The El Amria* [1982]

2 Lloyds Reports page 119, at page 123, which has been followed in Kenya.

Mr PN Khanna, on behalf of the respondent, made a valiant attempt to persuade us that the judge had exercised his discretion correctly, because he had obviously applied his mind to the various factors which were material to its exercise, and had <u>nevertheless</u> given limited leave to defend. Moreover, he had only given leave to defend as to Shs 189,000 which showed that he had given due weight to the plaintiff's representatives' arguments and had refused to set aside the judgment as to Shs 225,000 representing the liquidated sums claimed, because in his view there was clearly no defence thereto. Furthermore Scriven J

had expressly said that he had borne the relevant limitation periods in mind, and this showed that he was alive to the fact that he would in effect be depriving the plaintiff, or his representatives, of a defence to any proposed counterclaim that might be filed.

In the well known case of *Mbogo v Shah* [1968] EA 93, at page 95, Sir Charles Newbold P expressly approved Harris J's test of the principles it was necessary to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, as follows:

"Whether … 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."

I am perfectly satisfied that this is the test that should be applied notwithstanding that the rules have been re-cast since then. Having applied it I have no doubt that Scriven J took into account a consideration he should not have taken into account, namely the disquiet felt by Griffiths J as to the extra Shs 96,000. It may have been relevant at that time, but all the defendant had to do was to seek to set aside then, and file the counterclaim (or plead his set off) for Shs 96,000. Why did he not do so? Obviously because he hoped to get away with the whole claim, and it was simply not worth putting his head into the noose for a fraction, albeit a substantial fraction, of it.

Secondly the judge misapprehended the facts when he said that the original plaintiff's son had personal knowledge of the issues and was available in Kenya. That is directly contrary to the evidence which was before him in the form of the concluding sentence of Mr Hickson's affidavit of June 8, 1978. Thirdly, I can conceive of no greater injustice than that the plaintiff's representatives should have to come and defend a counterclaim, or even to prove the relevant part of the claim, over nine years after the judgment was entered and after the principal witness on the plaintiff's side had died. In my view, in the language of Brandon LJ, the judge's decision, albeit a discretionary one, was plainly wrong.

I would therefore allow the appeal, set aside the order of Scriven J dated September 27, 1979, insofar as it set aside Mosdell J's *ex parte* judgment as to Shs 189,000 and dismiss the application of April 7, 1978 *in toto*. I would order the respondent to pay the costs of the appeal.

Chesoni Ag JA. I have had the advantage of reading the judgment of Hancox JA in draft and I agree that this appeal should be allowed in the terms he has proposed.

The judge (Scriven J) wrongly exercised his discretion when he took into account a matter he ought to not to have considered, namely Griffiths J's disquiet whether the plaintiff had got almost #5,000 more than what was due to him. In my view the judge could not, too, have exercised the discretion in favour of the respondent who had waited for nearly nine years to seek the court's order setting aside the *ex parte* judgment. The respondent was guilty of laches and it was difficult to say that justice could be done to the parties after such a long time, when in fact one of them was now dead. The principles enunciated in the English case of *El Amria* [1982] Lloyd's Reports 119 at page 123 about exercise of discretion by a judge were applied to Kenya in the case of *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux & Another* – Civil Appeal No 16 of 1982. Those principles are in line with what the Court of Appeal for Eastern Africa said in *Mbogo v Shah* [1968] EA 93 at page 195.

I would, therefore, allow the appeal and grant the orders suggested by Hancox JA in his judgment.

Nyarangi Ag JA. This is an appeal against the exercise of discretion of the trial judge.

The facts of the matter are adequately set out in the judgment of Hancox JA and so are the arguments and submissions of the advocates for the parties.

The law on the matter is now settled. The English case of *The El Amria* [1981] 2 Lloyds Law Reports page 119 at page 123 as per Brandon LJ, which has been applied in Kenya, has comprehensive principles that are accepted as applying to an application concerning the exercise of a judge's discretion. The

leading local decision is the case of *Mbogo v Shah* [1968] EA page 93 in which De Lestang VP (as he then was) observed at page 94:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

It would be wrong for this Court to interfere with the exercise of the trial judge's discretion merely because this Court's decision would have been different.

The trial judge's concluding remarks in the judgment mentioned the death of the respondent and continued:

"... but I understand his son with personal knowledge of the issues is available in Kenya, as is the valuer who inspected the farm at the termination of the Defendant's tenancy, and so whilst this Defendant cannot expect to have his judgment set aside on anything like the usual terms he should nevertheless have a last chance to demonstrate his sincerely and a chance to substantiate his conviction of a defence on its merits…"

With respect to the trial judge, that conclusion is out of place because earlier on the judge had held that the application was devoid of merit. The finding that the son of the original plaintiff could testify about the issues was contrary to the affidavit evidence of Mr Hickson.

It is apparent that the trial judge was mesmerized by the observations of Griffiths J (of the High Court in England) that Mosdell J might have given £5000 more than he was entitled to to the plaintiff.

The trial judge misdirected himself on the several essential matters and as a result acted on matters on which he should not have taken into consideration.

I agree with Hancox JA that some injustice might be committed if further litigation is permitted at this late stage. I concur with the remarks of Hancox JA on section 35 of the Limitation of Actions Act, cap 22.

The trial judge's decision is clearly wrong. I too would allow the appeal to the extent indicated by Hancox JA. I concur with the order proposed on costs.

Dated and delivered at Nairobi this 15th day of June ,1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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JUDGE OF APPEAL

J.O.NYARANGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR