



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Potter, Kneller & Hancox JJA)

CIVIL APPEAL NO. 64 OF 1982

BETWEEN

JOSEPH NGUNJE WAWERUAPPELLANT

AND

JOEL WILFRED NDIGA.....RESPONDENT

JUDGMENT

This is an appeal from an order of the High Court at Nyeri dismissing an application by the appellant under order IXA rule 10 of the Civil Procedure Rules to set aside an *ex parte* judgment obtained by the respondent as plaintiff against the appellant as defendant. The latter entered an appearance but failed to file a defence.

The appellant sold a Peugeot 504 saloon to the respondent for Kshs 65,000. The respondent paid Kshs 40,000 to the appellant's advocates and the car was released to him. The respondent alleges that the car was in bad mechanical condition and that the appellant entered into a further agreement with him that the respondent should have the necessary repairs carried out and the cost should be defrayed out of the unpaid balance of the purchase price, eg the Kshs 25,000. The repairs allegedly cost Kshs 32,258.95, ie Kshs 7,258.95 more than the balance of the purchase price. The appellant allegedly refused to hand over the registration book of the car, sign the transfer form or pay Kshs 7,258.95. The respondent brought an action in the High Court at Nyeri for (1) an order that the car be transferred to him, (2) Kshs 7,258.95, (3) general damages for loss of use and (4) costs and interest. The respondent obtained *ex parte* judgment for Kshs 7,258.95 and the case was set down for assessment of damages. On April 2, 1982 O'Kubasu J ordered the transfer of the car, the payment of Kshs 7,258.95, the payment of general damages assessed at Kshs 10,000 and costs.

The appellant appeals against that ruling and order on three grounds. His third ground, which I shall consider first, is that the learned judge did not exercise his discretion judicially. I think the appellant is right. Unfortunately the learned judge misdirected himself as to the law applicable to order IXA rule 10. In his ruling the judge said:

“The applicant must show sufficient reasons why the judgment should be set aside. Cited authorities refer to sufficient cause.”

The learned judge then referred to a case decided in Kenya in 1951 under order IX rule 24 of the Civil Procedure (Revised) Rules, 1948, under which 'sufficient cause' has to be shown to set aside an *ex parte* judgment. He then referred to a case decided in Tanzania in 1960 and to a case decided in Uganda in

1962, in both of which cases the rules in force required the showing of ‘sufficient cause’.

Order IXA rule 10 as now in force empowers the court to set aside or vary an *ex parte* judgment upon such terms as are just, and there is no requirement of showing sufficient cause. We set out the case law applicable to the modern rules in the recent case of *Pithon W Maina v Mugiria* (1982- 88) 1 KAR 171. Suffice it to say here that –

1. The court has an unfettered discretion to do justice between the parties.
2. It may be just on the facts of the particular case to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice.
3. This court will not interfere with the judge’s exercise of his discretion unless there has been a misdirection leading to a wrong decision or a manifestly wrong decision leading to injustice. See *Patel v EA Cargo Handling Services Limited* [1974] EA 75 at 76 C and E; *Shah v Mbogo* [1967] EA 116 at 123 B; *Mbogo v Shah* [1968] EA 93 at 96G; *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 at 51.

Had the appropriate case law been cited to the learned judge, I think he might well have decided differently. The plaint was dated November 24, 1981. The date stamp of the Nyeri High Court is not legible. The appellant’s memorandum of appearance was received by the Nyeri Registry on January 18, 1982. On February 16, 1982 the respondent obtained *ex parte* judgment. The appellant’s chamber summons to set aside that judgment is dated May 26, 1982. The registry stamp is illegible. The application was heard on May 31, 1982. In his affidavit in support of the chamber summons the appellant gives his reasons for the failure to file a defence. When instructing his advocates to enter appearance he did not instruct his advocates as to the nature of his defence, but went to Mombasa for three weeks on business. He is a very busy man who travels between Nyeri, Nairobi and Mombasa at least twice a week. He runs an accountancy business and an export business. He says that he forgot about the case. I do not think it would be just for the appellant to suffer for this oversight, and more particularly so in view of what happened in regard to the claim for general damages, which I shall now consider.

The appellant’s first ground of appeal is that no reasonable notice of the setting down of that suit for assessment of damages was given to the appellant, who had entered an appearance, and the learned judge erred in not so holding.

Order IXB rule 1(2) provides:

“(2) At any time after the entry of interlocutory judgment, the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set down the suit for assessment of damages or of the value of goods and damages as the case may be.”

Then order IXB rule 3 provides:

“3. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied –

- a. that notice of hearing was duly served, it may proceed *ex parte*;
- b. that notice of hearing was not duly served, it shall direct a second notice to be served;
- c. that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.”

The appellant’s advocate who neglected to attend to his defence drafted this ground of appeal, but neglected to swear an affidavit in support of it. However, Mr Muchemi, who appeared for the respondent, submitted that reasonable notice had been given to the appellant/defendant by the publication and circulation of the daily cause list of the High Court at Nyeri for March 29, 1982, which contained the following:

“In chambers for formal proof:

9. HC NCC 193/81 *Joel Wilfred Ndiga v Joseph Ngunje Waweru* (Mathenge & Muchemi (Ole Kaparo & Waweru)”

Mr Muchemi informed us that the publication of this fixture gave four clear days’ notice of the hearing. This submission raises a question which may one day, when it is fully argued, engage the serious attention of this court. And that question is whether the duty of a plaintiff to give notice of setting down to a defendant is discharged by the timeous publication by the court of a cause list advertising the fixture. For the purposes of this appeal I am content to say that I am not satisfied that the appellant defendant had notice in this case as required by the rule. This is an added reason for allowing this appeal.

Furthermore, damages for loss of use of the vehicle were claimed as general damages, and no particulars of loss were set out in the plaint. At the hearing for assessment of damages the respondent/plaintiff stated that he had been deprived of the use of the vehicle from June 1981 until January 1982, and that he had ‘suffered loss’. With respect to the learned judge, this should have been a claim for special damages, and the loss suffered should have been proved strictly. How did the plaintiff/respondent suffer a loss of Kshs 10,000 in six months, ie approximately Kshs 400 per week?

The appellant’s second ground of appeal is that the learned judge erred in holding that the appellant had no defence to the respondent’s plaint. The appellant annexed to his affidavit in support of his application to set aside the *ex parte* judgment, a draft defence and counterclaim, in which the appellant denies the further agreement to pay for repairs and counterclaims for the balance of the purchase.

On the day of hearing of this appeal the appellant filed in the registry of this court a notice of change of advocate. But in vain, the newly appointed advocate did not appear. I can only express the hope that the appellant will be luckier the third time.

For the reasons I have given, I would allow this appeal, set aside the ruling and order of the High Court, set aside the *ex parte* judgment and assessment of damages of the High Court, and order that Nyeri Civil Case No 193 of 1981 be remitted to the High Court for trial, the appellant being granted an extension of time of 30 days from the date of delivery of this judgment in which to file a defence and court counterclaim. I would award the appellant the costs of this appeal and of the hearing of the chamber summons which is the subject of this appeal. As Kneller and Hancox JJA agree, it is so ordered.

Hancox JA. I have had the advantage of reading the judgment of Potter JA in draft and I find myself in complete agreement with all that he has said.

The plaint claimed an order that the defendant (the present appellant), transfer the vehicle KQX 879 to the plaintiff, (the respondent to this appeal), Kshs 7,258.95, being the balance the respondent alleged he had paid for repairs over and above the remainder of the purchase price (Kshs 40,000 of which he had already paid) pursuant to a second alleged oral agreement between the parties, plus general damages for the loss of use of the vehicle. No defence having been filed, judgment was entered for the liquidated sum by the deputy registrar, and O’Kubasu J then proceeded to formal proof. On April 2, 1982 he gave judgment for the respondent on the first two prayers and assessed the general damages for loss of use at Kshs 10,000. On June 10, 1982 the learned judge refused to accede to an application under order IXA rule 10 to set that judgment aside stating, *inter alia*:

“Clearly the court has wide discretion either to set aside judgment or refuse to do so. The applicant must show sufficient reasons why the judgment should be set aside. Cited authorities refer to ‘sufficient cause’ (*JC Eksteen v Kutosi s/o Bukua* (1951) 24 (2) KLR 90 and *Shasudin Jiwan Mitha v Abdulaziz Ali Ladak* [1960] EA 1054).”

The words ‘sufficient cause’ appeared in rule 24 of the former order IX, which was replaced by three new orders, IX, IXA and IXB by Legal Notice No 66 of 1973. These in turn were replaced by Legal Notice No 88 of 1978, represent the Civil Procedure Rules as now applicable. The former rule 24, shorn of its

proviso, was in these terms:

“24. In any case in which a decree is passed *ex parte* against a defendant he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit”.

and it was that rule which was considered in the two cases to which O’Kubasu J referred in the passage set out above, namely by Windham J, as he then was, in *JC Eksteen v Kutosi s/o Bukua* 24(2) KLR 90, and its Tanganyikan counterpart, order IX rule 13, by Simmons J in *Shadsudin Jiwa Mitha v Abdulaziz Ali Ladak* [1960] EA 1054. It was, however, additional to rule 10 of the same order in Kenya, which was in similar, though not identical, terms to the present order IXA rule 10. In both the court was and is given a wide discretion to set aside ‘upon such terms as’ (are) ‘just’. In *Kimani v McConnell* [1966] EA 547 at 549, Harris J pointed to one distinction between rules 10 and 24, stating that:

“Although the marginal note to order IX rule 10, refers to setting aside *ex parte* judgment, that rule (unlike rule 24 of the same order) is not in terms limited to the setting aside or varying of *ex parte* judgments as such and would appear to extend to all judgments passed pursuant to any of the preceding rules of the order including even rule 9(1).”

But the main distinction between those two former rules was that rule 24 additionally referred to a different situation: rule 10 applied only where judgment had been passed pursuant to any of the preceding rules of the order, which provided, *inter alia*, for the setting down of the suit ‘*ex parte*’ (that is to say without notice to the defendant (see Benneth Ag CJ in *Zirabamuzale v Corret* [1962] EA at 695), where the defendant had either failed to enter an appearance or had failed to file a defence. Rule 24 however applied to the situation where the defendant, not having entered an appearance or filed a defence, could nevertheless show that the summons had not been duly served, or, whether or not he had entered an appearance and filed a defence, he had nevertheless failed physically to attend when the suit was called for hearing. The tenor of the preceding rules 17 to 23, showed that they all referred to the non-appearance, that is to say the absence, of the parties, with the emphasis on the defendant, and rule 24 itself specifically said that he might apply to set aside:

“... if he satisfied the court that the summons was not duly served [meaning the summons to enter appearance] or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.”

Under that rule therefore, the defendant could apply to set the judgment aside only on two grounds:

1. That the summons had not been duly served.
2. That he was prevented by sufficient cause from physically appearing when the case came on for hearing.

The misapprehension has arisen due to the indiscriminate use in the former rule 24 of the word ‘appearing’, when in fact physical attendance was meant.

It is to be observed that the present rules divide the two situations into orders IXA and IXB, the former being headed:

“Consequence of non-appearing and default of defence”

and the latter

“Hearing and consequence of non-attendance”.

Rule 3 order IXB replaced rule 17 of the former order IX and substitutes 'attends' for 'appears'. Moreover, the requirement that a person who does not attend shall show sufficient cause has disappeared and the court is now given the same unfettered discretion, by rule 8 of order IXB to set aside as it is by rule 10 of order IXA for failure to enter an appearance or file a defence.

Seen in this light *Eskteen's* case (supra) is, perhaps easier to follow. In that case the defendant had, because of his advocates' mistake, not only failed to enter an appearance or file a defence but (no doubt as a direct consequence of the preceding events) failed to turn up for the hearing. Windham J said at 92:

"of course it would be undesirable and almost impossible to lay down any rigid rule to bind or guide courts in the exercise of their discretion in such applications, since each case must be decided on its merits. But an application to set aside an *ex parte* judgment given in default of appearance must, and order IX rule 24 so requires it, show 'sufficient cause' why he was prevented from appearing when the suit was called on for hearing".

It might be thought that Windham J was bracketing the different sets of situations together, but in my view it is clear that he was not applying the requirement of showing sufficient cause to a defendant who had failed to enter an appearance or file a defence (even though that had additionally occurred in that case) but as is shown by the words I have emphasised to one who failed to attend at the hearing. This is made even clearer by the second of the two cases mentioned by O'Kubasu J, *Mitha v Ladak* (supra) at 1056, letter H, where Simmons J considers the question solely in relation to the defendants' failure to appear, in the sense of his non-attendance, at the hearing.

It will be seen from the foregoing there never was any requirement that a litigant seeking to set aside a judgment upon any ground other than failure to attend the hearing had to show sufficient cause or sufficient reasons, which I treat as synonymous with 'sufficient cause'. The previous rule relating to the setting aside of a judgment in default of entering an appearance (as opposed to physical attendance) or of filing a defence was, as I said, in every similar terms to the present one. It was in relation to that earlier rule, that is to say the former rule 10 of order IX, that Harris J laid down the test to be applied in considering such applications, 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."

It is true that Harris J had bracketed rules 10 and 24 together in his preamble to this passage, but Newbold P in *Mbogo v Shah* [1968] EA at 95, an appeal from a later decision of Harris J in which only rule 10 was then under consideration, put the matter beyond doubt when he adopted the passage from Harris J's judgment which I have just set out, and, if it were needed, the further seal of approval was set by Duffus P in *Patel v EA Cargo Handling Services* [1974] EA at 76 in relation to that rule, and by this court in the recent case of *Pithon Waweru Maina v Thuku Mugiria* (1982-88) 1 KAR 171, which was in relation to the present rule 8 of order IXB.

In my judgment, therefore, the misapprehension which may have arisen in the instant case from the language of the former Rules, and from the passage from Windham J in *Eksteen's* case to which I have referred, does not provide any warrant for reading into the present rule a requirement of sufficient cause, which would have the effect of fettering the court's very wide discretion to set aside under order IXA rule 10. In these circumstances, for this and the reasons given by Potter JA, I agree that there was a misdirection and that the appellant should now be enabled to file a defence and counterclaim.

I would therefore also allow this appeal and I concur in the orders proposed by Potter JA.

Kneller JA. I have had the advantage of reading in advance the judgments of Potter JA and Hancox JA, with which I respectfully agree, and have nothing to add.

Dated and delivered at Nairobi this 15th day of August, 1983.

K.D POTTER

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR