



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law JJA & Simpson Ag JA)

CIVIL APPEAL NO. 24 OF 1980

BETWEEN

JESSIE MWANGI GACHAGO.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Law JA In Civil Case No 2436 of 1978, the respondent to this appeal, the Attorney-General, was sued by a plaintiff described as “Beluf Establishment” for damages in respect of the alleged loss of 360 bags of coffee, the causes of action being described as conversion, breach of duty as bailee, and actionable negligence. The plaint is dated September 20, 1978. By his written statement of defence, dated November 1, 1978, the Attorney General applied under Order I rule 14 of the Civil Procedure Rules asking for leave to issue third party notices against three named persons, one of whom is the appellant in this appeal, claiming against them “indemnity against the plaintiff’s claim”.

On November 17, 1978, documents headed —

“Thirty Party Notice (Order I rule 14 of the Civil Procedure (Amendment) Rules, 1975) Issued Pursuant to the Order of the Court dated November 13, 1978.”

were duly served on the three named persons, including the appellant. Attached to each of them was a copy of the plaint in Civil Case No 2346 of 1978. By the notice served on the appellant, he was informed that the Attorney General —

“claims against you indemnity on the ground that on or about September 27, 1977 and/or September 28, 1977 you converted coffee which was under the care of the Government of the Republic of Kenya among which coffee was the plaintiff’s coffee.”

The notice went on to say —

“and take Notice that if you wish to dispute the plaintiff’s claim against you, you must appear within fifteen (15) days after the service of this Notice on you, inclusive of the day of service, otherwise you will be taken to admit the plaintiff’s claim against you and you will be bound by any judgment given in the suit.”

This notice was defective, as after the word “against” in the second line of the passage cited immediately

above there should have appeared the words “the defendant, or the defendant’s claim against”, but these words were carelessly omitted (see Form 22, Appendix A, Civil Procedure Rules). However, no point was taken before us or in the court below as to the validity of the notice as served. What is important is that under the terms of the notice, the third party was required to enter an appearance, and this the appellant duly did, as did the other two third parties, who also filed defences denying liability to indemnify the defendant. The appellant did not file a defence. The next step was that on May 14, 1979, the defendant took out a summons for directions under Order I rule 18 asking —

1. that judgment be entered against the appellant “for failure to file defence”,
2. that the issue of liability between the defendant and the other two third parties “be tried and disposed of”; and
3. that the costs of the application be born (sic) by “the third party” (sic).

When the summons was heard, Mr Salter QC who then appeared for the appellant, submitted inter-alia that the appellant was not in default in failing to file a defence, as he had never been required to do so. This submission is to my mind obviously correct. A third party cannot be in default of defence unless he has been ordered to serve a defence and refuses or has failed to do so. The appellant in this case was never ordered to file a defence and was not in default in failing to do so. See also *Gloucestershire Banking Co v Phillips* (12 QBD 533) in which case Lord Colaridge CJ said —

“The third party is in the position of any other defendant, and if any other defendant appears and will make no defence, when properly called upon to make it ... Judgment may be signed against him.”

The instant appeal is not a case of a third party appearing and refusing to make a defence. On the contrary, it is a case of a third party appearing and making it clear that he is anxious to make a defence. On this ground alone I would allow this appeal

However, as the Attorney General has appeared in these proceedings, and as Miss Onguru on his behalf supported the judgment the subject of this appeal, I feel that it is proper that I should deal with her submissions. They were, in brief, that a judge dealing with a summons for directions under Order I rule 18 has a very wide discretion to give judgment against a third party, and she relied on the case of *Sango Bay Estates Ltd & Others v Dresdner Bank AG* [1971] EA 17, in which Spry VP is reported as saying that, on a summons for directions under Order I rule 18, a judge may decide that the third party has no defence, and give judgment against him in favour of the defendant. That is no doubt a correct statement, where the judge is satisfied that the third party has no defence, either on his own admission, or because he is in default. But that was not the position here: the appellant was not in default in not having filed a defence, and his advocate informed the learned judge that the appellant had a defence, which he was anxious to plead when required to do so. How, in these circumstances, could the learned judge be satisfied that the appellant had no defence? There was in my opinion no justification whatsoever for the judge entering judgment against the appellant on the basis that he had no defence. In third proceedings, the defendant who issues the notice and the third party face each other in the relationship of plaintiff and defendant. The general rule is that a defendant who has entered an appearance will not be debarred from defending. He may well be put on terms as to costs if he is badly in default. I can see no reason whatsoever for debarring the appellant in this case from defending the third party proceedings, especially as the defendant’s liability in the principal suit brought against him by the plaintiff still has not been established. Order I rule 17 seems to indicate that judgment against a third party should not be entered, even as against a third party who has not entered an appearance, until the defendant’s liability to the plaintiff in the main suit has been established.

The question now arises, what orders should this court make? The learned judge held as follows —

“The application succeeds. The defendant is entitled to the directions he seeks. The Court orders as prayed.”

What is the effect of all this? The first prayer was that judgment would be entered against the appellant. The second prayer was that the issue of liability between the other two third parties “be tried and disposed of”. This has been granted “as prayed”, but that is not good enough. When is that issue to be tried? The judge does not say. Third party issues are usually tried at or after the trial of the suit between the plaintiff and defendant. This must be made clear. Then the third prayer was that the costs of the application be born (sic) by the third-party. This prayer was also granted as prayed. But which third party is to bear the costs? There are three third parties. Directions given on a summons for directions must be absolutely clear, beyond possibility of mistake.

In my view, sufficient particulars can be gleaned from the plaint, the third party notice and Miss Onguru’s affidavit in support of the Summons for Leave to issue Third Party Notices, to enable the appellant to plead his defence. There is no need for this matter to be remitted to the High Court for a fresh hearing of the summons for directions.

I would allow this appeal, set aside the ruling of the learned judge, and substitute a ruling to the following effect with regard to the summons for directions the subject of this appeal —

- “1. That the application for judgment to be entered against Jessie Mwangi Gachage be dismissed
2. That Jessie Mwangi Gachago do file a defence to the third party notice dated November 17, 1978, and to the plaint attached thereto, within four weeks from today.
3. That the issue of liability between the defendant and the three third parties herein be tried on a date to be fixed or agreed after the disposal whether by trial or settlement of Civil Suit No 2436 of 1978.
4. That the costs of this application be costs in the cause between the defendant and the third parties.”

I would give the appellant the costs of and occasioned by the hearing of the summons for directions before Nyarangi J but I would not certify for the costs of Queen’s Counsel. I would give the appellant the costs of this appeal, but I would not certify for two advocates.

Madan JA. I agree with the judgment just delivered by Law, JA. The appellant was third party No 3 in these proceedings. He entered appearance to the third party notice issued against him by the defendant who then applied for directions under Order I rule 18 as follows:

“1. Judgment be entered against the (appellant) for failure to file defence.

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At the hearing of the summons for directions the advocate for the appellant as the third party asked for an opportunity to file a defence. The learned judge totally ignored his request overlooking that the appellant had entered appearance, and overlooking also that the appellant at no time had been required to file a defence, he said there was nothing to stop the appellant from filing a defence within a reasonable time. How could the appellant have filed a defence without directions to that effect from the court, and in the absence of such direction from what date was a reasonable time to be calculated? It is impossible to see that the learned judge could have been satisfied under rule 18 that there was no proper question to be tried as to the liability of the third party.

The order which was extracted pursuant to the “orders as prayed” made by the learned judge reads as follows:

“DECREE/ORDER CLAIM FOR DAMAGES

It is ordered

1. That judgement be entered against Jessie Mwangi Gachago, third party No 3 for failure to file defence for indemnity and conversion as prayed by the third party notice for an unspecified

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As it stands the order being indefinite it is not specifically enforceable by execution without a further order by the court crystallising any precise liability under it. Assuming that the Order was drawn in conformity with Order XX rule 6 (1)'read together with rule 7 (6) of the Civil Procedure Rules, which I doubt, it demonstrates the futility of entering judgement against a third party before a defendant's liability has been decided. The proper approach to third party proceedings is set out in Atkins Court Forms, Vol 37, 2nd Ed p 266:

"From the time of the service of the third party notice the third party becomes a party to the action with the same rights in respect of his defence against any claims made against him in the action and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued. The defendant who issued the notice and the third party thus face each other in the relationship of plaintiff and defendant."

As Simpson Ag JA also agrees the orders will be as proposed by Law JA.

Simpson JA. I have had the advantage of reading in draft the judgment of Law JA. I agree with it and with the orders proposed by him and have nothing to add.

Dated and Delivered at Nairobi this 13th day of March 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

A.H.SIMPSON

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR