REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIV APP 215 OF 00[1]

Tunoi, Bosire & Owuor JJA

Civil Appeal No. 215 of 2000

Summary of Facts – This was an appeal from an order of the High Court at Kisumu whereby the learned judge allowed a preliminary objection taken in a chamber summons. In accordance with this order, the appellants documents were expunged from the record and the appellant denied the right to be heard in the application because of lack of diligence in the matter.

Held:

1. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigate from the pursuits of his right.

2. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.

Appeal allowed.

Natural Justice – Right to be heard – requirement of all disputes to be investigated and decided on merit – a court ought to hear both parties.

October 18, 2002, **Tunoi, Bosire & Owuor JJA** delivered the following Judgment. This is an appeal from an order of the superior Court at Kisumu (Wambilyangah, J.) given on 17th day of April, 2000 whereby the learned Judge allowed a preliminary objection taken in a Chamber Summons filed in a suit, H.C.C. No. 64 of 2000 and ordered that the grounds of objection and replying affidavit filed by Trust Bank Ltd., the appellant herein be expunged from the record and thereafter restrained the appellant and anybody else acting on its behalf from dealing in any manner with the respondent's (Amalo Company Ltd.) property namely, Kisumu Municipality/7/158 until the suit was heard and finalised.

The appellant was dissatisfied with that order hence this appeal which was canvassed before us mainly on two grounds namely that:

"1. The judge erred in rejecting the grounds of opposition and Replying affidavit filed by the appellant.

4. The judge erred in expunging the documents filed by the appellant from the record.

5. The judge erred in holding that the respondent's application was unresisted."

What transpired in the court below was very simple. The respondent herein, filed a suit against the appellant herein, on 15th March, 2000 seeking various orders in respect of money it had borrowed from the appellant and which according to the appellant had not been paid as agreed. Together with the suit, the respondent filed a Chamber Summons under the provisions of **Order 39 rules 1, 2, & 3** of the Civil Procedure Rules, section 63 of the Civil Procedure Act and **Order 50 Rule 16** of the Civil Procedure Rules. In the Chamber Summons, it sought mainly a prohibitory injunction against the appellant who was in the process of taking steps to exercise its statutory power of sale as a chargee in the aforesaid property. As the learned Judge was persuaded that the application had merit, he granted a temporary injunction and set down the matter for inter partes hearing on 22nd April, 2000.

On 22nd of April, 2000, the appellant had not filed the documents. An order by consent was made extending the period for the filing of a replying affidavit and grounds of opposition by seven days from the above date and the matter to be heard inter partes on 6th April, 2000. On the hearing date, Mr. Gadhia, counsel for the respondent, had filed a preliminary objection based on the grounds that the applicant had failed to comply with the order of the court in that he had filed the replying affidavit on 24th March, 2000, and the same had not been served upon him. Secondly, that the replying affidavit had been filed outside the stipulated time namely on 3rd April, 2000. For these reasons, Mr. Gadhia requested that the appellant's documents be expunged from the record and the appellant be denied the right to be heard in the application. Mr. Kibichiy, counsel for the appellant, on his part explained that in order to prepare the replying affidavit he had to peruse through numerous documents kept by the Bank, hence the delay in filing the affidavit. Nevertheless, since both the documents were by then on record, the court was duty bond to consider the same. Further that the respondent was not going to be prejudiced by the delay. Otherwise Mr. Kibichiy sought for a short adjournment to enable him to serve the documents in sufficient time to enable Mr. Gadhia to consider them.

The learned judge was not amused by what he considered as Mr. Kibichiy's lack of diligence in the matter. He therefore exercised his discretion in favour of the respondent, expunged the documents from the record and granted the orders sought by the respondent without much ado expressing himself thus:

> "The documents filed by Mr. Kibichiy's firm are hereby expunged from the record. It means that the plaintiff's application is unresisted and given the matter adumbrated in the supporting affidavit, I hold that the plaintiff would suffer an irreparable damage if the charged security were sold before the hearing and determination of this suit".

As we have endeavoured to explain in a certain amount of detail, this was a matter in which the learned judge had before him the appellant's documents upon which his whole case was based, on the date he had set down the matter for hearing; save for the mere irregularity that the same had not been served on the respondent in time.

The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by **Georges, C.J.** (Tanzania) in the case of Essanji and Another Vs. Solanki [1968] EA at page 224.

> "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right."

That accords with the policy of the law as can be gleaned from **Order 9(1) of the Civil Procedure Rules** whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.

The learned Judge was faulted by counsel for not considering and following what this Court said recently

in the case of Central Bank of Kenya v Uhuru Highway Development Ltd. and others C.A 75 of 1998, whereby Bosire, J.A had the following to say on this same issue:-

> "I am therefore, unable to subscribe to the view expressed by Mr.
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> Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. Besides, the learned judge in the court below fell into error when he said that a failure to file grounds of
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> opposition automatically entitles the applicant to orders ex-parte".

This is our view in this matter. The appellant had the right to be heard on the documents he had put before the court and were on record. It cannot be said that he did not offer an explanation for the delay in serving the documents to the opposite party. Even if the application had to proceeded ex-parte, the learned judge was still under a duty to consider the application on its merit, based on the usual principles governing the granting of injunctions. We are satisfied that the learned judge was in error in the manner he proceeded in the matter and thereby exercised his discretion injudiciously.

Accordingly, and for the reasons above stated, this appeal is allowed and the orders made by the superior court on 17th April, 2000 are set aside. We further order that the application filed on 15th of March, 2000 by the respondent be heard interpartes in the superior court by another judge. We make no orders as to costs.