IN THE COURT OF APPEAL

AT MENGO

(Coram: Manyindo, V-P., Lubogo, Ag. .J.A., Odoki, J.A.)

CIVIL APPEAL NO.4 OF 1985

BETWEEN

LEBEL (EASTAFRICA) LTD…… APPELLANT

AND

E. F. LUTWAMA. .. ……. . RESPONDENT

(Appeal from an Order of the High Court of Uganda at Kampala

(Mr. Ouma, J.) dated 11th March, 1985.

IN

Civil Case Suit No.841/81)

JUDGMENT OF MANYINDO, V-P.

This is an appeal against the order of Ouma. J. dated 11/3/85 whereby he dismissed the appellant's application for an order setting aside the ex-parte judgment of Kantinti, J. (as he then was) dated 25/7/83. 'We heard this appeal ex-parte as neither the respondent nor his counsel turned up although the latter had been served with the hearing notice on 26/3/86.

The respondent sued the appellant in the High Court for recovery of land and a house thereon. The suit was heard ex-parte when counsel for the appellant did not turn up on the hearing day after he had been duly served with the hearing notice. The respondent obtained judgment.

The application before Ouma, J. was supported by an affidavit of Mr. Kabugo, counsel for the appellant company sworn on 24/3/84 and that of Mr. Rukidi who is the appellant's Personnel and Administration Manager. It was sworn on 8/1/85. The affidavit of Mr. Kabugo raised two issues that are relevant here.

Firstly, he stated that on the day of hearing he had been arrested at about 6 a.m. by army men on the pretext that they were looking for criminals and other anti-government elements. They

had detained him until afternoon of same day by which times it was too late to attend court.

Secondly, he claimed that the house, which is the subject matter of the suit, had been, damaged during the 1979 war but had been completely repaired by the appellant company which was, as a result, anxious to defend the suit in order to seek relief against possible forfeiture.

This point was also taken up by Mr. Rukidi in his said affidavit. He also stated, inter alia, that the appellant were informed of the hearing date four days after the suit had been dealt with by Kantinti, J. hence the inability of the appellant to send a representative to attend the hearing in addition to its counsel, who was expected to be there.

Ouma, J. did not, in his Ruling, make any finding on the appellant's counsel's claim that he had not attended the trial of the suit for good cause - his arrest and confinement by the security men. He only considered counsel's submission that as the appellant had carried out extensive and costly improvements on the respondent's property, they were entitled to defend the suit so as to protect their interests against forfeiture. However, the judge rejected that argument on the ground that it was not raised in the appellant's written statement of defence, and to consider that defence would be irregular.

The decision of Ouma, J. has been attacked on four grounds. They are:

> "1. The learned trial (sic) erred in law in failing to hold that counsel for the appellant was prevented by sufficient cause o attend the court for hearing of the suit on the 19th day of May, 1983.
>
> 2. The learned trial (sic) judge erred in law and. in fact in holding that, the appellant's failure to attend the court for hearing of the suit was not caused by

sufficient cause and. that the appellant was misled by its former advocates.

3. The learned trial (sic) judge misdirected himself in law in refusing to set aside the ex-parté judgment on the grounds that they were entitled to a relief against forfeiture and that they were likely to succeed on the merits of the suit.

4. The learned trial (sic) judge was wrong in law in refusing to set aside ex-parte judgment in the interests of justice and equity and to prevent abuse of justice."

The application to set aside the ex-parte judgment was made under 0.9 r.24 of the Civil procedure Rules and under s.l0l of the Civil Procedure Act. 0.9 r,24 states thus:

> "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 aside; and if be 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.
>
> Provided that, where the decree, is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also."

Section 101 of 'the Civil Procedure Act merely saves and' reinstates the inherent, powers of 'the High Court to' make orders that it deems fit to meet the ends of justice or to prevent abuse of court process. Clearly 0.9 r.24 gives the, High Court unlimited discretion to set aside an ex-parte judgment and as was painted out by the defunct Court of Appeal for East Africa

in Mbogo v. Shah (1968). E.A. 93 at page 94, the Court of Appeal will not interfere with the exercise of that discretion unless the decision of the lower court was clearly wrong or that, it was based on wrong principles or that it has occasioned mis-carriage of justice.

It is settled law that in deciding an application to set - aside an ex-parte judgment the court should consider, inter alia, the nature or subject matter of the suit and whether the applicant has a prima facie defence to the suit. In the instant case the claim by counsel for appellant that be was arrested on his way, to court and confined by security men for the whole morning was not disputed seriously.

In Lake Victoria Bottling Co. Ltd. **V.** Anthony Constance H.CC.S. No.6 of 1962 (reported in Volume of the 1963 Monthly Bulletin) it was held by Keating, J. (as he then was) that one of the test on an application to set aside an ex-parte judgment is whether the applicant (and, I would add, his counsel) honestly wanted to attend the hearing and did his best to do so. That was a decision of a lower court which is not binding on this court, but it is good law and I would follow it.

As I pointed out earlier on, the learned judge did not consider the question whether counsel for the appellant did no appear for good cause. In my opinion, had he done so he would have, answered that question in the affirmative on the affidavit evidence before him and the submissions made by counsel for both parties.

The learned judge misdirected himself on the statement by Mr. Rukidi in his affidavit that,

> "The company received a letter from our former. lawyers M/S Ekemu & Kabugo Advocates dated 5th May, 1983 informing us of the hearing date on 23/5/83 and hence we could not attend the hearing."

The learned judge said this regarding that averment,

> "All that this piece of evidence by affidavit is establishing, as I perceive it, is that the applicant was misled as to the hearing date by its former advocates and not that the applicant received hearing notice after the suit had been heard as it would appear to be alleged by the counsel."

With respect to the learned judge, the meaning given to the admittedly vague statement by the appellant's counsel was the correct one. The suit was heard on 19/5/83. The appellant company received the letter of 5/5/83 on 23/5/83. Clearly, Mr. Rukidi was paying that they had received that letter too late as the hearing date had already past. It follows that the appellant too had defaulted in appearance for good cause.

It is true that in their written statement of defense the appellants did not expressly raise a defence against possible forfeiture. The Notice of Motion accompanying the application to set aside the judgment was silent on this point. However, counsel for the appellant did submit at length on this defence at the hearing of the application. The learned judge was of the view that to set aside the ex-parte judgment would
amount to permitting the appellant to put up this new defence and that such a move would be unfair to the respondent.

With respect, I cannot agree. The purpose of a trial is to enable the parties to put their case properly and broadly so that the court may, hopefully, come up with a fair decision on all the crucial issues in the case. If in this case a trial had been ordered, it would have been open to the appellant to apply to amend their written statement of defence to incorporate this new defence. Whether that would prejudice the respondent or not would have been decided on that occasion.

It is clear from the submissions made by counsel for appellant at the hearing of the application that he intended to take up that defence if given a chance to do so.

I think the observation made by Ainley, J. (as he then was) in Jamnadas v. Sodha Vs. Gordhandas Hemraj (1952)7 U.I.R. 7 at page 11 is apt here. He said, when dealing with a similar application,

> "In my view that (i.e. the poverty of the excuse) is not the sole matter which must be considered in cases of this kind. The nature of the action should be considered, the defence, if one has been brought to the notice of the court, however irregularly (the underlining is mine) should be considered, the question as to whether the plaintiff can reasonably be compensated by costs
> for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court."

In the case before u the respondent leased his land to the appellant for 49years ending in 2006. The appellant undertook to put up the house in question which they did. The respondent's claim for recovery of the property was based on the ground that the appellant had failed to keep the suit property in good and tenantable repair.

In their written statement of defence the appellant denied that allegation stating (in paragraph 4.) that,

> "The defendant shall further aver that they are not, in breach of any covenant so contained in the said lease as alleged in the Plaint and that they have from time to time at reasonable intervals repaired and endeavoured to keep and have kept the buildings in question on the said land in good and substantial order and repair."

And so whether or not the property was in a state of disrepair was a triable issue. In the premises, I am of the view that the learned judge did not exercise his discretion judicially.

Had he done so be would have found that the appellant and their counsel had good reasons for missing the trial of the suit and that the appellant had a defence to the suit. I would, therefore, uphold all the four grounds of appeal and allow ‘this appeal, set aside the order of Ouma, J. set aside the ex-parte judgment of Kantinti, J. (as he then was) and re-instate the suit for hearing on a date to be fixed by the Chief Registrar of the High Court. With regard to costs, I would order the respondent to pay the appellant’s costs of this appeal and in the lower court.

S.T.Manyindo,

VICE PRESIDENT.

IN THE COURT OF APPEAL

AT MENGO

(Coram: Manyindo, V-P., Lubogo, Ag. .J.A., Odoki, J.A.)

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Civil Case Suit No.841/81)

JUDGMENT OF LUBOGO, AG. J.A.

I have read the judgment of the learned Vice President in draft and I agree with it as well, as the order for costs.

D. L. K. Lubogo,

AG. JUSTICE OF APPEAL.

IN THE COURT OF APPEAL

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(Coram: Manyindo, V-P., Lubogo, Ag. .J.A., Odoki, J.A.)

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JUDGMENT OF ODOKI, J.A.

I have read the judgment of the learned Vice President in draft, I also agree with it as well as the order for costs.

B. J.Odoki,

JUSTICE OF APPEAL.

DATED THIS 30TH DAY OF MAY, 1986.

Mr. Kabugo of M/S Kabugo & Co. Advocate for the Appellant, ex-parte.
Respondent Absent.

I certify that this is a true copy of the original

M.K. Kalanda, Registrar
Court of Appeal