THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0609-2006

(Arising from HCT-00-CC-CS-0417-2006)

Sofitra (U) Ltd Applicant

Versus

Swastika Impex Ltd Respondent

Legislation referred to:

1. *Civil Procedure Rules, (Chapter 71, 2000 Rev Ed),*

Cases cited:

1. *Ooka v Phillister Nabunjo H.C.C.S.No. 613 of 1963 (unreported),*
2. *Sebei District Administration v Samwiri Gasyali and Others, 1968 E A 300*
3. *Jamnadas V. Sodha v Gordhahandas Hemraj, (1952), 7 U.L.R. 11,*

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S. EGONDA-NTENDE

RULING

1. The applicant is the defendant in the head suit. It is seeking that a judgment entered in default against it on the 18th August 2006 be set aside, and that the applicant be granted

leave to defend the suit on its merits. In effect the ground for this application, as can be gathered in the many grounds stated in the notice of motion is simply that the applicant has a good defence to the plaintiff's claim. The application is supported by an affidavit sworn by Sasi Nair, the Country Manager of the Applicant. A supplementary affidavit, sworn by Assumpta Kemigisha, an advocate working with the applicant's advocates was also, albeit, without leave of court, filed in this matter.

2. The respondent/plaintiff opposes this application, and an affidavit in reply to the application, sworn by Ashok M Joshi, a director of the respondent was filed in this regard.
3. Mr. Kabagambe, learned counsel for the applicant, submitted that the applicant was not at fault, but the fault lay with the counsel, that failed to file the written statement of defence in time. This applicant should therefore be allowed an opportunity to defend this suit.
4. Mr. Kibaya, learned counsel for the respondent opposed this application. He attacked the filing of the supplementary affidavit by the applicant, as it was done without leave of this court. He argued that this court should not have regard to it. And if the court had no regard to it, there is nothing before the court that explains why the applicant failed to file the defence in time. Secondly he submitted that the applicant was under an obligation to show that it had a defence worth being called a defence. In the instant case the email message referred to in the affidavit of the applicant as instructing it not to deliver the goods, was in fact, instructing them to deliver the goods.
5. Lastly Mr. Kibaya submitted that setting aside the judgment in this case would be prejudicial to the respondent due to the delay that would be visited on these proceedings.
6. I shall start by bringing the applicable rule here in view. Order 9 Rule 12 of the Civil Procedure Rules, (Chapter 71, 2000 Rev Ed), states,

> 'Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the Registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.'

7. This rule obviously provides wide discretion to this court in applications of this nature. I shall examine how this provision has been interpreted and applied in the past. In Ooka v Phillister Nabunjo H.C.C.S.No. 613 of 1963 (unreported), Russel, J., held that where a

defendant had appeared, but not filed a statement of defence, and had a good defence on the merits, unless he was simply trying to delay the action, the court should normally exercise its discretion and let him put forward a defence, but penalise him severely by way of costs.

8. In Sebei District Administration v Samwiri Gasyali and Others, 1968 E A 300, the respondent sued the appellant and others for damages for assault and trespass. The appellant did not enter an appearance after it was served with summons. Judgment against it was obtained in default. The respondent applied for execution on 8th December 1967, and on the 18th December 1967, the appellant applied to set aside the ex parte judgment. The magistrate hearing the application dismissed it, and leave to appeal was granted to the appellants, and the appellants were also ordered to deposit the decretal amount in court, which they did.
9. On appeal to the High Court, Sheridan, J., stated at page 301,

> 'It is not disputed that the appellants have a defence on the merits of the case. Nor does it appear that they have been trying to obstruct or delay the course of justice. As soon as they became aware of the judgment by the application for execution, they took steps to rectify the position. And, as I have already observed, they have paid the decretal amount into court. In these circumstances, the justice of the case required that the defence to be heard on its merits:'

10. Sheridan, J., in the above case referred to the case of Jamnadas V. Sodha v Gordhahandas Hemraj, (1952), 7 U.L.R. 11, where Ainely, J., (as he then was), stated,

> 'Though I have the greatest sympathy with a busy magistrate who no doubt has a great deal to put up with in the way of belated applications and requests for adjournments, and though two views can no doubt be taken of this matter, I yet think that insufficient attention was paid by the lower court to the fact the appellant had a defence to put forward, and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs had been made. I may be doing the learned magistrate an

> injustice, but from a reading of his ruling of June 19 it seems to me that he has concentrated solely upon the poverty of the appellant's excuse. In my view that 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, 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 be always be remembered that to deny the subject a hearing should be the last resort of a court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shout out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend.'

11. It is clear from the foregoing authorities that a number of considerations are apposite in proceedings of this nature. And that such considerations ought to be taken together. These include whether the defendant has a good defence or not. The question of delay or promptness in coming to court is relevant. Whether an application is made in good faith or is an attempt to obstruct the wheels of justice may be considered if it arises. The prejudice that may be suffered by the plaintiff should also be considered. And whether or not such prejudice may be compensated by an order for costs. Running through all the above cases, is the showing of a good defence on the merits.
12. Turning to the facts in our case, it is clear that the applicant has acted promptly in coming to this court. This application was filed on 1st September 2006 when the ex parte judgment in default was entered on 18th August 2006. It may be noted that the applicant was out of time in filing its defence by about a week only. The defence in this case ought to have been filed before 3rd August 2006. It was filed on 11th August 2006.
13. Turning to the merits of the defence, the claim was for value of goods imported by the plaintiff to Uganda, and loss of profits on that consignment. It was contended that the

defendant was instructed to clear and forward the said consignment of goods to Kampala, and that the plaintiff had paid all dues including freight and the defendant's charges to the defendant. The defendant failed to clear and deliver the goods to the plaintiff in Kampala.

14. The defendant contends both on the affidavit and the proposed written statement of defence that the plaintiff had no claim on the applicant as stated, in part, in paragraph 7 of the affidavit of Sasi Nair, below,

> 'it was the late director of the Respondent Company who requested our Company to hold the containers in Mombasa as owing to financial constraints, he was not in a position to arrange freight charges and other dues. (A copy of an email to that effect is annexed hereto and marked, ''B''.'

15. The annexture B referred to reads,

> 'Dear Sasi Nair Ji, Good Day!!! Hope you are fine. Reference our discussion at your office. I am requesting you to load my 1x 20 Kajaria container after 15th of January 2006 as am organising duties etc., by that time.
> With best regards,
> Harshad Patel'

16. It is clear to me that this is not an instruction to hold the containers in Mombasa indefinitely but an instruction to load the container not earlier than 15th January 2006. The construction put upon the said email by the applicants is the exact opposite of its import. The plaintiff was asking the applicant to deliver the consignment, approximately 4 weeks, or a month from the time of writing the message. This message, given its headers, appears to have been written on 14th December 2005.
17. Secondly the email does not, as alleged by Mr. Sasi Nair, state that the container should be held in Mombasa as Mr. Harshad Patel was looking for money for freight charges and other dues. Mr. Harshad Patel, in the email message clearly stated that the container should be loaded after 15th January 2006 as he was 'organising duties etc., by that time.' There is clearly no reference to freight and other charges presumably due to the applicant.

The reference in the message is to ‘duties’ which I presume are due to the Government in the form of taxes.

18. Clearly the Mr. Sasi Nair, a director of the applicant, who swore the affidavit in question, and attached this message is simply being disingenuous in importing to the message what clearly is not available on that message.
19. The applicant further contends that the plaintiff’s claim, in the plaint, that it paid all dues is false as there is an outstanding sum of US$800.00. A statement of account is attached showing the plaintiff’s account with the applicant. It shows that two invoices were raised on 17 and 18 November 2005 for a total of US$8,034.06 by the defendant/applicant. It also shows payments by the plaintiff from 12 November 2005 to 6 December 2005 totalling to US$7,200.00.
20. It is clear that by the time the email message referred to above by the applicant, which must have been written on or about the 14th December 2005, the applicants were already in receipt of approximately 90% of the funds reflected on their invoices, and leaving a balance of only US$800.00. The respondent had paid the bulk of the applicant’s invoiced charges in respect of this transaction.
21. Of course the applicant may be entitled to the US$800.00, that it alleges the respondent has not paid, but the applicant has not indicated any desire to counter claim for the same, either, on its application or on the proposed written statement of defence.
22. On the basis of the facts that are evident on the application and the supporting documents put forth by the applicant, in particular the email message and the statement of account, it cannot be said, as the applicant has attempted to do, that the respondent/plaintiff has no claim on the applicant. This defence is not an arguable defence given the documentary evidence put forth by the applicant itself on this application. The applicant’s position is not credible at all. It is a sham defence.
23. The applicant may well have a good reason as to why the respondent’s consignment of goods is not in Kampala. Unfortunately such reason has not been stated in its application before me or in its proposed defence in this matter. In effect the applicant has failed to show an arguable or a good defence to the suit in this case. The applicant has therefore failed to satisfy one of the conditions necessary for this court to exercise its discretion and allow the applicant to proceed with the defence of this suit on its merits.

24. Notwithstanding the fact that this application has been brought without delay, and that prejudice occasioned to the respondent could possibly be compensated for by costs, the applicant has failed to show that it has any defence to the plaintiff's suit. I accordingly dismiss this application with costs.

Signed, dated and delivered this 4th day of October 2006

FMS Egonda-Ntende

Judge