THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 42/97

CORAM: HON. MR. JUSTICE G.M. OKELLO, J.A.,
HON. MR. JUSTICE J.P. BERKO, J.A. &
HON. MR. JUSTICE S.G. ENGWAU, J.A.

NATIONAL ENTERPRISES CORPORATION…….. APPELLANT
VERSUS
MUKISA FOODS LIMITED……. RESPONDENT

JUDGMENT OF BERKO, J.A.

This is an appeal against the Ruling of Lugayizi, J. made on 15/10/97 in which he dismissed the appellant's application to set aside an *ex-parte* Judgment entered against it.

The circumstances leading to the application are a little complicated, and I must state them in detail. Mukisa Foods Ltd, the respondent, filed against the appellant a HC, Civil Suit No. 746 of 1992 claiming certain relief. The appellant was apparently served with the Summons to enter appearance together with the plaint. The appellant did not enter an appearance or filed a defense to the action. When the matter came up for hearing on the 20/1/94, Counsel for the respondent successfully applied to proceed ex-parte under Order 9 rule 17(1)(a) of the Civil Procedure Rules.

The Court proceeded to hear evidence. After the evidence of four witnesses, counsel for the respondent, on the 13/5/94, applied to amend the pleadings under Order 6 rule 18 of the CPR. The reason given for the desiring the amendment was that circumstances have materially

changed since the filing of the pleadings. It was said that at the time of filing the original pleadings the appellant was refusing to give vacant possession of the suit premises. The evidence on record showed that the appellant had vacated, but had removed a lot of machines from the premises. The intended amendment would be that the appellant had given vacant possession of the suit premises after removing substantial amount of machinery from the premises. It would be contended that the removal of the machinery was unlawful and that the appellant should be ordered to return them or pay their value.

The court granted the respondent leave to amend the plaint. The court made the following order:

"This should be done within seven days after this Order. The amendment shall also be filed and served upon the defendant herein".

The court's record shows that the ruling was read on 30/5/94 at 3.13p.m. Then on the same day the following note appears:

"30/5/94

Court as before"

Mr.. Mubiru

Can we set a date for submission

Court - This case is adjourned for submission on 15/6/94 at 3.OOp.m."

After some adjournments, lasting for almost 2 years, learned counsel for the respondent began his submissions on 30/4/96. At the end of the long submission, the following notes appeared in the record:

"If the court ordered plaintiff to be compensated for value of machinery then some remedy would have been recorded to plaintiff.

I talked of Court appointing an expert to determine value of machines removed you can use S. 101 of CPS and S. 17(3) and 32 of the Judicature Act to make the kind of order.

As far as general damages are concerned, I will send a write up on this".

The write-up for Assessment of General Damages was eventually filed. In it the Judge was requested to appoint an expert to determine the value of the machines to enable the court to assess the amount payable. There is nothing on the record indicating that the court appointed an expert to value the machinery.

The court eventually, in its judgment, delivered on the 29/5/96 ordered the appellant to return the machinery or pay its value assessed at Shs. 350 million. It also awarded the respondent Shs. 10 million General damages plus costs of the suit. The Decree was extracted and signed by the learned Trial Judge on the same day.

On the 5th August 1997 the appellant filed a Notice of Motion under Order 9 rule 24, order 6, rule 23 Order 48 rule 1 order 42 rule 1 and Section 101 of The Civil Procedure Act (Cap. 65) for an Order

(1) Setting aside the ex-parte judgment, and
(11) For leave to plead to the amended plaint.
The grounds of the application, as can be gathered from the Affidavit of Vincent Kamugisha, are:

(1) That after the service of summons to enter appearance, the appellant instructed it's Company Secretary to enter appearance and defend the suit;
(11) That the said Company Secretary neither filed an entry of appearance nor a defence to the plaint before he resigned to participate in the Constituency Assembly Elections;
(111) That on 3.11.94 a hearing Notice was served on the Director General of the appellant's Company;
(IV) That the Director General instructed Mr. Kalule Luyombo of M/s. Kalule Luyombo & Co. Advocates to act on behalf of the appellant;
(V) That Mr. Kalule Luyombo, unknown to the appellant, did not take any action on the case;
(VI) That the appellant got to know that the case had proceeded ex-parte when their properties were advertised for sale;
(VII) That the appellant was not served with the amended plaint;

(VIII) That appellant did not remove the machinery from the suit premises as those machinery were vandalized in the 1979 war, and
(IX) That the appellant was prevented by sufficient cause from appearing on the 20/1/94 when the suit was called for hearing and that the appellant has a good defence to the respondent's case as none of its properties was ever taken away by the appellant.

The application was resisted. The learned Judge heard arguments and refused to set the ex-parte judgment aside. He reasoned, firstly, that the appellant did not enter an appearance, Secondly, he was not satisfied that the appellant instructed M/s. Kalule Luyombo & Co. Advocates to represent them, and thirdly, he was of the opinion that, even though the court ordered the amended plaint to be served on the appellant, that was not necessary because since the appellant had neither entered an appearance nor filed a defence, it had put itself outside the court. Consequently he held that the appellant had not shown sufficient cause under Order 9 rule 24 of the CPR to warrant the grant of its application. He also declined to order a review under Order 42 of the CPR on the ground that to do so would make the applicant achieve through the back door what it could not lawfully achieve through the front door under Order 9 rule 24 of the CPR. There are five grounds of appeal, but I do not find it necessary to set them out. The main thrust of the appeal is whether the Judge exercised his discretion judicially when he refused to set aside the exparte judgment.

There is no dispute that the appellant did not enter an appearance. It also did not file any written statement of defence. The ex-parte judgment was therefore regularly entered against it in default of pleadings.

I propose to begin with the following statement of Fry L.J. in **Anlaby v Praetorius (1888) 20 GBD 764 at 769.**

"There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has discretion to impose terms as a condition for granting the defendant relief'.

The court clearly has a discretion whether to grant the prayer or not. As was said by Kay L.J. **in Jenkins v Bushby {1189}1 1 *Ch.* 484 "The court cannot be bound by** a **previous decision to exercise it's discretion in a particular way, because that would be in effect putting an end to the discretion".**

Discretion necessarily involves latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ***ex debito justitiae*** once the facts are known.

In a case like the present there is a judgment, which though by default, is a regular judgment. Therefore the appellant must show how the discretion to set aside should be exercised in its favor. The primary consideration is whether there is merit to which the court should pay heed; if merits are shown the court will not prima facie desire to let judgment pass on which there has been no proper adjudication. Here the appellants denied that they removed the machinery from the premises. That clearly shows an issue which the court should have tried. The court might also have regard to the appellants' explanation why it neglected to appear after being served, though, as a rule, its fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court, in its discretion, is empowered to impose. The appellant here has an explanation. It said that the summon to enter appearance and the plaint were given to its Secretary with instructions to enter appearance and file defence. The Company Secretary neglected to carry out the instructions for reasons best known to himself and later resigned & from the Company to seek his fortunes in a Constituency Assembly
Elections. The Company also instructed M/s. Kalule Luyombo & Co. Advocates to represent them, but they neglected to do so. The truth of this explanation is however denied by the respondent. But at this stage I see no reason why the Company should be disbelieved on what appears to me to be mere conflict of affidavits. Besides the explanation, the court ought to have considered the nature of the action. This was an action involving millions of shillings. There is also the issue concerning the amended plaint. When applying for the amendment, counsel for the respondent told the court that the circumstances have materially changed since the filing of the suit. The changed circumstances were the allegation that the appellant had removed the machinery from the premises. The appellant was condemned to return those machinery or pay Shs. 350 million to the respondent. Yet this amended plaint was not served on the defendant. In my view that was an error. The appellant might have had good reasons for not defending the original plaint. But it was wrong to assume that it would not have defended the amended plaint that introduced a new element that was not in the original plaint.

The principle that should guide the court in such matters was aptly stated by **Lord Atkin in Evans v Bartlam (1937) A C 473 at 480.**

"The principle obviously is that unless and until the Court has pronounced a judgment

upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure."

This principle must be fortified by the following observation of **Ainley J** in **Jammadas Sodlia v Gordhandas Hemraj (1952) U S R 7 at 11:**

"I think it should always be remembered that to deny the subject a hearing should be the last resort of a court".

Clearly, the circumstances require that the case be heard on its merit. If I may paraphrase the views of Clauson L.J in **Redditch Benefit Building Society v Roberts, 1940 1 All. E.R 342,** the defendants are here and are anxious to be put in a position to defend the case. Looking at the matter from the Plaintiff/Respondent's side, I do not think they will be prejudiced or suffer hardship if they can be compensated in costs.

It follows n what I have said that the learned Judge was wrong in refusing the application to set aside the ex-parte judgment I have seen that if the decision is allowed to stand, it will result in injustice being done. This court, in such a situation, has the power and the duty to remedy the injustice.

I would therefore allow the appeal. The ex-parte judgment is hereby set aside on terms that the appellant pays the costs thrown away. The appellant is granted leave to plead to the amended plaint within 14 days from date of judgment. The appellant will have the costs of the appeal and the court below.

Dated at Kampala this 2nd day of July 1998

J.P.BERKO

JUSTICE OF APPEAL.

JUDGMENT OF ENGWAU, J.A.

I have had the benefit of reading the judgment of J.P. Berko, JA in draft and I agree with it. The

learned trial Judge was wrong in refusing the application to set aside the ex-parte judgment and grant leave to the appellant to plead the amended plaint.

In the result I would allow appeal along the terms made by Berko, J.A

Dated at Kampala this 2nd day of July 1998.

S.G. ENGWAU

JUSTICE OF APPEAL.

JUDGMENT OF G.M • OKELLO, JA.

I have had the benefit to read in draft the judgment prepared by Berko JA and I agree entirely with it.

As Engwau JA .also agrees**,** the appeal is allowed on the terms proposed by Berko JA.

Dated at Kampala this 2nd day of July 1998

G.M. OKELLO

JUSTICE OF APPEAL