



REPUBLIC OF KENYA

WEC Lines Nederlands BV v Otrabu Des Transport Des Marchadis

High Court, at Mombasa

March 19, 1991

Wambilyangah J

Civil Case No 756 of 1990

Civil Practice and Procedure – *setting aside* – *application for setting aside judgment* – *defendant proposing to settle the decretal sum by instalments* – *whether application for setting aside can be allowed in such circumstances.*

The defendant brought an application to the High Court seeking stay of execution of judgment entered in default of appearance and defence.

In urging the application, the applicant's counsel stated that on the date of service, its Regional Representative, who had authority to deal with the matter, left urgently for Rwanda where some of their vehicles carrying sensitive goods were detained due to a raging insurrection in that country.

There was no affidavit from the applicant's Regional representative. It was further stated by the respondent in opposing the application that some two men who were the applicant's representative had approached the respondent with a proposal to pay the decretal sum by instalments.

Held:

1. The defendant by failing to have the Regional Representative swear an affidavit in order to explain how soon he left for Rwanda after being served with summons rendered the explanation given for failing to enter appearance in time inadequate and probably untrue.
2. If two persons from the defendant's company had offered to liquidate the sum sued for by instalments, it would mean that they had reckoned with the futility and hopelessness of their defence.

Application refused.

Cases

No cases referred to.

Statutes

1. Civil Procedure Act (cap 21) section 3A

2. Civil Procedure Rules (cap 21 Sub Leg) order IXA rule 10; order XXI rule 11

Advocates

Mr Lumatete for the Plaintiff.

March 19, 1991, Wambilyangah J delivered the following Judgment.

This is an application by the defendant under order IXA rule 10 and order XXI rule 11 of the Civil Procedure Act asking for 2 main orders, namely that execution be stayed and the judgment obtained in default of appearance. According to paragraph 3 of the supporting affidavit it is deponed that at the time the summons were served on the defendant, its regional representative had to urgently travel to Burundi in order to make arrangements for alternative routes for their vehicles as the normal one had then been rendered impassable by the insurrections which were raging in Rwanda. He depones that some of their vehicles which were carrying "sensitive" goods had at the time been detained in Rwanda. It is stated in the affidavit that due to the regional representative's stated hasty departure for Rwanda, he was not able to give due attention to the summons which had been served upon him. The question is whether this cogently explains why the defendant failed to enter appearance in the suit within the required period.

According to the replying affidavit, it is deponed that when two gentlemen went to discuss the issues raised by the case with the defendant's advocate, they did not inform the advocates about the absence from the country of the main man in the defendant's company. Instead they offered to pay the sum sued for by monthly instalments of Shs 30,000/- which offer was flatly rejected by the defence lawyer. Regarding the regional representative's journey to Rwanda Mr Lumatete points out in his submission to court that the non-disclosure in the supporting affidavit of the dates when that journey was embarked on makes it impossible for the Court to be sure that the lack of opportunity for entering their appearance was owing to that journey. Moreover, it is also contended by Mr Lumatete, that the regional representative himself has not sworn any affidavit to explain what was it that actually curtailed him from answering to the summons which had been served upon them. Mr Lumatete has gone on to wonder why it took the applicants as long as between 13th December, 1990 when their goods were attached in execution of the decree obtained in default of appearance and 17th January 1991 when they got an interim order for stay of execution.

In my view the defendant by failing to have the regional representative swear an affidavit in order to explain how soon he left for Rwanda after being served with summons render the explanation given for failing to enter appearance in time one which is inadequate and probably untrue. It amounts to a failure to make a full and frank disclosure on a material aspect. As a matter of fact this aspect is the one on which the Court would have acted in the exercise of its unfettered discretion to set aside the default judgment.

The 2nd aspect to the case is the offer to pay by instalment. The defendant does not deny this averment in the plaintiff's replying affidavit. If 2 men from the defendant's company offered to liquidate the sum sued for by instalments, it would mean that they had reckoned with the futility and hopelessness of their defence. That would also explain the prolonged delay in bringing this application. If the regional representative's hasty trip to Rwanda had been the cause for defendant's failure to enter appearance in time then the delay taken in filing this application coming as it did a couple of days prior to the auction date which has not been explained creates an impression that these defendants have not really been keen to defend the suit.

I have addressed my mind to the possibility of there being an arguable defence to the suit but I find

myself inclined in favour of the plaintiff in view of the defendant's 2 gentlemen's offer to Mr Lumatete that they be allowed to pay by instalment. This offer which has not been denied cannot be reconciled with their present diametrically different stand in which liability to the plaintiffs is totally derived.

After consideration the entire application in totality I hold that it must fail. I dismiss it with costs.



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