REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: GICHERU, SHAH & O'KUBASU, JJ.A.)
CIVIL APPEAL NO. 199 OF 1999
AS CONSOLIDATED WITH
CIVIL APPEALS NOS. 200 AND 201 OF 1999
BETWEEN

KENYA COMMERCIAL BANK LIMITED .....APPELLANT
AND
1. JOSHUA AGGREY OBURI
2. JOAKIM OCHIENG OKIAH ..... RESPONDENTS

(Appeals from the Orders of the High Court of Kenya at Kisumu (Justice Wambilyangah) dated 3rd February, 14th May and 8th December, 1998 in H.C.C.C. NO. 133 OF 1997)
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JUDGMENT OF THE COURT

Three appeals, that is Civil Appeals numbered 199, 200 and 201 all of 1999 were consolidated for the purpose of hearing when their hearing began on 19th June, 2001. The parties to the three appeals are the same. Kenya Commercial Bank Limited is the appellant and Joshua Aggrey Oburi and Joakim Ochieng Okiah are the two respondents. On 27th May, 1997 Joshua Aggrey Oburi (the plaintiff) filed suit in the superior court against Kenya Commercial Bank Limited (the second defendant) and Joakim Ochieng Okiah (the first defendant) claiming the following reliefs:

"(a)A declaration that the plaintiff be and is hereby entitled to be discharged from being surety thereof.

(b)An injunction to restrain the Defendants by themselves their servants/agents from selling, attempting to sell or in other way howsoever disposing of all that parcel of land known as SIAYA/KARAPUL RAMBA/2793. "

The summons was served on the appellant on 29th March, 1997. The plaintiff on 13th April, 1997 applied for entry of judgment against the two defendants for failure to enter appearance. The request for judgment does not show under what provision of the Civil Procedure Rules was such a judgment sought to be entered. On the same day, that is 13th April, 1997, the Deputy Registrar of the superior court, F. A. Mabele, Esq. entered judgment against the defendants 'as prayed' and directed that the matter be listed for formal proof.

Order IXA rule 5 of the Civil Procedure Rules provides for entry of an interlocutory judgment. It reads:

"5. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecun iary damages, and any defendant fails to appear, the court shall, on request in Form No. 26 of Appendix C, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the valu e of the goods and damages as the case may be."

Order IXA rule 8 reads:

"Subject to rule 3, in all suits not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set down the suit for hearing under Order IXB rule 1."

It can be seen straight away that there is no provision for entry of interlocutory judgment in regard to the reliefs sought by the plaintiff which reliefs we have set out above. So what is to be done" In this case the plaintiff ought to have set the suit down for hearing (formal proof) without giving notice to the defendants who had both not appeared. Instead of doing that the plaintiff applied for interlocutory judgment, obtained the same, and proceeded to draw the decree which purportedly finally adjudicated the suit.

The second defendant applied to set aside the judgment under order IXA rule 10 of the Civil Procedure Rules. It did not incorporate in the chamber summons the grounds upon which the application was based but incorporated the same in the affidavit which was sworn in support of the application and annexed to the chamber summons.

When the application to set aside the said interlocutory judgment came up for hearing the learned judge, although there was no objection taken to the format of the chamber summons, proceeded to strike out and dismiss the application saying as follows:

"The chamber summons does not meet requirements of Order 50 Rule 7. No grounds are shown in chamber summons. I accordingly strike it (out) and dismiss it with costs."

The learned judge followed the strict letter of order 50 rule 7 of the Civil Procedure Rules in striking out and dismissing the application. This rule requires that the grounds of the application ought to appear in the chamber summons. In the case of *Castellino v. Rodrigues* (1972) E.A. 223 it was held that a motion which does not contain the grounds is only irregular and is curable by amendment. It was also held in the same case, that a reference in a document to an annexure incorporates the contents of the annexure in the document. The Court of Appeal for East Africa said in the Castellino case at page 225:

"As a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexure in the document."

It also said at page 226: "Of course rules are made to be observed, but irregularities can be cured by amendment when they have occasioned no prejudice. In these matters of form, courts are much less strict today than formerly. "

The learned judge erred first in two ways. He ought to first have appreciated that the Deputy Registrar had no power to enter an interlocutory judgment in the case. He ought to have set aside that judgment ex debito justiciae. But he did not do so. He proceeded to confirm that judgment by striking out and dismissing the application to set aside a totally irregularly obtained judgment. If the learned judge was aware of the decision in the Castellino case (supra) he would have either considered the grounds as taken in the annexed affidavit or he would have asked the plaintiff to amend the application to incorporate the grounds therein. It is unfortunate that the learned judge was not aware of a five judge bench decision of this Court in the case of Peter Mburu Echaria v. Priscilla Njeri Echaria (Civil Appeal No. NAI. 247 of 1997) (unreported) wherein the Court said:

"We agree that the Notice of Motion is defective but the defect is curable, and, for that reason, and Ms. Karua having applied for leave to amend the notice of motion, we grant leave for the respondent to amend the notice of motion so as to comply with the requirements of Rule 42(1) of the Rules of the Court."

It must be noted that rule 42(1) of the Rules of this Court mandates that the grounds upon which a motion is brought ought to be stated in the application.

For these reasons, we allow Civil Appeal No. 199 of 1993 and set aside the order of the learned judge striking out and dismissing the second defendant's application of 5th September, 1997 and substitute therefor orders that the interlocutory judgment entered on 13th April, 1997 be set aside and that the second defendant be granted leave to enter appearance within the next ten days and to file its defence within 15 days thereafter. Having so determined Civil Appeal No. 199 of 1997 the other two appeals need not be fully considered.We say, only, that filing of Civil Appeal No. 200 of 1999 became necessary as the learned judge, on 14th may, 1998 dismissed an application filed by the second defendant by which application the second defendant, once again, sought the setting aside of the said interlocutory judgment, this time by incorporating the grounds thereof in the application itself. The learned judge held that the second application was res judicata as the first one stood dismissed. But that was not the case. The learned judge had not heard the first application on merits and when such was the case the doctrine of res judicata does not apply even if there is a dismissal ordered.The learned judge strictly ought to have (if he was right) ordered striking out rather than dismissal. The Court of Appeal for Eastern Africa in the case of ***Ngoni - Matengo Co-operative Marketing Union Ltd vs. Osman*** (1959) E.A. 577 said per Windham, J.A. at page 580:

"It seems to me that the reasoning, in the passage from the judgment on the application in Bhogal's case. (Bhogal v. Kassam (1953), 20 E.A.C.A.) which I have set out, is based on the inadvertent assumption that what the court had previously dismissed was a competent appeal, so that a subseque nt attempt to restore it would, or might, be met by

a plea of res judicata. But since, both there and in the present case, the earlier appeal was incompetent, there was no res before the court capable of becoming judicata."

Mr. Nyamogo for the first respondent argued that Civil Appeal No. 200 of 1999 was unnecessary. That is not right. Until that ruling was set aside the same stood and we see no reason why C.A. No. 200 of 1999 ought not to have been filed.

Civil Appeal No. 201 of 1999 was lodged as a result of the decision of the learned judge whereby he ruled that the second defendant's application dated 26th November, 1998 was also res judicata. That application was by way of chamber summons seeking setting aside of judgment entered on 13th April, 1997 at the same time seeking leave to reinstate and amend the second defendant's chamber summons dated 5th September, 1997 in the form annexed thereto. It also sought enlargement of time for giving notice to the taxing officer of the items in the bill of costs which the second defendant was objecting to.

We are not able to say that the application dated 26th November, 1998 was superfluous as Mr. Nyamogo wants us to say. A party is entitled to use all procedural remedies available to it **ex abundanti cautela** rather than take a chance on an appeal only.

The upshot of all this is that all the three consolidated appeals are allowed with costs and we reiterate the orders made in regard to Civil Appeal No. 199 of 1999. The costs which were taxed and paid over to the plaintiff by the second defendant are hereby ordered to be refunded. The costs so paid will be refunded with interest thereon at court rates from the date of payment thereof until the date of refund.

These are our orders.

Dated and delivered at Kisumu this 22nd day of June, 2001.

J.E. GICHERU

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

E. O'KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.