



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 2215 OF 1980

KEHAR SINGH KALSI LTDAPPLICANT

VERSUS

ASSOCIATED STEEL LTD.....DEFENDANT

RULING

This is an application for the setting aside of an *ex parte* judgment which I entered herein on January 29, 1981, and for the hearing *inter partes* of the motion dated October 16, 1980. The application is supported by the affidavit of Mr Benson K Mukuria, an advocate of this court. That affidavit essentially sets out the circumstances in which the applicant's advocate failed to turn up for the hearing of the motion on which the *ex parte* judgment herein was entered, and also alleges that the defendant has a good defence which discloses serious triable issues.

The pleadings disclose the facts of the matter, as follows. The plaintiff is a building contractor. The defendant is the owner of premises on Plot No 209/3473, Industrial Area Nairobi on which it wanted to build a workshop and offices. On October 5, 1977, the defendant accepted the plaintiff's offer to build for it a workshop and offices in accordance with the original drawing and plans prepared by the defendants' architects, M/s TS Brar and Associates. The plaintiffs constructed the workshop and offices under the supervision of the defendant's Architects. On November 30, 1979, the defendant's Project Manager notified the Architects that the plaintiff had completed all the pending jobs and that his payments could be made after the Architects had approved the work done by the contractor. On December 7, 1979, the defendant received all the keys to the building and took possession of the building. On May 8, 1980, the architect issued his final (revised) certificate No 9 in which an adjustment was made for the costs of re-erecting the outer boundary wall which had collapsed. Because of the need to re-erect the outer boundary wall the Building Surveyor of the City Council of Nairobi would not issue the occupation certificate. Despite this, however, the defendant occupied the premises and are using it to date. The defendant, however, has refused to pay the amount due on the final revised certificate No 9. The plaintiff filed this suit on August 7, 1980, claiming the amount due to it on the face of the final certificate. When the summons was served, the defendants entered appearance and filed a defence. The day before the defence was filed, however, the plaintiff filed the application for summary judgment. The application for summary judgment was, as I have said, heard *ex parte*. I am now being asked to set aside that *ex parte* judgment.

Learned counsel referred me to various authorities dealing with the rules as to setting aside of

judgments. In *Kimani v McConnel* [1966] EA 547 Harris J said:

“a reasonable approach to the application of the rules (as to, setting aside of *ex parte* judgments) would be for the court first to ask itself whether any material factor appears to have entered into the passing of the *ex parte* judgment, which would not or might not have been present had the judgment not been *ex parte* and then, if satisfied that such was or may have been the case to determine whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed”

The affidavit in support of the application for summary judgment sets out in detail the particulars of the claim. There was a building contract the basis of which was the original drawing by the defendant's Architects and the plaintiffs' quotation which was accepted by the defendant. The construction work was supervised by the defendant's Architect until the keys to the buildings were handed over to the defendant on December 7, 1979, when the defendant took possession of the buildings. On November 30, 1979, the defendant's project manager had confirmed to the Architects that he could inspect the buildings and if he approved the workmanship he could make out the final certificate for the payment of the plaintiff. A dispute had arisen about the construction of the outer party wall with one of the neighbours but in his final certificate, the Architect decided the cost of re-erecting this wall and gave a credit in favour of the defendant. That final certificate was issued on May 8, 1980, and it showed the sum of Kshs 81,650 (the amount claimed in the plaint) as being due to the plaintiff. The defendant of course refused to pay and in the statement of defence filed herein, it alleged that the plaintiff did not complete the building in accordance with the drawings and other modifications or extra works as instructed by the defendant's architects and in particular complained about the collapsed boundary wall. There was also a complaint that the plaintiff did not obtain the occupation certificate from the City Council of Nairobi. No counterclaim or set-off were pleaded.

It is on the basis of the above pleadings that I have to decide whether any triable issues are raised to justify the defendant being given leave to defend. No new facts have been alleged in the present application that were not before me when I entered the *ex parte* judgment. The contract between the parties did not stipulate about the issue of an occupation certificate. However, in the Architects' letter of March 31, 1980, the matter seems to have been raised by the defendant with the Architects who in that letter informed the defendant that the certificate would only be issued upon the boundary wall which had earlier collapsed being reinstated. As I have stated, the architects had in their revised final certificate given a credit to the defendant in respect of the re-erection of the said boundary wall which means that the defendant had assumed the responsibility for reinstating this wall since they were already in occupation of the premises by December 7, 1979. If that were not so, I would expect the defendant to have put in a counterclaim in their written statement of defence. It is normal when the standard form of building contract is used by the parties that the issue of the final certificate is conclusive evidence that the works have been properly carried out and completed in accordance with the terms of the contract. That of course is not the case here where the standard contract form was not used. However, my analysis of the evidence before me does not lead me to the conclusion that the certificate was issued when any jobs were still pending.

In the result, I am not satisfied that there is any serious arguable defence disclosed to warrant my setting aside the *ex parte* judgment entered herein earlier. The application for setting aside the *ex parte* judgment and for stay of execution are therefore accordingly dismissed. Costs of this application to the respondent.

Dated and delivered at Nairobi this 11th day of February, 1982.

J.R.O MASIME

JUDGE



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