Case Number:	Civil Appeal 19 of 1976
Date Delivered:	30 Apr 1976
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Eric John Ewen Law, Abdulla Mustafa, Samuel William Wako Wambuzi
Citation:	Christopher Kiprotich v Daniel Gathua & 5 others [1976] eKLR
Advocates:	PN Khanna for the Appellant, WB Waweru for the Respondents.
Case Summary:	**Christopher Kiprotich *v* Daniel Gathua & 5 others** Court of Appeal for East Africa, Nairobi 30th April 1976 Wambuzi P, law V-P & Mustafa JA ***Judgment*** *– judgment based on admissions of fact – jurisdiction – admissions arising from failure to file pleadings – plaintiff failing to file reply to counterclaim – subject-matter of counterclaim indivisible from that of plaint – plaint not struck out – whether proper to award judgment on admissions - Civil Procedure Rules, order XII, rule 6.* ***Time*** *– adequacy of notice – “sufficient notice” – one clear day’s notice of motion for judgment in default of defence – Civil Procedure Rules, order L, rule 4 – judgment – form – award of damages – award unquantified – costs and interest similarly unquantified – impossibility of drawing up order* The jurisdiction to award judgment on admissions

under the Civil Procedure Rules, order XII, rule 6, resulting from a failure to reply to a counterclaim should only be exercised in the clearest of cases and never where the subject-matter of the counterclaim is so closely related to the subject-matter of the plaint as to the indivisible and the plaint has not been struck out or dismissed. Even where the subject-matter is distinct and divisible, a party who had appeared but is in default of pleading should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward. *Rogers v Woods* [1948] 1 All ER 38 applied:

The appellant issued proceedings against the respondents in which he claimed damages for forcible entry and trespass to land. The respondents, in their defence and counterclaim, asserted that they had purchased the land from the appellant and applied to have the appellants' suit dismissed, and also for an order transferring the land to them and damages for breach of contract. The appellant's advocate sought particulars of the defence and counterclaim but, as a result of what he claimed to be an oversight, omitted to apply for an extension of time in which to file a reply and defence to the counterclaim. The respondents, on giving the appellant only one clear day's notice, moved for judgment on the counterclaim asserting that under order VIII, rule 17(5), of the Civil Procedure Rules the appellant must be deemed to have admitted the facts in the counterclaim. The appellant did not appear at the hearing and judgment was entered against him on the counterclaim under order XII, rule 6. The judge gave the respondents jugdment for the transfer of the land, unquantified costs for ploughing, unquantified general damages for breach of contract and "costs and interest". An *ex parte* application to set aside the judgment was dismissed. On appeal,

Held:

Allowing the appeal and setting aside the judgment,

(1) That one clear day's notice of the motion for judgment was not "sufficient notice" within order

	L, rule 4. (2) That, in awarding specific performance of the alleged contract of sale and general damages, the judge had failed to quantify the damages and no evidence of damage had been adduced. (3) That no order could be drawn upon the judgment since the amount of costs awarded for ploughing, the general damages for breach of contract, and the "costs and interest" had not been quantified. (4) That, for the reasons stated, *supra*, the jurisdiction to enter judgment on admissions arising from a failure to file a reply to a counterclaim should not have been exercised. **Cases referred to in judgment** *Jamnadas v Soda v Gordhandas Hemraj*, 7 ULR 7. *Mbogo v Shah* [1968] EA 93. *Rogers v Woods* [1948] WN 13, [1948] 1 All ER 38. **Appeal** Christopher Kiprotich appealed (Civil Appeal No 19 of 1976) from an order of Nyarangi J in the High Court at Nairobi on 9th February 1976 (Civil Case No 58 of 1975) in which he ordered specific performance of an alleged contract for the sale of land and, *inter alia*, damages to be paid by the appellant to the respondents, Daniel Gathua, Mbugua Nganga, Perminas Kamau, Richard Gatheca, Geoffrey Githae, James Wainaina (trading as Kamwogo Farmers Co). The facts are set out in the judgment of Law V-P. *PN Khanna* for the Appellant. *WB Waweru* for the Respondents. *Cur adv vult.*
Court Division:	Civil
History Magistrates:	-

County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(CORAM: Wambuzi P, law V-P & Mustafa JA)

CIVIL APPEAL NO 19 OF 1976

CHRISTOPHER KIPROTICH ………………………...............................…… APPELLANT

VERSUS

DANIEL GATHUA

MBUGUA NGANGA

PERMINAS KAMAU

RICHARD GATHECA

GEOFFREY GITHAE

JAMES WAINAINA (trading as Kamwogo Farmers Co)**...............….... RESPONDENTS**

JUDGMENT

The appellant is the plaintiff in a suit filed in the High Court of Kenya. In his plaint he claimed damages against six named defendants, the respondents in this appeal, for forcibly entering and trespassing on his land at Njoro. By their defence and counterclaim dated 3rd May 1975, the respondents pleaded that their entry on the land was lawful as they had purchased the land from the appellant and paid the full purchase price therefor. They prayed that the appellant's suit be dismissed, that he be ordered to transfer the land to them, and for other relief including damages for breach of contract. The appellant did not file a reply to the counterclaim. On 11th September 1975, the respondents applied to the Court by notice of motion for judgment on their counterclaim, citing order VIII, rule 17(5), and order XII, rule 6, of the Civil Procedure Rules. The relevant part of order VIII, rule 17(5), reads as follows:

… and unless a plaintiff files a reply to a counterclaim within the time fixed by or in accordance with these rules the statement of facts contained in such counterclaim shall at the expiration of the time so fixed be deemed to be admitted …

Order XII, rule 6, reads as follows:

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment as the Court may think just.

The application for judgment was served at the office of Mr Kamere, who was then the advocate acting

for the appellant, at Nakuru on 15th September 1975. We were told that Mr Kamere practices in Nairobi but also has offices in Nakuru and Thompson's Falls. The appellant did not appear and was not represented. The judge, without hearing evidence, and having before him only the affidavit of one of the respondents as to the truth of the matters stated in the counterclaim, ordered that judgment be entered for the respondents as prayed in paragraphs 7(b), (d) and (e) of the defence and counterclaim. The effect of this order was that the respondents were given judgment for: (1) the transfer to them of the appellant's land: (2) the costs incurred in ploughing the land, and general damages for breach of contract; and (3) costs and interest on the sum awarded from date of filing suit until payment in full. The judge did not quantify the "costs" or "general damages" which he purported to award under item 2 above.

The appellant then applied by chamber summons for the *ex parte* judgment entered against him to be set aside. The application was supported by an affidavit sworn by Mr Kamere. In this affidavit, Mr Kamere deposed that he had asked for, and been supplied with, particulars of the defence and counterclaim, but that "through an oversight" he had forgotten to ask for an extension of time to file a reply to the defence and a defence to the counterclaim. In paragraph 9 of his affidavit, Mr Kamere swore that: the [appellant] has a good defence to the counterclaim namely that none of the moneys alleged to have been paid by the [respondents] was ever paid to the [respondents] was ever paid to the [appellant] or anyone else on his behalf.

When the application was heard, Mr Waweru for the respondents produced a letter written to him by Mr Kamere, dated only four days later than his affidavit, in which he stated:

Our client is prepared to refund your clients money which [is] Shs 380,847/75 and not Shs 470,600/- as claimed in the counterclaim.

As Mr Kamere did not appear on this appeal, he has given no explanation for the statement sworn to by him that "none of the moneys… was ever paid to the [appellant]," and Mr Khanna for the appellant has not been able to suggest an explanation. When the application to set aside the judgment was argued before the judge, Mr Owino-Ger appeared for the appellant. His main submission was that judgment should not have been entered for the respondents, as the dispute between the parties concerned land, and there was no claim for a liquidated sum in the counterclaim. The judge rejected this submission and refused to set aside the judgment.

He said, in his ruling:

Mr Owino-Ger next made the point that a formal proof was necessary. Even had this happened, it wouldn't have made any difference as the Court would have accepted the evidence in support of the counterclaim and entered judgment accordingly.

This was, with respect, a serious misdirection. If formal proof was necessary in this case, it cannot be assumed that it would have been sufficient. The judge went on to hold that there could be no defence to the counterclaim, and he rejected the application with costs. From this order, the appellant with leave has appealed.

Mr Khanna for the appellant has put forward a number of grounds of appeal. As I have formed the opinion that the appeal must succeed for reasons which I shall give later, I will confine myself to mentioning some of the grounds which in my view have merit and which would in themselves have required this appeal to be allowed. Firstly, one clear day's notice, which is all the appellant was given before the hearing of the application for judgment, was clearly not, in my opinion, "sufficient notice"

within the meaning of order L, rule 4. Secondly, the judge ordered not only specific performance of the alleged contract of sale of the land, but also awarded general damages for breach of that contract as prayed in the counterclaim, without specifying the amount of such damages. A Court has jurisdiction to award damages in addition to ordering specific performance, for instance if the purchaser has suffered loss by reason of having been kept out of possession unlawfully. But such damages must be quantified, and should be based on some evidence. Thirdly, the judge, in what purported to be a final judgment, awarded "the costs incurred in ploughing the land" and "general damages for breach of contract" without quantifying the sums awarded under those heads, and ordered the payment of "costs and interest" on those unquantified sums. No decree could possibly by drawn up giving effect to such a judgment.

There is, however, in my opinion, an even more fundamental objection to the judgment which the judge pronounced and refused to set aside. It purports to award the title to certain land to the respondents, on a counterclaim, to which land the appellant also asserts a title by his plaint which has not been struck out, dismissed or otherwise disposed of. The principles applicable in such circumstances are, in my opinion, correctly stated in *Rogers v Woods* [1948] 1 All ER 38, a case decided under order XXVII, rule 11, of the Rules of the Supreme Court in England, as then in force, which like order XII, rule 6, of the Kenya Civil Procedure Rules gave jurisdiction to a Court to enter judgment on admissions, including constructive admissions arising out of failure to file a reply to a counterclaim under order VIII, rule 17(5). It was held that such jurisdiction undoubtedly exists, but that it should not be exercised where the subject matter of the plaint and of the counterclaims indivisible and the action is still pending. That is precisely the position here. The appellant's suit is still pending, and the subject matter of that suit is indivisible from the subject-matter of the counterclaim; that is to say, the title to the same area of land. The judge, in these circumstances, should have refused to entertain the application for judgment on admissions. The reason is, to my mind, obvious. When the appellant's suit comes to be tried, the judge who tries it may come to the conclusion that there never was in law a valid and enforceable contract for the sale of the disputed land, and hold that the appellant is the lawful owner thereof. This would give rise to an impossible situation, if the judgment, the subject of this appeal, is allowed to stand. To sum up, the jurisdiction to award judgment on admissions resulting from failure to reply to a counterclaim should only be exercised in the clearest of cases, and never, in my opinion, where the subject matter of the counterclaim is so closely related to the subject-matter of the plaint as to be indivisible, and the plaint has not been struck out or dismissed, as was the case here. Even where the subject matter is distinct and divisible, a party who has appeared but is in default of pleading should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous, and which he wishes to put forward. The other party can always be compensated by costs.

For these reasons, I would allow this appeal, with costs, and order that the judgment on admissions entered by the High Court *ex parte* be set aside, together with the orders for costs made on that occasion, and on the occasion of the application to set aside that judgment. I would leave those costs to be dealt with by the judge who finally disposes of the suit, including the counterclaim. I would order that a reply to the counterclaim be filed within fourteen days of the date of this judgment. The appellant's suit can then proceed for hearing in the usual way.

Wambuzi P: I had the advantage of reading in draft the judgment prepared by Law V-P and I agree with it. I wish, however, to add a word or two about the power of a court to set aside an *ex parte* judgment in the circumstances of this case.

The chambers summons taken out cites order IX, rule 10, of the Civil Procedure Rules and section 95 of the Civil Procedure Act. The order referred to was no longer operative at the relevant time and I think what was meant was order IXA, rule 10, which applies to setting aside judgments entered pursuant to

the provisions of that order. Quite clearly, therefore, it would not apply to a judgment entered pursuant to the provisions of that order. Quite clearly, therefore, it would not apply to a judgment entered under a different order, in this case order XII, rule 6. Under section 95 of the Civil Procedure Act, however, the High Court has power to extend the period fixed by the Act (which by section 2 includes the rules) for the doing of an act even though the period so fixed has expired. It follows, in my view, that as the judgment in this case was entered in default of pleadings, the Court could have exercised its discretion, which does not appear to be limited or qualified in any way, to extend the time for filing a reply to the counterclaim. In these circumstances, the *ex parte* judgment would have had to be set aside. If there should be any doubt about this view, then, the Court could always invoke its inherent powers in section 3A of the Civil Procedure Act, "to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court."

The application to set aside the judgment on admissions given *ex parte* in this case was dismissed mainly on the ground that the facts stated in the counterclaim were deemed to have been admitted and there was no good defence to the counterclaim. The trial court had an unfettered discretion to set aside or vary the *ex parte* judgment and as was stated in *Mbogo v Shah* [1968] E A 93, this Court will not interfere with the exercise of that discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong conclusion. Law V-P has already pointed out that it was wrong to order the transfer of the two parcels of land to the respondents, the ownership of which was the subject matter of a suit by the appellant which was left pending in that Court.

Secondly, whereas I would agree with the judge that under order VIII, rule 17(5) of the Civil Procedure Rules the appellant would have been deemed to have admitted the statement of facts contained in the counterclaim if he had failed to file a reply thereto within the time prescribed by the rules, I would point out that the same rule provides that the Court may at any subsequent time give leave to the plaintiff to file a reply. It follows, in my view, that if leave to file a reply were given and the reply were filed then the facts in the counterclaim would no longer be deemed to have been admitted under that rule.

What happened in this case was that by his application on 1st December 1975 the appellant by his counsel sought to have the *ex parte* judgment set aside and an extension of time to file a reply to the counterclaim. The application was supported by an affidavit sworn by counsel on 24th October 1975. He deponed to having asked for particulars of the counterclaim, which were duly filed in Court by the respondents but through oversight forgot to ask for extension of time to file a reply. He claimed that the appellant had a good defence to the counterclaim as he denied having received any payments from the respondents as alleged in the counterclaim. In these circumstances, the judge had to consider whether these were circumstances upon which he could exercise his discretion to set aside the *ex parte* judgment and grant leave to file a reply.

In his ruling, however, the judge appears to have considered the facts stated in the counterclaim together with the particulars subsequently filed by the respondents as admitted by the appellant and concluded: It is my respectful judgment that the [appellant's] denial of receipt of the amount counterclaimed is false and defenceless. The affidavit in support of the application to set aside the *ex parte* judgment contains nothing else that is likely to constitute a good or valid defence.

In other words, he applied the proviso to rule 17(5) of order VIII against the appellant by holding that he had admitted the facts in the counterclaim by his failure to file a reply and then, apparently went on to consider whether there was any good or valid defence to the admitted facts so as to justify leave to file a reply! With respect, I think the course adopted by the judge was wrong. Its effect was to nullify the provisions of the proviso to rule 17(5) relating to extension of time to file a reply. In my view the judge was not required at that stage to determine whether or not the proposed defence was true. This is a

matter, which could be decided after evidence has been called on both sides. The judge did not consider at all whether the reasons advanced by counsel for his failure to file a reply in time were good reasons or not. I agree, as has been pointed out in the judgment of Law V-P, that some parts of the particulars and counsel's affidavit may be difficult to reconcile but I think that in the circumstances of this case, these are matters for the trial court to resolve on evidence. Admittedly a good defence may be one of the factors to be considered as to whether or not a Court should set aside an *ex parte* judgment, but the defence need not be proved.

Although the court's discretion in these matters is unfettered, it must nevertheless be exercised judicially. I would not say that this was the case here. In the circumstances of this case I would approve of the principle in *Jamnadas V Soda v Gordhandas Hemraj*, 7 ULR 7 that:

Where a defendant though in default appears before the Court and indicates that he has a defence and shows the Court what that defence is, then if the defence discloses some merits, and the plaintiff can reasonably be compensated by costs for the delay, it is proper for the Court to take steps to try the case upon the merits, both sides being given a hearing.

And if I may borrow the expression used before in these Courts, procedural rules are intended to serve as the handmaidens of justice, not to defeat it. As Mustafa JA also agrees with the judgment of Law V-P there will be an order in the terms proposed by Law V-P.

Mustafa JA: I agree with the judgment prepared by Law V-P and with the order he proposes. I have nothing useful to add.

Appeal allowed with costs.

Dated at Nairobi this 30th day of April 1976.

S.W.W. WAMBUZI

……..........…….

PRESIDENT

E.J.E. LAW

………....……

VICE - PRESIDENT

A.MUSTAFA

……...........…….

JUDGE OF APPEAL

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