FANNY MULIANGO AND SAMSON MULIANGO v NAMDOU MAGASA AND MURUJA TRANSPORT & FARMING COMPANY LIMITED (1988 - 1989) Z.R. 209 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND CHAILA, JJ.S.
16TH FEBRUARY AND 8TH JUNE, 1989
(S.C.Z. JUDGMENT NO. 26 OF 1989)

Flynote

Civil Procedure - Defence not delivered within time period - Judgement in default obtained shortly after time period expired - Effect of.
Civil Procedure - Defendant consents to assessment of quantum of damages - Whether such consent precludes trial on liability.

Headnote

The appellant issued a writ in the High Court claiming damages arising out of a motor accident. On a summons of directions the registrar made an order that the appellant deliver a statement of claim within 21 days and the respondent deliver a defence within 21 days of the receipt of the statement of claim. The appellant subsequently delivered the statement of claim nearly two months late and when the respondent failed to deliver the defence on time, obtained a default judgment two days after the stipulated time for delivery. A defence was subsequently delivered shortly thereafter, alleging contributory negligence. The respondent applied to the registrar to set the judgment aside. The respondent thereafter consented to assessment of damages without any admission as to liability. The registrar refused to set the default judgment aside. The respondent appealed to the High Court which allowed the appeal. The appellants appealed.

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The appellants argued, inter alia, there was no defence on the merits, that the default judgment was obtained well after the period for delivery of a defence had elapsed and that the respondent had consented to judgment in a certain sum of damages from which no appeal could lie.

Held:

(1) Where there is a defence to an action it is preferable that a case should go for trial rather than be prevented from so doing by procedural irregularities.
(2) The consent of a party to the assessment of the quantum of damages in a certain sum is in no way a consent to a judgment in that sum. Damages arising out of a claim may be agreed between the parties leaving the question of liability to be dealt with by the court.

Cases referred to:

(1) Waterwells Limited v Jackson (1984) Z.R. 98
(2) Kabwe Transport v Press Transport (1975) Limited (1984) Z.R. 43
(3) Hollington v F. Hewthorn & Company Limited [1943] 2 All E.R. 34.
(4) Siwinga v Phiri (1979) Z.R. 145

Legislation referred to:
1. Civil Evidence Act. 1968 (U.K.)

For the appellant: D. M. Luywa of D.M. Luywa Co.
For the respondent. H.G. Mbaluku of H.G Mbaluku.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

This is an appeal against a judgment of a High Court judge allowing an appeal from a deputy registrar's refusal to set aside a judgment in default of defence. In this judgment we will refer to the appellants as the plaintiffs and to the respondents as the defendants as they were originally in the court below.

The history of the proceedings in this case was that the plaintiffs issued a writ on 24th of September 1986 claiming damages from the first defendant for personal injuries and damage to a motor vehicle of the first defendant. A consent summons for directions providing for the filing of the statement of claim within twenty one days of that order and for filing of the defence within twenty one days after receipt of the statement of claim was issued on 18th February 1987, and on the same date, a consent order for directions was made by the court, providing that the statement of claim be delivered within twenty-one days of the date of the order and that the defence be delivered within fourteen days of the receipt of the statement of claim. The discrepancy in the number of days was not drawn to the attention of the deputy registrar, but on appeal to the learned appellate judge, it appears to have been accepted that the period of twenty-one days for delivery of the defence should be adhered to. The statement of claim was delivered to the defendants' advocates on 6th May 1987 (nearly two months after the date laid down in the order for directions). The defence, dated 1June, 1987, was served on the plaintiff's advocates, but in the meantime they had signed judgment in default of defence on 29 May 1987. The application to set aside judgment was made to the deputy registrar who delivered a reserved ruling, refusing to set aside the judgment, on 19th of January, 1988. In the meantime, application was made for an assessment of damages on 10th July 1987, and on 2nd February 1988, an assessment of damages in the sum of K308,605-00 and 10% interest was

made with the consent of the defendant. Subsequently, on 26th February 1988 there was an order by consent for a writ of execution to be stayed and for the defendant to pay a minimum of K10,000-00 within ninety days and, thereafter, instalments in respect of the assessed damages. On 10th March 1988 the plaintiffs applied to join Maruja Transport Company Limited as an additional defendant and an order as prayed was granted on 17th March 1988. On 7th April 1988 the appellants filed a notice of appeal out of time against the registrar's refusal to set aside the default judgment, and, on 30th June 1988, the appellate judge delivered a reserved judgment allowing the appeal and setting aside the default judgment, with an order that if any damages had already been paid, they must be paid into court by the plaintiffs. It is against this judgment that the plaintiffs now appeal. The learned deputy registrar in his reserved ruling said that the case of *Waterwells Limited v Jackson* (1) applied, and he went on to say that the default judgment was obtained well after the default in

delivery of the defence and he had not been given a satisfactory explanation for the default. He then said that there appeared to be little or no defence on the part of the defendant, and referred to the fact that the first defendant had pleaded guilty to a charge of careless driving, for which he incurred a fine of K50-00. For this reason he found that the defendant had not disclosed a defence on the merits.

In her judgment the learned appellate judge noted that the statement of claim was served two months after the due date and that judgment in default was entered twenty three days after service of the statement of claim. It was noted that the defence was dated 1 June 1987 and the learned judge found that the delay was not inordinate nor had there been mala fides. In the same judgment it was found that the defendant only consented to the quantum of damages on assessment and it was incorrect to say that the judgment had been consented to. The learned trial judge further found that the defence furnished by the first defendant appeared to be valid and would succeed if sufficiently supported by evidence. In consequence, it was found that this was a case where a full trial was necessary to establish liability and the defendant should have an opportunity to defend.

On behalf of the appellant, Mr. Luywa supported the finding of the deputy registrar and argued that there was no defence on the merits and that, in any event, the vehicle of the defendant was insured.

We will deal with this latter point immediately. We have no hesitation in saying that the existence or otherwise of a valid insurance policy has no relevance whatsoever to the question of whether or not a party has driven a motor car negligently. The existence of an insurance policy is only relevant to the question of joining the insurance company as a defendant, and in this particular case it is apparent that the plaintiffs have abandoned their claim against the insurance company.

As to the argument that there was no defence on the merits, we have already noted that the learned trial judge found that the defence furnished by the defendant appeared to be valid and would succeed if supported by evidence. We agree that in the defence, the first defendant alleged contributory negligence on the part of the plaintiff and gave three particulars of such negligence. In the circumstances, it cannot possibly be said that the defendant failed to disclose a defence on the merits. We have observed

that, in the plaintiffs' heads of argument, the plaintiffs put forward the same argument as was used by the learned deputy registrar in his ruling when he said that the fact that the first defendant had pleaded guilty to a charge of careless driving and had been fined K50-00 appeared to contradict his affidavit that he had a defence to the action. In the case of Rand Transport Co. Ltd. v Press Transport (1975) Ltd. (2), at page 46, this court ruled that the provision of the Civil Evidence Act 1968 of England to the effect that evidence of criminal proceedings could be referred to and taken note of to assist a decision in civil proceedings, did not apply in Zambia, because we have an Evidence Act of our own which does not contain such a provision.

It follows, therefore, that the decision in the case Hollington v F. Hewthorn & Company, Ltd (3), to the effect that a certificate of conviction cannot be tendered in civil proceedings, still applies in this country on the ratio decided that criminal proceedings are not relevant and are re inter alios acta. In

the same case we disapproved the High Court judgment in the case of Siwinga v Phiri (4) which was to the opposite effect. It follows that the reference by the learned deputy registrar to what was in fact a signing by the first defendant of an admission of a guilt form, (not a plea of guilty), was improper and certainly not a ground for saying that the obvious defence of contributory negligence raised by the first defendant was not a defence on the merits. We would comment here that a number of misdirections arose in the learned deputy registrar's judgment . He said that the default judgment was obtained 'well after the default occurred'.

In fact the judgment was obtained either two days or nine days after the default had occured, and this could hardly be said to be "well after." Furthermore, the learned deputy registrar, after referring to this court's judgment in the case of Waterwells (1), to the effect that the most important consideration was whether there was a defence to an action, and that it was preferable that cases should come to trial rather than be prevented from so doing by procedural irregularities, failed to apply the principles set out in that case.

Mr Luywa argued that even if the first defendant had a defence, further circumstances had intervened, namely, that the defendants had consented to judgment in a certain sum of damages and no appeal could possibly lie to a judge in chambers after such consent to judgment.

In her judgment the learned appellate judge specifically found that the defendant had only consented to the assessment of the quantum of damages, and that it was not correct to say that the judgment obtained was consented to. We see no reason to find fault with the learned judge's findings in this respect. The defendant's consent to the assessment of the quantum of damages in a certain sum was in no way a consent to a judgment in that sum. In many cases the damages arising out of a claim are agreed between the parties leaving the question of liability to be dealt with by the courts. The subsequent agreement to pay in instalments to avoid execution in no way affected the question of whether or not judgment had been consented to. This ground of appeal must, therefore, also fail.

Mr Luywa further argued that the appeal to the judge in chambers was seventy-two days out of time, and that the defendant should have made

specific application for leave to appeal out of time following which the learned appellate judge should have specifically dealt with that issue when delivering her judgment.

We note that the notice of appeal against the deputy registrars decision is headed "Notice of appeal to a Judge in Chambers (Out of time)." The learned appellate judge specifically noted in the first paragraph of her judgment that the appeal was out of time and then went on to deal with the appeal, and in the last paragraph, to allow the appeal. It is apparent to us that the learned appellate judge, being well aware of the fact that the appeal was out of time, and having heard the arguments of counsel as to the acceptance of the appeal out of time, exercised her discretion to accept the defendant's method of application for leave to appeal out of time and in view of the fact that the appeal was thereafter heard and determined, obviously decided to grant leave to appeal out of time. We are unable to accept Mr Luywa's argument that the question of leave to appeal should have been

dealt with more specifically by the learned appellate judge. We are satisfied that the matter was in the learned judge's mind and was properly dealt with. This ground of appeal must also fail.

One further point made by Mr Luywa was that it would be unfair to the plaintiffs to allow the learned appellate judge's judgment to stand because it included an order that any monies paid under the assessment of damages by the defendants to the plaintiffs should be paid into court pending the trial of the action. This, said Mr Luywa, would cause suffering to the plaintiffs and was a reason why the original default judgment should not be set aside. In reply to this Mr Mbaluku indicated that there was no intention on the part of the defendants to require compliance with the learned judge's order for the payment into court. We accept this as an undertaking by Mr Mbaluku on behalf of clients, and it follows, therefore, that the plaintiffs will not have to comply with that part of the learned appellant judge's order that relates to a payment into court by the plaintiffs of any monies paid in satisfaction of the assessment of damages by the defendants to to the plaintiffs. This ruling will of course not affect the portion of the parties after full trial when the liability of each party will be determined by the trial judge.

For the reasons which we have given, this appeal is dismissed with costs too the defendants in any event.

Appeal dismissed
