KHALIL v CHOITHRAMS

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COURT OF APPEAL OF SIERRA LEONE, Civil Appeal 33 of 1978, Hon Justice S C E Warne JA, Hon Justice M E A Cole JA, Hon Justice S T Navo JA, 27 October 1979

[1] Civil procedure – Judgment in default of defence – Default judgment set aside – Appeal against setting aside of default judgment – Rules of the High Court Order 39 r 4 - Rules of the Court of Appeal rr 31, 32

On 19 June 1978 the respondents were served with a writ of summons. Counsel for the respondents entered conditional appearance on 23rd June 1978. On 25th July 1978, judgment in default of defence was entered against the respondents. On 26th July, a purported defence was filed in the office of the Master and Registrar. On 8th August, 1978 Davies J granted an order setting aside the judgment in default of defence. The appellant appealed against this order. Counsel for the respondent conceded that the application ought not to have been made ex debito justiciae because the judgment in default was in fact regular and also conceded that time did run against them when the conditional appearance was filed, and continued to run against them when the appearance became unconditional, since no steps had been taken to set aside the writ of summons. Counsel for the appellant submitted that the motion to set aside the judgment did not disclose any prayer and as such contravenes Order 39 rule 4 of the Rules of High Court

Held, per Warne JA:

1. It would appear that the trial judge did not carefully consider the affidavit in support of the motion on its merits. If he had he would have seen that the orders which he made were not tenable. In view of the foregoing, both grounds of appeal must succeed. I therefore allow the appeal. Orders are set aside.
2. In support of the motion the court now had the affidavit and the intended defence as exhibit to the affidavit. Under rule 31 of the Court of Appeal Rules, this was a proper case in which the court can exercise its discretion in favour of the respondent and set aside the judgment in default of defence obtained on 25th July, 1978.

Cases referred to
Farden v Richter (1889) 23 QBD 124

Legislation referred to
Rules of the Court of Appeal rr 31, 32
Rules of the High Court Order 23 r 15, Order 39 r 4
Ruled of the High Court [UK]Order 27 r 15

Appeal
This was an appeal against an order made by the Davies J in the High Court On the 8 August 1978, setting aside a judgment in defence obtained and signed by the appellant on the 25 July, 1978. The facts appear sufficiently in the following jusgment.

J H Smythe QC with A E Manly-Spaine for the appellant.
J B Jenkins-Johnston for the respondent.

WARNE JA: On the 8th August, 1978, an order was made by the Honourable Justice G O Davies in the High Court, setting aside a judgment in defence obtained and signed by the appellant on the 25th day of July, 1978.

Against this order the appellant has appealed. The order reads:

1. That the judgment in default herein dated the 25th day of July, 1978 be set aside.
2. That the defence filed on the 26th July, be allowed to stand.
3. That defendants/appellants do pay costs of this application assessed at Le40.00 by the court.

The appellant has filed two grounds of appeal:

1. That the learned trial judge was wrong in law to have granted the application to set side the judgment in default entered against the defendants/respondents on the 25th day of July 1978 as the application on the motion paper was "for an order that the judgment in default entered herein against the defendants/appellants be set aside ex debito justiciae".
2. That the learned judge was wrong in law to have set aside the judgment in default of defence herein having regard to paragraphS 4 & 5 of the affidavit in support of the application to set aside sworn to on the 28th day of July, 1978 in that it therein stated that the judgment in default was entered against the defendants before the defendants were obliged to make their defence.

This is the chronology of this action:

On the 19th day of June, 1978 the respondents were served with and received a writ of summons issued on behalf of the appellant to this writ of summons. Counsel for the respondents entered a conditional appearance on the 23rd June 1978. On the 25th July, 1978, judgment in default of defence was entered against the respondents herein. On the 26th of July a purported defence was filed in the office of the master and registrar of the High Court by counsel for respondents. On the 8th August, 1978 the court was moved to set aside the said judgment. The prayer was granted and order (supra) made. Can the court make this order in the light of what is contained in the motion paper and the affidavit? Counsel for the appellant has submitted that the court cannot make such an order and ought not to have made the order. He submitted that the motion paper did not state the ground on which the order was sought to set aside the judgment in default and referred to Order 39 rule 4 of the Rules of the High Court. He went on to argue that the application was made under Order 23 rule 15 of the Rules of the High Court.

Counsel for the respondent conceded that the application ought not to have been made ex debito justiciae because the judgment in default was in fact regular and also conceded that time did run against them when the conditional appearance was filed, and continued to run against them when the appearance became unconditional, since no steps had been taken to set aside the writ of summons.

However, counsel has urged the court, that in spite of these defects, he is inviting the court to invoke the provisions contained in rules 31 and 32 of the Rules of the Court of Appeal.

The application before the High Court was made under Order 23 rule 15, which states:

"Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court, upon such terms as to costs or otherwise as such court may think fit, and motion for judgment under rule 2 of this order, such setting down may be dealt with by the court in the same way as if judgment by default had seen signed when the case was set down."

I am satisfied that the application was made under the proper order and rule. In this case the court below had a discretion to grant the application "upon such terms as to costs or otherwise."

However, a distinction must be drawn between a regular judgment which could be set aside on terms and an irregular judgment which will be set aside ex debito justiciae.

The corresponding English Order and rule to Order 23 rule 15 is Order 27 rule 15 under the rubric "Regular Judgment" which states:

> "If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, ie, an affidavit stating facts showing a defence on the merits (*Farden v Richter* (1889) 23 QBD 124".)

I will now examine this rule. That the judgment in default was regular, we are all agreed. Counsel for the appellant submit that the motion paper did not disclose any prayer and as such contravenes Order 39 rule 4 of the Rules of High Court, which states:

> "Every notice of motion to set aside, remit, or enforce an award, or for attachment or to strike off the rolls, shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

Did the respondents comply with the aforesaid provisions to warrant the court exercising it s discretion in their favour?

There are two limbs in this rule: (1) where the motion is a motion simplicites and (2) where the motion is founded on evidence by affidavit.

The respondents have invoked both limbs.

On the fact of the motion paper the respondents prayed the court "for an order that the judgment in default of defence entered herein against the defendants/appellants on the 25th day of July, 1978 *be set aside ex debito justiciae* and that the defence already filed by the defendants' solicitor on the 26th day of July, 1978 be allowed to stand. As can be seen the *general grounds* for the application are spelled out. We have already agreed that the judgment in default is regular and we are also agreed that the purported defence was filed out of time. In such a case the application under limb (1) cannot succeed and ought not to have succeeded. However counsel for the respondent complied with the second limb of this rule.

On the face of the motion paper he states "*and take notice further* that at the hearing of this application it is intended that the affidavit of James Blyden Jenkins-Johnston sworn to on the 25th day of July, 1978 will be read and used."

It would appear that the learned trial judge did not carefully consider the affidavit in support of the motion on its merits. If he had he would have seen that the orders which he made were not tenable. In view of the foregoing, both grounds of appeal must succeed. I therefore allow the appeal. Orders are set aside.

Counsel for the respondents has invited this court to invoke its powers under rule 31 and 32 of the Rules of the Court of Appeal.

Rule 31 states:

> "The court may from time to time make any order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal, and may direct the court below to enquire and the certify its findings on any question which the court thinks fit to determine before final judgment in the appeal, and make any interim order, or grant any injunction which the court below is authorised to

make or grant and may direct any necessary enquiries or accounts to be made or taken and generally shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as a court of first instance, and may re-hear the whole case, or may remit it to the court below to be reheard or to be other wise dealt with as the court may direct."

In the light of this rule, can this court set aside the judgment in default of defence obtained on the 25th July 1978? I think this court can; but before this can be done, I will consider the affidavit of James Blyden Jenkins-Johnson sworn to on the 25th day of July, 1978 in support of the motion to set aside the judgment.

Inter alia, the deponent deposed in paragraph 6 the following:

"That ex abundante cautela, I lodged the defendant's defence at the High Court Registry on the 25th July, 1978 whereupon I was informed that the plaintiff's solicitor had lodged an interlocutory judgment in default of defence the previous day, which the Master had already signed. I then asked that the defence be filed. A copy of the defence is exhibited hereto and marked "C". A copy of the judgment in default of defence is also exhibited and marked "D".

I must state at once that the defence was irregularly filed and as such it is of no effect as far as it is an answer to the writ of summons; however it is an exhibit to the affidavit which is required in an application of this nature. This court cannot ignore it.

In paragraph 8 of the affidavit, the deponent states:

"that the defendants have a very good defence and are prepared to defend this action vigorously if this application succeeds."

We now have in support of the motion the affidavit and the intended defence as exhibit to the affidavit.

I believe this is a proper case in which the court can exercise its discretion in favour of the respondent and set aside the judgment in default of defence obtained on 25th July, 1978.

The said judgment is accordingly set aside.

The respondents are hereby granted leave to file a defence to the writ of summons.

In view of what I have said above I make the following order:

1. That the judgment in default of defence obtained on the 25th July 1978 be set aside.
2. That the defendants/respondents be at liberty to file a defence within 14 days of this judgment.
3. That the costs in the court below be costs in the cause.
4. That the respondents do pay the costs occasioned by this appeal to the appellant agreed by both counsel at Le200.00.

Reported by Glenna Thompson