

CENTRAL AND PROVINCIAL AGENCIES (1983) Z.R. 152 (H.C.)

HIGH
KAKAD, J.
29TH
(1983/HP/1490)

COURT
NOVEMBER
,1983

Flynote

Courts - Court process - Abuse of - What amounts to.

Civil Procedure - Judgment in defect of appearance - Application to set aside - Existence of triable issues - Effect of.

Costs - A ward of - Liability of party abusing court process.

Headnote

The respondent (plaintiff) instituted fresh proceedings, obtaining and executing judgment while fully aware that the original proceedings in the same action, were still pending in the High Court. The appellants' (defendant) application to the Deputy Registrar to set aside the judgment obtained in default of appearance was dismissed on the grounds that the appellant had disclosed no proper defence.

Held:

- (i) The plaintiff's action in instituting fresh proceedings while aware that the action was still pending implies an ulterior motive and was altogether an abuse of the process of court.
- (ii) The existence of contentious matters between the parties discloses that there are triable issues at stake, justifying setting aside the judgment obtained in default of appearance.
- (iii) An abuse of the court process will result in the party responsible being penalised in Costs.

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For the appellant: M. M. Mwanang'umbi, Legal Services Corporation.

For the respondent: T. Chalansi, Chalansi and Co.

Judgment

KAKAD ,J.:

The appellant, Zambia Breweries Limited (hereinafter referred to as the defendant) appeals against the decision of the Deputy Registrar dismissing the defendant's application to set aside the judgment entered in default of appearance on 13th November, 1983.

The events leading to the appeal before this Court are:

On 27 October, 1983, the respondent, Central and Provincial Agencies Ltd. (hereinafter referred to as the plaintiff) issued a specially endorsed writ against the defendant claiming K2,050,000.00 being rental charges for the use of the plaintiff's equipment as listed in the particulars of the claim.

The said writ, according to the certificate of service, was served on the defendant on 28th September, 1983.

On 13th October, 1983, the plaintiff obtained judgment in default of appearance.

On 19th October, 1983, upon the plaintiff's application a writ of fi.fa was issued.

The bailiff on the same day i.e. 19th October, 1983, went to the defendant's premises and levied execution.

Thereupon the defendant on 21st October, 1983, issued a summons applying to set aside the judgment and execution.

On 7th November, 1983, the Deputy Registrar heard the application and dismissed it, ruling:

"Judgment was regularly obtained and no proper defence has been shown to exist. Application is dismissed with costs".

On 8th November, 1983, the defendant filed a notice of appeal and consequently this appeal.

Whilst going through the affidavit in support of the application, I have observed the following which in my view has an important bearing on the matters concerning the plaintiff or his Counsel's conduct in this case.

On 9th March, 1983, the plaintiff had issued a specially endorsed writ against the defendant claiming K188,000.00 based on the same facts and matters as in the action before this Court. That action was 1983/HP/ 406 whereas the action in consideration before this Court is 1983/HP/1490. The action now before this Court was instituted on 27th September, 1983, whilst the action in 1983/HP/406 was still pending. In 1983/HP/406 the defendant had entered an appearance.

I have also noticed that the defendant's address on the writ in 19831 / 406 is materially different from the one on the writ before this Court.

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The action in 1983/HP/406 was not discontinued until 1st November, 1983. Equally it should be observed that the notice of discontinuance, as required, was not served on the defendant.

From the above it is clear that the plaintiff had instituted the action in the case before this Court whilst the action in 1983/HP/406, based on the same facts and matters, was pending in the High Court. Equally, the plaintiff had obtained judgment in the action before this Court when he or his Counsel, I believe, must have been aware of the pending action in 1983/HP/406, and that the defendant had entered an appearance 1983/ HP/406. Despite the above, the plaintiff went ahead and found it proper to levy execution in the action before this Court. The execution in this case was therefore levied when the plaintiff's action in 1983/HP/406, based on the same facts and matters, was still pending before the High Court.

From the above, I can only conclude that the plaintiff or his Counsel in dealing with the action before this Court in the manner it was dealt with, when fully knowing that the suit in 1983/HP/406 based on the same facts was pending, had some ulterior motives. However, have no doubt that the plaintiff in instituting the action now before this Court when fully knowing that the action against the defendant in 1983/HP/406 based on the same facts and matters was pending, had clearly abused the process of the Court.

Coming to the merits of the appeal, will first deal with the learned Deputy Registrar's ruling dismissing the application on the grounds that the defendant had disclosed no proper defence. The learned Counsel for the defendant submitted that the affidavit in support of the application not only disclosed triable issues but disclosed facts as to how the disputes between the parties arose and why they remained unsettled. He claimed that the defendant had at no time agreed to pay the rent claimed by the plaintiff. According to him, the facts disclosed in the affidavits showed that the matters in dispute were being negotiated and there was never any agreement between the parties.

The learned Counsel for the plaintiff submitted that the learned Deputy Registrar was justified in finding that there was no defence disclosed. He contended that the defendant had converted the plaintiff's properties to its use and therefore had impliedly agreed to pay K10,000.00 rent per week as demanded by the plaintiff.

Having read paragraphs 8, 9, 10, 11 and 12 of the affidavit and the documents in coupon of the application, it is to me clear as day light that there are various matters concerning the claims and makers between the parties that required to be resolved at the trial. Equally the plaintiff's affidavit opposition, in particular to paras 6, 7, 8, 9 and 10 and the documents, my view, support the defendants' contention than there are contention matters between the parties. The question of agreement, rent and the legality of the use of the properties in question were apparently unresolved and are therefore obvious triable issues.

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With respect to the learned Deputy Registrar, I cannot understand how he, light of what is stated in the affidavits in support; and in opposition, could have come to find that "no proper defence has been shown to exist". It would have been a great assistance to this Court if the learned Deputy Registrar had given detailed reasons for coming to the conclusion he did.

For the foregoing reasons I have no hesitation in finding that the learned Deputy Registrar had erred in finding that there was no defence shown to exist. In my judgment the learned Deputy Registrar on the facts obtained had clearly erred in refusing to set aside the judgment.

Having come to the above conclusion, I do not consider it necessary to go into the question concerning the regularity or irregularity of the judgment.

I therefore allow the defendants appeal to set aside the judgment entered on 13th October, 1983. The defendant is granted unconditional leave to defend subject to the defended entering an appearance within ten days from today.

In this case I find it necessary to consider the question of costs concerning execution levied by the bailiff. The question of the costs has to be considered bearing in mind what I have said concerning the existence of the pending actions 1983/HP/406.

At the time the action in this case was instituted, the action in 1983/ HP/406, based on the same facts and matters, was pending in the High Court. The defendant in 1983/HP/406 had in fact entered an appearance I have no doubt that the plaintiff or his Counsel were fully aware of the situation at the time. On the facts obtained and taking all the circumstances into account, I am of the opinion that the plaintiff or his Counsel had decided to institute the action in this case despite the other pending action because it probably was not going to be easy to obtain easy judgment in the pending action. To institute the actions before this Court, whilst the suit 1983/HP/406 was still pending, was, as I have said before, clearly an abuse of the Court's process. Equally to have obtained judgment and to have issued fi.fa in this case that situation was correct spondingly an abuse of the Court's process.

In my considered view, any party that deliberately abuses the Court's process ought to suffer in consequential costs. The plaintiff, in this case, went ahead, obtained judgment default and issued execution despite the pending action in 1983/EP/406, based on the same facts, and in which the defendants had entered an appearance. I do not know if the plaintiff had realised the magnitude of execution costs on K2,050,000.00. In the circumstances it would, in my view, be totally unjust and unequitable to penalise the defendant in costs. The plaintiff having deliberately abused the Court's process in this case must in my judgment be condemned to consequential costs.

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I therefore the plaintiff to bear the bailiff's costs on execution. As regards the costs concerning the application before the Deputy Registrar and of the appeal before this Court, I order these costs to be costs in the cause to the defendant.

This (court further orders that any further proceedings by the plaintiff in this case be stayed until the plaintiff pays the bailiff's costs and costs the discontinued action. 1983/HP/406. I also order the bailiff to refund K5,000.00 to the defendant, execution costs recovered from the defendant and order the bailiff to recover full costs of execution from the plaintiff..

Appeal allowed

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