EDSON CHENDA v SATKAAM LIMITED (1979) Z.R. 119 (H.C.)

HIGH COURT
MOODLEY, J.
2ND MARCH, 1979
1978/HN/136

Flynote
Civil procedure - Stay of execution - Judgment - Hearing of summons - Parallel actions - Whether possible.
Civil procedure - Discretion to transfer case - Re-transfer - Setting aside judgment and granting leave to defend - Condition precedent - Bona fide application.

Headnote
The plaintiff issued a specially endorsed writ against the defendant claiming a balance of almost K500 in respect of goods sold and delivered to the defendant at his request. The defendant did not enter an appearance and the plaintiff signed judgment in default of appearance. The case was transferred from the High Court to the Luanshya subordinate

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court for enforcement of the judgment. The defendant applied to the District Registrar to re-transfer the action to the High Court so that he could apply to set aside the judgment and be granted unconditional leave to defend the action. The District Registrar disallowed the summons and on appeal:

Held:
(i) An application for a stay of proceedings before the subordinate court is a condition precedent to the hearing of the summons by the District Registrar.
(ii) A condition precedent to the setting aside of judgment and the granting of leave to defend is that the District Registrar in the exercise of his discretion grants an order issued for the transfer of the case from the subordinate court to the High Court.
(iii) Such an application must be bona fide and satisfy the court that there is a defence on the merits.

Legislation referred to:
High Court Act, Cap. 50, s. 23 (2).
Subordinate Court Rules, Cap. 45, O. 38, r. 4.

For the defendant: L. Mwanawasa, Mwanawasa & Co.
For the plaintiff: J.S. Adams, Adams & Adams.

Judgment
MOODLEY, J.: This is an appeal from a decision of the learned District Registrar at Ndola who had on the 9th November, 1978, disallowed a summons to transfer the above action from the subordinate court, Luanshya, to the High Court, Ndola, and an application to set aside a judgment

which the plaintiff had obtained in default of appearance on the 27th February, 1978, and further that the appellant be granted unconditional liberty to defend the action.

Both Mr Mwanawasa for the appellant and Mr Adams for the respondent have made detailed submissions in chambers in support of their rival contentions. It would appear that on the 2nd September, 1977, the plaintiff issued a specially endorsed writ against the defendant claiming a balance of K495.91 in respect of the goods sold and delivered to the defendant at the defendant's request. The plaintiff says that the writ was served on the defendant personally and when the defendant had not entered an appearance on that writ the plaintiff signed judgment in default of appearance on the 27th of February, 1978, for the sum of K495.91 after credit had been given to the defendant for a sum of K200 which the defendant had paid against his debt. Thereafter the matter was transferred to the Subordinate Court in Luanshya for the purpose of enforcing the judgment of the High Court. It is understood that judgment summons had been issued against the defendant and the subordinate court thereupon made an order that he defendant discharge his debt by monthly instalments.

It is in these circumstances that the defendant had applied to the learned District Registrar to re-transfer the action from the subordinate

court, Luanshya, to the High Court so as to enable the defendant to apply to set aside the judgment and be granted unconditional leave to defend the action. In the course of the argument before this court the question arose as to whether in the light of the fact that the proceedings had been considerably advanced before the subordinate court to the extent that an order had been made against the defendant, this court had jurisdiction to entertain the summons in the first place. It should be said that the affidavit in support of the summons before the District Registrar omitted to provide a detailed reference to the previous proceedings in the High Court. Neither have there been any details concerning the subordinate court proceedings. Further it would appear that there was no application for stay of proceedings before the subordinate court so as to permit the learned District Registrar to hear the summons for the transfer or re-transfer of the cause from the subordinate court to the High Court and for setting aside judgment in default of appearance. Mr Mwanawasa suggests that a stay of execution was not a condition precedent to the hearing of the summons by the District Registrar. If Mr Mwanawasa is correct then it would appear that if there was no stay of the subordinate court proceedings and the learned District Registrar had proceeded to hear the summons which he did, then there would be two parallel actions in this matter, one before the subordinate court and another before the District Registrar.

I am quite satisfied that by virtue of s. 23 (2) the High Court has wide powers to transfer a cause from the subordinate court to the High Court. This subsection reads as follows:

> "Any cause or matter may, at any time or at any stage thereof, and either with or without the application of any of the parties thereto, be transferred by the Court or Judge from any Subordinate Court to any other Subordinate Court or to the Court, or from the Court to any Subordinate Court or from any Session or sitting of the Court to any other Session or sitting."

Thus it is quite clear from this sub-section that the court has powers to transfer from the subordinate court to itself, any cause or matter at any time or any stage. It should be said that the power to order such transfer on the part of the High Court is discretional. However, what one must bear in mind here is that the District Registrar was being asked to re transfer the cause from the subordinate court since the cause in question had been previously transferred from the High Court to subordinate court for purposes of enforcing a judgment of the High Court.

As I have said that without an order for a stay of proceedings before the subordinate court, it would mean that when the District Registrar was hearing the summons there was in fact another action pending before the subordinate court. This situation in my view is undesirable and can lead to many complications. The subordinate court has power to order a stay of proceedings in terms of O. 38, r. 4, of the Subordinate Courts Rules. Once an order for the stay has been granted by the subordinate court then it is up to the applicant to apply by way of summons to the High Court to transfer the proceedings from the subordinate court

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to the High Court. However, the summons in the form it was filed for hearing before the District Registrar was in fact misconceived. The first summons should apply for an order for the transfer of the cause from the subordinate court to the High Court. The reason is that the power to order the transfer is discretional. Thus the District Registrar had to decide first whether the exercise of his discretion he would grant the application for an order for the transfer of the cause to the High Court from the subordinate court. If he granted the application then he could go on to hear the other summons for the setting aside of the judgment and for leave to defend the action. If he refused to grant an application for the transfer then that is the end of the matter unless, of course, the applicant appeals against his decision on the grounds that the refusal to grant the transfer was an injudicious exercise of his discretion. It is my view that the learned District Registrar should not have heard a summons which contained both an application for transfer and an application to set aside judgment and to grant leave to defend.

The learned District Registrar in his ruling had disallowed the summons of the defendant when on the merits he found that the defendant had no defence to the action. He stated that he would be inclined to grant the summons for the transfer of the action provided there was a likelihood that the judgment would be set aside in the event of a transfer. In my view this was a proper direction on the part of the learned District Registrar. Then he dealt with the application to set aside judgment. It is quite clear that his decision to dismiss the summons to transfer the action was based on the fact that there was no defence open to the defendant even if he was given leave to defend. As I have already stated the matter was complicated by the fact that a single summons was issued in respect of two distinct and separate reliefs sought.

I would like to add a further comment on the notice of appeal filed by the defendant in this mater. It would appear that the notice of appeal was directed to the refusal by the learned District Registrar to set aside judgment in default and to grant unconditional leave to defend the plaintiff's action. Nowhere in the notice or grounds of appeal does the defendant challenge the District Registrar's refusal of the application for the transfer of the action from the subordinate court to the High Court

at Ndola. A condition precedent to the setting aside of judgment and the grant of leave to defend is that the learned District Registrar in the exercise of his discretion would have "granted the summons (if one was issued) for the transfer of the cause from the subordinate court to the High Court. One would have thought that at the very least the notice of appeal would have referred to the refusal of an order for transfer by the learned District Registrar.

Before disposing of this matter, I would briefly refer to the merits of the application to set aside judgment and grant unconditional leave to defend. It is quite clear that it is open to the defendant in an action to apply to the High Court to set aside judgment in default of appearance and to be granted leave to defend the action. Any such application must

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be bona fide. If the applicant satisfied the court that there was good reason for judgment to be set aside and leave given to defend, the court will no doubt grant the application. In obtaining leave to defend the defendant need no more than establish a triable issue namely, he should satisfy the court that he has a defence on the merits. In para. 4 of the defendant's affidavit dated the 11th October, 1978, he avers that up and until the service of the judgment summons requiring him to appear before the subordinate court, Luanshya, on 27th July, 1978, he was not aware of the institution of legal proceedings against him as no court documents were ever served on him before this incident. The plaintiff in his affidavit dated 28th October, 1978, avers that the specially endorsed writ in this cause was served by the bailiff on the defendant personally and on the 25th October, 1978, the bailiff had given sworn evidence before the magistrate of the First Class at Luanshya of the said service. This was not refuted by the defendant in any subsequent affidavit. Quite clearly it would appear that the defendant's contentions that he was not served with a specially endorsed writ in this case and that he was ignorant of the proceedings before the High Court were false. In view of this therefore, the defendant's bona fide is questioned. Apart from this falsification, a further point that the court would consider is, if the defendant had entered appearance to the writ in the High Court and the plaintiff had applied for summary judgment under O.13 of the High Court Rules since the debt was a liquidated amount, would the court on the basis of the reasons adduced by the defendant grant leave to defend? It is quite clear that if one peruses the affidavit of the plaintiff sufficient evidence was adduced to show that the defendant was indebted to the plaintiff in respect of the amount claimed. If one reads the three documents exhibited to the plaintiff's affidavit as a whole, no other inference or interpretation is possible. The defendant had knowledge of the debt; he had agreed to payment; he had in fact discharged part of that debt until he decided to inform his employers to stop payment of the balance of the instalments which the employers were deducting from his salary .Would the court find that a mere bald denial of the debt and an assertion that the defendant had only introduced various unidentified customers to the plaintiff amount to a bona fide defence on the merits, especially when one considers that the defendant was found by the subordinate court to have been served with the specially endorsed writ, a fact which he had denied in his affidavit. It is quite clear that in the face of that kind of evidence the High Court must of necessity find that the defendant had not been acting in good faith; that he had not raised a defence on the merits and therefore no triable issue had been disclosed. In those circumstances the court will certainly in my view grant the application for summary judgment in respect of the liquidated debt.

Thus for the foregoing reasons the appeal against the decision of the learned District Registrar is

dismissed with costs to the plaintiff, such costs to be taxed in default of agreement.

Appeal dismissed
