MOHAMED A. OMAR v ZAMBIA AIRWAYS CORPORATION LTD. (1986) Z.R. 23 (S.C.)

SUPREME COURT
GARDNER, MUWO AND SAKALA, JJ.S.
22ND JANUARY, 1985
(S.C.Z. JUDGMENT NO 6 OF 1986)

Flynote
Civil Procedure - Appeal - Further Affidavit - Admissibility of.
Civil Procedure - Appeal - Judge in Chambers - Whether actual rehearing.

Headnote
The plaintiff issued a writ claiming the repayment of the balance of a sum of money paid for two years rent in advance of premises which had never been occupied because the building was alleged not to have been completed. The affidavit in support of an 0.13 summons referred to non-completion.

The defendants thought this referred to non-completion of the written lease and filed an affidavit alleging that money was owed to him for three months notice. The Deputy Registrar found that there was no defence to the claim that the building had not been completed and entered summary judgment. The defendants appealed to a High Court judge and filed a supplementary affidavit to the effect that the erection of the building had been completed before the payment of rent in advance. The judge held that on the evidence before the Deputy Registrar there was no defence disclosed. The defendants appealed.

Held:
An appeal to a judge in Chambers is treated as an actual rehearing of the application and the judge should have regard to the contents of supplementary affidavits.

Cases cited:
(1) Evans v Bartiam [1937] A.C. 478
(2) Kearney and Company Ltd. and Agip (Z) Limited and Asphalt and Tarmac (1985) Z.R. 7
(3) Krakaver v Katz [1954] 1 All E.R. 244

For the appellant: A.D. Adams, Messrs Solly Patel, Hamir and Lawrence.
For the respondent: N. Kawanambulu, Messrs Shamwana & Company.

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

This is an appeal from a judgment of a High Court judge in chambers upholding a ruling of the deputy registrar of the High Court giving judgment to the respondent under Order 13 of the High

Court Rules.

The facts of the case are that the appellant being the owner of two

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houses, agreed to let them to the respondent and it was agreed that he should receive two years rent in advance.On the day due for occupation the respondent claimed that the premises were not ready for occupation, they therefore did not go into possession and the appellant repaid to the respondent some money which had been paid to him by the respondent but withheld an amount equivalent to three months rent in lieu of three months notice which should have been given by the respondent under the terms of the agreement. The respondent issued a writ against the appellant claiming the balance of the sum it had paid as two years rent in advance, as money paid for a consideration which had totally failed.

The appellant entered an appearance to the writ and the respondent took out an Order 13 summons for summary judgment. In support of that summons the respondent's Legal Superintendent swore an affidavit in which the relevant paragraph was paragraph 5 which read as follows:

> "5. That the Defendant is justly and truly indebted to the plaintiff in the sum of K9,200.00 being the balance of the deposit which the plaintiff had paid the Defendant as an advance rent for two houses which the Defendant offered the plaintiff but could hot be occupied by the plaintiff by reason of non-completion."

In his affidavit in opposition the appellant confirmed the agreement as alleged by the respondent and in addition averred that it was agreed that either party might terminate the lease on three months notice. He further went on to aver as follows:

> "8. That in breach of the said agreement the Plaintiff summarily terminated the agreement aforementioned and I accordingly deducted the amount equivalent to three months rental the amount whereof is K9,200 being the cost of the Plaintiff occupying from the amount I held as their deposit, my two dwelling houses aforementioned and the amount equivalent to the 3 months notice."
> "9 That the Plaintiff has caused to suffer loss and damage as they agreed to have my houses from September 1981 and thereafter breached the agreement and I lost the opportunity to give the houses to other tenants and thereafter had to look for new tenants."

At the hearing before the Deputy Registrar Mr Kawanambulu, the advocate for the respondent, asked for judgment on the grounds that the affidavit in opposition did not disclose any defence. Mr Sikota, the advocate for the appellant, stated that he was in difficulty because on reading paragraph 5 of the respondent's Legal Superintendent's affidavit he had the impression that the word "non-completion" was a reference to a non-completion of the agreement to lease. He asked for one week's adjournment, but the deputy registrar ordered that there was no triable issue disclosed and he granted judgment as prayed.

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It transpired that the word "non-completion" was intended to refer to the erection of the buildings, and on appeal to the learned judge in chambers, the appellant filed a supplementary affidavit in which he averred that the statement by the respondent's Legal Superintendent was not true and that the premises referred to were completed prior to the payment by the respondent of the rental. This supplemental affidavit was drawn to the attention of the learned appellate judge in chambers and Mr Kawanambulu on behalf of the respondent argued that before the deputy registrar no defence was disclosed.

In his judgment the learned appellate judge said as follows:

> "There was ample evidence before deputy registrar that the defendant had no defence to the action. The deputy registrar was in my opinion correct in entering judgment in favour of the plaintiff. The appeal isn therefore dismissed with costs."

It is that judgment that is the subject of this appeal.

Mr Adams, on behalf of the appellant, has argued that the second affidavit filed on behalf of the appellant disclosed a defence to the action, and has also submitted that the deputy registrar should have acceded to the request by Mr Sikota for an adjournment in order to answer the allegation of non-completion of the buildings which was necessitated by Mr Sikota's understanding of the words "non-completion" as referring to non-completion of the lease or tenancy. He further argued that the learned appellate judge should have considered the supplementary affidavit, because the appeal before him was an actual rehearing.

Mr Kawanambulu on behalf of the respondent argued that the averment by the respondent's Legal Superintendent in paragraph 5 of the affidavit was very clear and obviously referred to non-completion of the buildings. He maintained that the deputy registrar's refusal to grant an adjournment was justifiable in the circumstances. In regard to the proceedings before the appellate judge, Mr Kawanambulu argued that under Order 58 Rule 1 of the Supreme Court Practice (the White Book), the learned appellate judge was bound to give due weight to the finding by the deputy registrar as set out in the case of *Evans v Bartlam* (1). He further argued that the learned appellate judge had a discretion whether or not to allow the additional evidence in the form of the supplementary affidavit by the appellant, and he referred to the note to Order 58 Rule 1 to this effect. In the event of this court considering that the supplementary affidavit should have been taken into account, Mr Kawanambulu argued that it still didn't satisfy the requirements of disclosing a triable issue to warrant the granting of leave to defend, in that the appellant's supplementary affidavit was no more than a simple denial of the respondent's allegation that the houses were not completed for occupation.

We have considered the arguments put forward by both counsel and in dealing with points raised by Mr Kawanambulu we would comment that the wording of paragraph 5 of the respondent's Legal

Superintendent's affidavit with its reference to non-completion was ambiguous. At the very least

Mr Sikota's statement before the deputy registrar that he found it ambiguous should not have been ignored by the deputy registrar. In our view the application for an adjournment in order to put in an affidavit to answer the allegation of non-completion of the buildings was justified and should have been granted.

With regard to the proceedings before the judge, the editorial note to Order 58 Rule 1 makes it clear that an appeal to a judge in chambers from a deputy registrar is an *actual* rehearing. We also agree with the second paragraph of the editorial note 58/1/2, that it is common practice for a judge in chambers, subject of course to the question of costs, to admit further additional evidence by affidavit. However, the editorial note continues as follows:

> "...but if a party has taken his stand on the evidence as it stood before the Master or Registrar, the Judge in Chambers may in his discretion, by analogy with the practice in Court of Appeal, refuse to allow him to adduce further evidence (see *Krakauer v Katz*) (1954) 1 A.E.R. 244."

The case referred to was an appeal to the Court of Appeal in England. In an interlocutory matter before a judge in Chambers counsel for the defendant was asked whether he required an adjournment in order to answer the plaintiffs affidavit. He said that he did not. On appeal the defendant sought to adduce further evidence by affidavit. In his judgment on this preliminary point Denning, L.J., said at p. 245:

> "It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right. It is a matter of discretion in this court whether or not further evidence by affidavit should be admitted."

It will be seen therefore that Denning, L.J., was referring to an appeal to the Court of Appeal, and, with respect, we agree with his comments. This court also will admit further evidence only for the most cogent of reasons. However, with respect, we cannot agree with the editorial note that the practice in an appeal to a judge in chambers from a registrar is analogous to the practice in the Court of Appeal. We appreciate that in the *Krakauer* case it appears that the interlocutory matter started not before a registrar or master but before a judge in chambers and the appeal to the Court of Appeal was the first appeal, but we do not agree that all first appeals should be dealt with in the same way regardless of which court is to hear them. In this regard we agree entirely with the first part of the editorial note in the White Book 5812 that "an appeal from the master or registrar to the judge in chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal and the judge treats the matter as though it came before him for the first time." There is no authority cited for this part of the editorial note but we accept it as a statement of the

actual practice that obtains in such circumstances. In our view it follows therefore that, as the matter is treated as coming before the judge in chambers for the first time, supplementary affidavits should be dealt with as though they were first affidavits, subject to the question of costs. The second part of the note which we have criticised depends upon the dictum of Denning, L. J., relating to the

practice when an appeal comes to the Court of Appeal, and, as we have said, we do not accept that the practice before a Court of Appeal or this court governs the practice before a judge in chambers on appeal from a deputy registrar. In the case of *Kearney and Company Limited and Agip (Z) Limited and Asphalt and Tarmac* (2), we said:

> "We would also comment that we agree with Mr Sikota's argument that on an appeal to a judge in chambers the application is an entirely fresh application and it was not improper to lodge a further affidavit which should in fact have been taken note of by the appellate judge."

We confirm that view in this case, and the learned appellate judge in chambers should have had regard to the contents of the supplementary affidavit filed by the appellant.

As to Mr Kawanambulu's argument that in any event the supplementary affidavit does not disclose a defence, we have only this to say. The plaintiffs reasons why he alleged in the writ that the consideration had totally failed is contained in paragraph 5 of his affidavit in support of the summons under Order 13. This alleges that the respondent could not take possession of the two houses by reason of non-completion, and it was subsequently learnt that by that the respondent meant that the building of the premises had not been completed. In order to disclose a defence to this action the appellant had to make an averment which contradicted that claim. In the supplementary affidavit it was averred that the buildings were completed before the payment of the rent. Mr Kawanambulu argued that the respondent should have been more detailed. In Our view, he could not have been more detailed than he was because no more detailed allegations as to non-completion were made. It follows therefore that we find that the supplementary affidavit did in fact disclose a defence to the action. There is a triable issue and leave to defend should have been given.

The appeal is allowed the orders of the deputy-registrar and the judge in chambers are set aside and leave to defend is granted.

We order that the amount paid in satisfaction of the Summary judgment shall be repaid by the respondent to the appellant together with the costs of execution if any, and the costs both in this court, the judge in chambers and before the deputy registrar shall be the appellant's in any event .

Appeal Allowed
