REJIELI DIOGE v MUNIAN CHETTY and 3 Ors (HBC0053R of 2002B)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

5 April 2004

Practice and procedure — judgments and orders — default judgment — application to set aside — whether there was adequate reason to enter default judgment — whether application to set aside made promptly — High Court Rules Os 2 r 2, 10, 13, 19.

On 10 May 2001, the Plaintiff was hit along the road by a motor vehicle driven by the first Defendant (D1). As a consequence, the Plaintiff sustained injuries and was hospitalised for almost 26 days. D1 was convicted for dangerous driving and was fined.

On 30 July 2002, the Plaintiff claimed for damages against D1 and the second Defendant (D2), the owner of the motor vehicle. Affidavits of service were filed on D1 and D2. However, due to failure to acknowledge service, default judgments were entered against them.

After a notice of assessment of damages was served, the Defendants submitted that the Plaintiff should be subjected to medical examination before a doctor of their own choice as required by s 18 of the Motor Insurance (Third Party) Act. The court ordered the assessment of damages stayed pending the medical examination of the Plaintiff by the Defendants' doctor. Thereafter, the court awarded costs against the Defendants. Several adjournments followed.

On 19 September 2003, the Defendants moved to set aside the default judgment entered against them based on the following grounds that: (a) there was irregularity in entering the judgment; (b) there was contributory negligence on the part of the Plaintiff; and (c) the Defendants had merits in the defence.

The Plaintiff opposed and subsequently filed an affidavit. Leave was granted to the Defendants to file their affidavits in response. However, the Defendants' filed their submission late and as a result, the Plaintiff failed to comply with the order of filing the submission before the hearing. Later, the case was adjourned because counsel for both parties failed to appear. When adjourned again to a later date, the Defendants failed to file any submission on the due date. The court proceeded to hear the application to set aside.

The Defendants' arguments were as follows: (a) that adequate reasons must be given by the court why the judgment was entered by default; (b) the application to set aside must have been made promptly and without delay; (c) that there be affidavit of merit on the defence.

Held — (1) What the Defendants offered was that the delay was caused by the non-availability of their investigation report. However, the same cannot be accepted as an adequate reason for the delay because there were strict requirements as to the time for filing of documents under the High Court Rules.

(2) The evidence established that the Defendants had more than enough opportunity to make their applications but instead led the Plaintiff to believe that they were only challenging the quantum of damages. However, service of a writ was permissible under O 10 of the Rules. Thus, even if the Defendants were able to prove that there was irregularity in the service of the writ, they would be deemed to have taken fresh steps under O 2 r 2 to deny them of such relief.

(3) The Defendants focused on the argument of contributory negligence on the part of the Plaintiff. However, records showed that the accident was due solely to the negligence of D1. The Defendants relied on the report of the investigator but details of which were not made known to the court and they could not counter evidence provided in the records of the court. Thus, there was no triable case of contributory negligence and the Defendants were unable to prove that there was merit in their defence.

Application dismissed.

Case referred to

Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646, cited.

D. Sharma for the Plaintiff

R. Naidu for the first and second Defendants

Jitoko J. On 23 March 2004 this court dismissed the Defendants' application to set aside a default judgment, with reasons to be given later. These I now give.

Background

On 10 May 2001 the Plaintiff was run down along the Labasa — Nabouwalu road by the first Defendant (D1) driving a vehicle registered No DC 652 owned by the second Defendant (D2). D1 is in the employment of D2. The Plaintiff sustained serious injuries resulting in her hospitalisation at the Labasa hospital until 5 June 2001 when she was discharged. D1 was subsequently convicted at the Labasa Magistrates Court for dangerous driving, fined $250 and debited 2 demerit points.

On 30 July 2002 the Plaintiff filed her writ for damages against D1 and D2. Affidavits of service on D1 and D2 were filed on 1 and 23 October respectively, and there being no acknowledgement of service filed by the Defendants, default judgments were entered against them. Notice of assessment of damages were served on the Defendants and the hearing set down for 28 November 2002. On 25 November, the Defendants filed notice of appointment of their solicitors together with summons for stay. Counsel for the Defendants, on 28 November 2002 submitted in the summons for the assessment of damages, that the Plaintiff should submit herself to a medical examination before a doctor of the Defendants' choice. This is because, according to counsel, the requirements of s 18 of the Motor Insurance (Third Party Act) compels the Plaintiff to do so. The clear inference to the court of the application coupled with the oral submission of counsel, was that the payment of damages would be made by the insurance company for the Defendants. The court thereupon ordered the assessment of damages stayed pending the medical examination of the Plaintiff by the Defendants' doctor. Costs of $100 was awarded against the Defendants. The matter was adjourned to 22 January 2003 which did not occur because of Hurricane "Amy". When the matter was finally called on 19 February 2003, counsel for the Defendants explained that the examination of the Plaintiff was still to be done. In the meantime, counsel added, a settlement proposal by the Plaintiff is being considered by the Defendants. Court adjourned it to 24 April 2003 for hearing. The court on 22 April 2003, was informed by counsel for the Defendants that the matter was likely to be settled. The case was again adjourned to 29 May 2003 for hearing of assessment. Yet again when the case was called on the day, the Defendants asked for further adjournment to allow insurance company's response to medical report. The court adjourned the hearing to 25 June 2003 and payment of $450 costs to the Plaintiff. On 25 June, the court heard that the Defendants will contest the quantum of damages claimed by the Plaintiff and the hearing was adjourned to 27 June 2003. The court did not proceed to hear the assessment on 27 June, and the hearing adjourned further to 25 September 2003.

On 19 September 2003, the Defendants filed their summons to set aside the default judgment entered against them in October 2002. The grounds advanced by the Defendants were that the judgment had been entered irregularly, that there

was contributory negligence by the Plaintiff, and at any rate the Defendants have defence on merit. The Plaintiff opposed the summons in the affidavit filed on 22 September. By leave of Court on 24 September, the Plaintiff filed her own affidavit on 8 October 2003. On 30 October 2003, leave was granted to the Defendants to file their affidavits in response. In addition, the court ordered submissions to be filed and adjourned it to 21 November 2003 for hearing of Defendant's motion to set aside. The Defendant's filed their submission late and as a result the Plaintiff was not able to comply with the order that she filed her submission before the hearing of 21 November 2003. As a result the Plaintiff was granted further time (21 days) to file her submission with liberty to the Defendants to respond if necessary, 7 days thereafter. Owing to the very slow progress in the proceedings, the court ordered that the hearing be transferred to Suva on 18 February 2004. There were no appearance by both counsel when the case was called in Suva on 18 February 2004. It was adjourned to 8 March and the court directed that counsel be informed of the new date. On 9 March, the Defendant asked and was given a further 7 days to file submissions, and the court adjourned the hearing to 23 March 2004. The Defendants failed to file any submission on the due date. The court nevertheless proceeded to hear their application to set aside.

Court's consideration

The principles that guide the court in considering whether to set aside a default judgment or not and which forms the basis of the Defendants' arguments are set out in the leading authority of *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646. These are that there must be adequate reasons given why the judgment was allowed to be entered by default, that the application to set aside must be made promptly and without delay, and there be an affidavit of merit of the defence.

1. Are there adequate reasons for judgment to be allowed to be entered by default

There does not appear to be any to convince this court. In the first instance, the Defendants had failed to give any notice of intention to defend as required under O 13 of the Rules, even although they had been served and in turn acknowledged the service of the writ. All the Defendants could offer in their submission was that the delay was due to the non-availability of their own investigation's report. This cannot be accepted by the court as an adequate reason for the delay. After all there are strict requirements as to time for filing of documents under the High Court Rules.

2. Whether the application to set aside was made promptly

The application to set aside is made 12 months after the writ had been served on the Defendants. While there have been instances where the court had ruled in favour of applications even after lapses of period longer than 12 months, the court's exercise of its discretion is in the end, guided by the circumstances of a particular case.

It is quite clear from the fact of this case that the Defendants have had more than enough opportunities presented to them to make their applications.

Instead they had, in this court's view, led the Plaintiff and her counsel all along to believe that they were only contesting the quantum of damages. The court itself had been given the impression that the Defendants' counsel's requests for adjournments since 28 November 2002 were being done in aid of facilitating the

medical examination of the Plaintiff by the Defendants' doctor, towards a possible settlement of the claim. Other evidence, including exchange of correspondence between the parties, also lend support to this view.

The Defendants argue, as one of the grounds for their application, that the writ was served by registered post and as a result, the judgment entered was irregular. However, as counsel for the Plaintiff correctly argues, service of a writ is permissible under O 10 of the Rules. In any event, even if the Defendants were to prove some irregularity in the service of the writ, they would, by their acts of requesting for medical reports of the Plaintiff and also demanding for her to undergo medical examination by their own doctor, be deemed to have taken fresh steps under O 2 r 2 so as to deny them of such relief. This ground also fails.

3. Are there merits in the defence

All that the Defendants can advance is the argument of contributory negligence on the part of the Plaintiff. Yet, as counsel for the Plaintiff points out, the records in the Magistrates Court bears clear and uncontested evidence that the accident was due solely to the negligence of D1, the employee of D2. It could very well be that the Defendants are relying on the report of their so-called investigator. Such a report, the details of which has not been made known to this court, would not in my view, refute the evidence as contained in the records. There is no triable case of contributory negligence in here. The end result is that the Defendants are unable to convince this court that there are merits in the proposed defence. This ground must also fail.

4. Application to set aside

The Defendants had filed their application to set aside under O 19 of the High Court Rules. Quite clearly, as counsel for the Plaintiff submits, the application should have been made under O 13. Order 19 is available only where, after notice of intention is filed, no statement of defence had followed. In situations where as in this case, the Defendants had failed to file in the first instance, notice of intention to defend, then O 13 procedure is the correct process. In the court's view, the mistake is fundamental, which cannot be rectified simply by the use of the court's discretion.

Costs

Counsel for the Plaintiff submits that the court awards costs on an indemnity basis. In support he argues that the application has no merit whatsoever and amounts to no more than gross abuse of the court's process.

There is every indication that the Defendants since the assessment of damages came before the court on 28 November 2002, had done all they could to delay the hearing, or at any rate, of making the Plaintiff believe all along that the only outstanding issue was the quantum of damages. Counsel in the first instance, had indicated that the parties were amenable to settlement. Later the issue of medical report was raised together with the demand by counsel for the Defendants for the Plaintiff to undergo medical examination by their own doctor in Suva. There followed adjournments by the Defendants' counsel, for reasons principally of non-availability of the Plaintiff's medical report. The inordinate delays resulted in the court finally ordering that the hearing of the Defendants' summons be brought across to Suva. Meanwhile, the Plaintiff, a 53-year-old woman continues to wait for a hearing date. There does not seem to be any doubt that the actions of the Defendants amount to what appears to be a deliberate attempt to prolong and retard any progress towards the assessment of damages. While the court

generally is reluctant, except in exceptional cases, to award costs on an indemnity basis, in this instance, indemnity is more than justified.

The application is dismissed.

There will be costs of $1500 awarded on an indemnity basis. The costs to be paid within 14 days.

The assessment of damages is to be adjourned before the Labasa Deputy Registrar to fix an early date for hearing.

Application dismissed.