CELESTINE KULAGOE -v- FRANCIS DURAI

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 34 of 1990
Hearing: 28 March and 4 April 1990
Judgment: 5 April 1990

Appellant present in person
J. Muria for the Respondent

Ward CJ: This is an appeal from a refusal by the learned Principal Magistrate (Central) to set aside a judgment ordered against the appellant following his failure to attend the hearing of the action.

The case was a claim for the return of a canoe seized, it was claimed, by the defendant together with another man and a police officer on 26th December 1988 without the plaintiff's knowledge or consent.

The case was set down for 15th June 1989 and, on that day, the defendant did not appear. Although there is no evidence anywhere in the court record that service had occurred, it is clear from the later grounds of appeal that the defendant was served.

The magistrate decided to proceed with the case and the record reads:

> "15.6.89
>
> Plaintiff: Swear I am Francis Derai of Leitongo Village. I had a canoe. It is now at Celestine's house. He came and took it away without any discussion while I was away. Never returned. I want order for its return. I paid $1,400 for canoe and have maintained it in good order. Total expenses on canoe $2,000. I think it is worth about $4,000 now. I bought it in 1986. Fibreglass. In default of return I ask $4,000.
> Ct: Judgement for plaintiff. Canoe to be returned.
> In default $4,000."

Having taken absolutely no steps to defend the action, the respondent then submitted a typescript document that ran to seven and a half pages headed **"Appeal to Principal Magistrate Central to waive decision".**

In that he sets out the basis of his defence which amounts to an admission that he arranged for the canoe to be taken but raising a claim of right and insisting it was taken from an entirely different person. He also explains his failure to reply to the summons or to attend at court.

On 9th November 1989 the learned magistrate treated the papers as an application to set aside in terms of O.30 r.11 of the Magistrates Courts Rule. Referring to the appeal document, he stated in his ruling:

> "In the eight pages of that document I can find no reasonable excuse for the defendant failing to appear or communicate with the court - He was admittedly served and decided to be absent; there is no question of mistake or lack of opportunity. The nature of the proposed defence is also far from clear.
>
> In those circumstances I decline to set aside judgment."

It appears from the record that ruling was made on the papers alone, no hearing was fixed and neither party was present or represented. The defendant now appeals to this Court and advances the same grounds as he placed before the learned Principal Magistrate.

O.30 r.11 of the Magistrates Court (Civil Procedure) Rules allows -

> "Any judgment or order given by default of either party to any suit may be set aside by the court or a Magistrate upon such terms as to costs or otherwise as the court or Magistrate may think fit."

It may have been more appropriate to consider this under O.28 r.5 -

> "Any judgment obtained against any party in the absence of that party may, on sufficient cause being shown, be set aside by the court upon such terms as to costs or otherwise as it may think fit."

O. 28 deals more with the reasons for the absence of the party but, in both O.28 and O.30, he principles to be applied when considering an application to set aside are the same. The basic principle is that a failure to observe rules of procedure should

not normally deny a litigant his chance to put his case and have it considered on its merits. How the court should approach the decision whether to set the judgment aside is explained in **Kayuken Pacific -v- Harper,** Case No. 18 of 1986, a case on O.29 r.12 of the High Court Rules which has similar wording to that of O.30 r.11.

The first matter to consider is whether there is a triable defence. If there is not, a reinstatement of the case would be pointless. If there is, the court must then pass to a consideration of the following matters as set out in the **Kayuken** case:

> "1. What was the reason for the failure by the absent party to appear?
>
> 2. Has there been undue delay by the absent party in launching his proceedings for a new trial?
>
> 3. Will the other party be prejudiced by an order for a new trial?
>
> Whilst this court would not normally interfere with the exercise of a discretion except on grounds of law, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it."

In this case, despite the learned magistrate's suggestion that the nature of the proposed defence is unclear, I feel there is sufficient in the appeal document to reveal a triable defence.

However, when considering the question of the appellant's failure to appear, I am in full agreement with the learned magistrate. It is clear the appellant simply decided to be absent. The basic reason he gave for failing to act on the summons was a "state of incredulity and statice" induced by the stupidity of the plaintiff's claim. He described the claim as so absurd that he was lost for words and expressed the view that the fact "the court of law ..... should be swindled to placing credence on such claims was so unbelievable to the appellant that he was immobilised to inaction."

He then explained his failure to attend was because he "was held incapacitated by duty at post and lack of funds." He added that he tried to telephone the court but could not get through.

The learned magistrate was right to take no notice of such clear nonsense but, having read the plaintiff's description of the defence and heard him in court, I am left with a distinct feeling that, if judgment is left in favour of a person who, it is claimed, had neither possession of nor right to the canoe, there is a real risk of injustice.

It seems from the papers that no consideration has been given to time limits in this appeal but no point is taken on that and so I assume it is in order. However, I do not feel there has been undue delay in launching these proceedings neither do I feel the other party will be prejudiced in the presentation of his case by an order for a new trial. Any extra loss of use of the boat can be covered by damages if the plaintiff should still win his claim.

As a result, I allow the appeal, set aside the ruling of the learned Principal Magistrate made on 9th November and order that the case be heard de novo in the magistrate's court.

That leaves two matters on which I feel I must comment.

As I have said above, nothing in the record suggests the parties were present at the decision to set aside. Such proceedings can affect the position of the parties and must always be listed in court so that the parties may be heard.

It appears the learned magistrate based his decision solely on a consideration of the letter of the respondent and, having done so, rejected it. The respondent had a right to be heard in support of that. Equally, the plaintiff stood to lose his judgment if the ruling was against him and should also have been given an opportunity to be heard. Such a breach of natural justice is sufficient to give a party the right to have judgment set aside and had I found against the appellant on the previous

matters, I should have set the ruling aside on that ground and ordered the application to be reconsidered.

The other point is one that does not affect the appeal but, perhaps, calls for brief comment.

At the hearing, the plaintiff was present and the defendant did not appear. The learned magistrate perfectly properly, therefore, heard evidence to prove the plaintiff's claim.

In such cases, the amount of evidence required is not great. It need simply be sufficient to persuade the court to the required standard in the absence of any contrary evidence and is frequently relatively formal. However the magistrate must be careful to ensure there is sufficient evidence to satisfy him of the necessary ingredients of the claim.

In this case there was clear evidence of the removal of the canoe and the lack of right. The magistrate therefore ordered the canoe to be returned. The plaintiff had also given evidence of the value of the canoe and so the magistrate made the order that the sum of $4000 be paid in default of return.

Whilst the magistrate considered he had sufficient evidence of the value of $4,000, I feel the plaintiff's estimate of its value needed more evidential support before the magistrate could feel it was proved sufficiently to be made part of the judgment.

This appeal and the application to the Principal Magistrate in the court below have been caused entirely by the appellant's failure to act at the right time. He must pay the respondent's costs in the Magistrates Court and this court within 14 days and the case is to be relisted in the Magistrates Court within 21 days thereafter.

(F.G.R. Ward)
CHIEF JUSTICE