C.C.304/08

2008

M. NO 19

IN THE HIGH COURT OF SIERRA LEONE
(GENERAL CIVIL DIVISION)

BETWEEN:-

MR. THEOPHILUS M. MARTYN - PLAINTIFF

AND

SIERRA LEONE NATIONAL PETROLEUM COMPANY LTD - DEFENDANT

B.E.T. CUMMINGS (MS) for the Plaintiff

M. DUMBUYA (MS) for the Defendant

RULING DELIVERED THIS 31st DAY OF March 2011 BY HONOURABLE MRS. JUSTICE V. M. SOLOMON J.A.

RULING:

The present action is commenced by Writ of Summons dated 28th August, 2008 for several reliefs. The Defendant entered an appearance on the 19th September, 2008 and Judgment in default of defence entered on the 17th July 2010. The Defendant filed a defence and counterclaim on 14th July, 2010. The present application is by Motion Paper dated 18th October, 2010 for the several orders as prayed for on the Motion to wit:-

1. That an Interim Stay of Execution of the Judgment in Default of Defence dated the 17th day of June 2010 be granted by the Court pending the hearing and determination of the application herein.

2. That the Judgment in Default of Defence dated the 6th day of February 2010 be set aside ex debito justitiae on the following grounds:

i) That the Judgment in default of Defence to fixes interest without it being assessed by the Court as required by law there being no agreement between Plaintiff and Defendant as to the quantum of interest.

ii) That by virtue of the Provisions of Order 22 rule 7 a Judgment in Default of Defence cannot be entered without applying to the Court for judgment in respect of the claims contained in the relief sought by Plaintiff in the writ of summons herein.

iii) That the proceedings herein are an abuse of the process of the Court as there is a pending action by Counter Claim by the Plaintiff herein which said action has not been discontinued.

3. In the alternative that the said Judgment in Default of Defence dated 17th June 2010 be set aside in that the Defendant/Applicant has a good Defence on the Merits.

4. That the Defence filed on behalf of the Defendant/Respondent herein dated 14th day of July 2010 be allowed to stand.

5. Any further or other Orders.

6. That the costs of this application be costs in the cause.

There is an affidavit in support and the application is opposed by the Plaintiff to which there is an affidavit in opposition.

Both Counsels made oral submissions to the court. Counsel for the Defendant relied on the entire affidavit in support and exhibits thereto. Counsel submitted that the Defendant has a good defence with triable issues which must be put before the court. She admitted that the counterclaim in exhibit "PL8" has never been discontinued. That the defence and counter claim marked "PL4" raises misconduct and other triable issues which ought to be tried. She referred to Order 22 rule 1 and 11 of the High Court Rules 2007 (herein after called "The Rules"). She submitted that Default

Judgment cannot be entered without an application to the court. Counsel relied on Annual Practice 1999 at page 156 and 157 and 508 Halbury's Law of England at page 34 paragraphs 49 and 51. Counsel also relied on cases of Evans V Bartlam, Berthan Macauley V Jim Diamantopolous, and Croper V Smith and finally submitted that the Judgment in Default of Defence be set aside and terms imposed.

Counsel for the Defendant submitted that it is wrong to apply to set aside a judgment as of right and to set it aside on terms. She submitted that even after the irregularity complained of, the Defendant has filed a defence and counterclaim marked "PL12" and by so doing has taken a fresh step. Counsel submitted that if the Judgment in Default marked "PL5" was irregular then the Defendant should not have taken a fresh step by filing a defence and counter claim. She submitted that the present application was filed three months after entry of Judgment in Default. And that it was over a period of four years that the action marked "PL7" was dismissed. It was dismissed on the 1st April 2010 marked "PL10". Judgment in Default was obtained on 17th June 2010. She submitted that this cannot be an abuse of due process. That the defence and counterclaim filed dated 14th July, 2010 was out of time that is, 10 days and without an order of court to file a defence out of time. She relied on the Saudi Eagle case and submitted that not only must you have a good defence but a real prospect of success. She submitted that the principal sum is not disputed. The defence filed has criminal consequences and the Plaintiff has been discharged on all criminal charges by the court marked "B" dated 4th March, 2008. She submitted that the court has

power to vary or reduce any Judgment obtained and order that this matter proceed to trial on terms.

There are several claims on the Motion Paper dated 18th October, 2010 referred to supra. The 1st order was not canvassed by Counsel for the Defendant and the same is regarded as abandoned. The 2nd and 3rd orders prayed for are in the alternative. In the 2nd order Counsel has canvassed the argument that the Judgment in default dated 17th June 2010 marked "PL15" was irregularly obtained and should be set aside ex debito justitiae. I shall consider this second order in the light of the documents and submissions. The judgment in default of defence was dated 17th June 2010 almost two years after this action which was commenced on 28th August, 2008. The Defendant entered an appearance on 19th September, 2008 and filed a defence and counter claim on 14th July, 2010. Judgment on Default had already been obtained before the Defence/Counterclaim filed. This is deemed to be taking a fresh step as submitted by Counsel for the Plaintiff. If the Judgment in Default was irregularly obtained then the Defendant should have filed papers to set it aside and not to file a Defence/Counterclaim. The judgment is in respect of a mixed claim and this court is to adduce evidence in respect of the 2nd to 4th orders. For mixed claims Judgment in Default can be obtained under Order 22 rule 6 of the Rules and such judgment can be entered without an application to this court. I do not agree that this judgment falls under Order 22 rule 7 of the Rules as its claims are those stipulated within rules 2 and 5 thereof. I am of the view that this judgment was regularly obtained as so will not be set aside as of right. Another argument canvassed by Counsel for the Plaintiff was that it is about 4 months from

date of judgment to the present application. The Defendant has not given any reasonable excuse why there was this delay. In as much as there has been delay on the part of this application, it is one which can be compensated on stringent terms as stated in the case of Singh V Atombrook Ltd (1989) 1 WLR page 810. In aforesaid case, the Court of Appeal stated that a Defendant who has applied to set aside a judgment for irregularity three months after becoming aware of its terms, was held to be too late to have the judgment set aside as of right, and was put on stringent terms.

I will now consider the 3rd and 4th orders which are in the alternative to the 2nd Order. The judgment in default is a regularly obtained judgment and can only be set aside upon terms as to costs and after consideration of the defence/counterclaim filed. The defence/counterclaim was filed on the on the 14th July, 2010 out of time and without leave of this court. The issue for my consideration is whether this Defendant has disclosed a defence on the merits. This discretionary power of this court is to avoid the injustice which may be caused if judgment follows automatically on default. In exercising this discretion, my primary consideration is whether the Defence has merits to which this court should pay heed not as a rule but as a matter of common sense. I refer to the Annual Practice 199 at page 159-61 under rubric "discretionary powers of the court". It is my view that I should exercise my discretion in favour of the Defendant and set aside the judgment on terms. There is abundant authorities within our jurisdiction which supports the view that matters ought to go to full trial for their final determination and only in exceptional cases will a default judgment be allowed to stand. The interest of

justice will only be served when a matter is proceeded to trial and all the parties are heard as the maxim Audi Alterem Partem. I refer to the case of EVANS V BARTLAM (1937) per Lord Atkin in which he stated and I quote:

> "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure".

I shall also refer to the case of SCAPP: 4/2004 AMINATA CONTEH V ALL PEOPLES CONGRESS (2004) in which the Supreme Court held that if the parties dispute just one issue then the matter ought to proceed to trial. Further, as the claim is mixed evidence needs to be adduced to prove some of it for instance interest and damages.

I shall now consider the liquidated claims of the parties, that is, sum of Le62,192,278/46 as against Le11,105,373/67. Both parties have claimed these sums in their claim and counter-claim. The former is claim for the entitlement to terminal benefits and the latter is cost of a car bought for the Plaintiff. The difference between the two sums is Le51,086,906/79. I hereby order that this sum be paid into court within four days of this order which said sum will be available to the successful party.

In the premises, I hold that the judgment is regularly obtained but it should be set aside in the interest of justice and upon terms. From the foregoing, I hereby order as follows to wit:

1. That the Judgment in Default of Defence dated 17th June 2010 is hereby set aside on terms.

2. That the Defendant is to pay into court the sum of Le51,086,904/49 within four days of this Order.
3. The Defendant is to file a defence/counterclaim within four days of this Order.
4. The 4th Order prayed for on the Motion Paper is refused.
5. The Plaintiff is to file a reply and close all pleadings within 4 days after service of the Defence/Counterclaim.
6. That either party is at liberty to file summons for directions on the future conduct of this matter.
7. That the Plaintiff is to file a notice of discontinuance on the counterclaim in action intitutled CC:257/2004 Sierra Leone National Petroleum Company Limited V Theophilus M. Martyn.
8. Cost occasioned by this application be borne by the Defendant and is assessed at Le2,000,000/00.

V. M. SOLOMON J.A.