IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 647
MA 59/2020
Arising in CC 04 /2017)

ARNOUD MULLER **APPLICANT**
(rep. by S. Rajasundaram)

and

BENOITON CONSTRUCTION **RESPONDENT**
(rep. by Basil Hoareau)

Neutral Citation	*Arnoud Muller v Benoiton Construction* MA 59/2020 [2020] SCSC 647
	10th September 2020
Before:	Vidot J
Summary	setting aside of ex-parte judgment; section 69 of the Code of Civil Procedure
Heard:	
Delivered:	10 September 2020

RULING

VIDOT J

[1] This is an application made in terms with section 69 of the Seychelles Code of Civil Procedure to set aside an ex-parte judgment in civil suit CS04 of 2014, delivered by this court on 17th February 2020 (hereafter "the judgment"). The application is supported by an affidavit that is sworn by Counsel for the Applicant. The Respondent has filed an Affidavit in Reply resisting the application.

[2] In the affidavit the Attorney for the Applicant sets out the reasons for the non-appearance of the Applicant on the date the case was set for hearing, a matter which was addressed in

the judgment. He states that the Applicant is a foreigner and at all material times an aged person with ailing health problems. He states that this Court did not give due consideration to the Applicant's health problems when a viva voce application was made for a postponement of the case. He added that after that application was made, Counsel for the Applicant withdrew from the case and the Court proceeded to hear the case without giving the Applicant due notice.

[3] Therefore since the Applicant was not accorded due opportunity to put up representation this Court caused an injustice to him by not granting him the opportunity to defend himself. It is averred that the Applicant has good chances of succeeding on both law and facts on appeal. The Applicant pleads that the Defence filed in the above mentioned suit be considered when this application is receiving consideration.

[4] In his Affidavit in Reply, Mr. Alderick Benoiton, a Director of the Respondent company, noted that on the 10th June 2019, when the case was called he was present in court but the Applicant was absent and being represented by Counsel, Mr. Rajasundaram. Despite claiming that Mr. Muller, the Applicant had a medical predicament, no medical report nor any affidavit were produced to Court to support claims that the Applicant was indeed medically unfit to travel to Seychelles to attend Court. He also stated that there was no formal application before Court to request for an adjournment and that the case had been fixed since 11th October 2018, on which date Counsel for the Applicant, asked for an adjournment on the basis that the Applicant had been hospitalised. Such adjournment was in fact granted.

[5] The Respondent further contends that Counsel for Applicant could still have represented his client on the 10th June 2019 by cross-examining the Respondent's witnesses. The Respondent was the Plaintiff in suit CC04 of 2014. It is further averred that Counsel withdrew his appearance on the 10th June 2019 with the aim of getting the Applicant to file a baseless application and that by so doing abused the process of court and that both the Applicant and his Counsel are attempting to obstruct or defeat the course of justice. The Respondent further argues that the affidavit of the Attorney Mr. Rajasundaram is defective and that there is no basis for the Court to set aside the ex-parte judgment

[6] In his written submission, Counsel for the Applicant sets out events that led to the case to be heard ex-parte. He avers that the Applicant was hospitalised and that he requested an adjournment with the full undertaking to subsequently produce relevant medical certificate. Counsel did in fact give that undertaking. However, the case had been adjourned on at least 2 previous occasions due to the Applicant's indisposition. Counsel submitted that the Applicant had been hospitalised thus the reason he could not get any medical certificate. On one occasion medical report to support that was produced and an adjournment was granted. On the 07th June 2020, an email was sent to the Registrar's office. That email emanates from Frank Oostlander , a foreign lawyer (from the Netherlands) it reads as follow;

"My colleague dr. S. Rajasundaram has asked me to end you this message on behalf of our mutual client, citizen from Netherlands, Mr. A Muller.

I inform you that Mr. Muller currently is in no way fit to travel by air due to a heart attack he suffered at the end of last year. His medical condition is such that he is unable to attend a court hearing, which I understand is scheduled for next Monday the 10th June at your account.

On behalf of Mr. Muller and my colleague dr. Rajasundaram at Seychelles I request you politely to adjourn the hearing.

....."

This email clearly does not support the allegations that the Applicant was hospitalised. Even the letter dated 02 October 2018 from a Mr. Van der Meij, produced at the hearing of the 11th October 2018, as reason to postpone the hearing, which was granted, did not mention that the Applicant was hospitalised. It merely stated that the Applicant suffered a heart attack on the 17th September 2018 and is recovering from this severe medical condition. If the Applicant was unwell, there was sufficient time to get a necessary affidavit or medical report to present to Court upon application for an adjournment.

[7] I find that as above stated Counsel could have cross-examined Mr. Benoiton. He could after that have argued the pleas in limine raised in the Defence to the fact that the Applicant was suing on an oral agreement for a debt of US$127,664.14 that possibly could have been contrary to Article 1341 of the Civil Code of Seychelles ("the Code"). Counsel for the Respondent pointed out that the Applicant had not filed any application for an adjournment with supporting affidavit. However, if there was a medical certificate to confirm the Applicant alleged ill health and that he had been hospitalised, this court would have allowed a viva voce application irrespective. Considering the above, at this point I would say that this Application is merely an abuse of process and that there was no basis for the Court to have adjourned the matter. Counsel's request for leave to withdraw his appearance and to now retake the case was with respect nothing but a ruse in an attempt to get an adjournment.

[8] Counsel for the Applicant also relied on sections 69 and 183 of the SCCP to establish that it was necessary to adjourn the case and that this would have met the end of justice. Section 69 reads thus;

"If in any case where one party does not appear on the day fixed in the summons, judgment has been given by the court, the party against whom judgment has been given may apply to court to set it aside made by motion made within one month after the date of the judgment if the case has been dismissed or within one month after execution has been effected if the judgment has been given against the defendant, and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall set aside the judgment upon such terms as to costs, payment into court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side."

[9] However, in order to invoke section 69 the party against whom judgment is given must not have appeared in court on the date fixed in the summons. We are here dealing with a different situation; the Applicant did not fail to appear on the date fixed in the summons. He failed to appear only after the case had been fixed for hearing and that was not the first hearing date. There were previous hearing dates that were aborted and reason for such adjournment had been the ill health of the Applicant which was supported with medical report. In **Biancardi v Electronic Alarm [1975] SLR 31**, a case being relied upon by Counsel for the Respondent also, the following was observed

"The final question is whether the defendant is entitled to invoke section 69. Reading section 69, it is clear that to satisfy its provision one of the essential requirements is that the party invoking the same must not have appeared on the dare fixed i the summons for appearance before court. In order words, section 69 applies only in the case where the party , against whom judgment has been given ex-parte, has not appeared on the date fixed in the summons for appearance under section 63."

Section 63 deals with the requirement that on the date fixed in the summons for the Defendant to appear and answer the claim that the parties are in attendance at the court in person or by the respective attorney or agent. As pointed out by Counsel for the Respondent one has to also look at section 65 SCCP. Section 65 provides for procedure when the defendant does not appear on the date fixed in the summons. In such case, after due proof of service of the summons, the court may proceed to hear the suit and give judgment or may adjourn the case for hearing of the suit ex-parte.

[10] It all these instances, one notes that they deal with circumstances where the defendant does not appear in answer to the summons. In the present case the Applicant (Defendant) did appear in answer to the summons but failed to appear on subsequent dates set for hearing. Therefore, section 69 has no application to the Applicant's situation as he did appear on the day fixed in the summons. That translates that the basis for the Application is non-existent.

[11] Counsel for the Applicant also invited Court to consider section 183 of the SCCP. This Court disagrees with the interpretation given to that section by that Counsel. Counsel

argued that that section requires that notice is sent to the defendant when counsel seeks leave for Counsel to withdraw. As correctly pointed out by Counsel for the Respondent section 183 does not come into play in such circumstances. Section 183 comes under the heading of "discontinuance". Section 182 explains that discontinuance happens when the plaintiff gives notice to the Registrar of his intention to discontinue or withdraw the plaint against one of the defendants at which point the Registrar needs to issue notice to the Defendant.

[12] The Petitioner also prayed that the Court exercises the rules of natural justice and adopts procedure that meets the end of justice. In his affidavit he called on the court to exercise equity and show understanding that the Applicant was at the particular time suffering from ailments. Counsel for the Applicant argued that it would be only fair and just to allow the application. I have noted above, that the letter dated 07th June 2020 did not support allegations that the Applicant was hospitalized. The letter of 02nd October 2018 did not support that allegation either. The Applicant had more than around eight months to confirm that with a necessary medical certificate. This Court is of the opinion that equity was confused on the facts of this case. Equity follows the law. As pronounced by Counsel for the Respondent equity serves the diligent and not the indolent. In this case the Applicant had not shown diligence in ensuring that he gets the necessary medical certificates. This Court considers that an abuse of process of court. In **Gill & Ors v Film Ansalt (SCA 28 of 2009) [2013] SCCA 11 (03rd May 2013),** a case also quoted by Counsel for the Respondent stated that the court should not allow itself to become *"a vehicle of unjust outcomes at the hands of those who advertently or inadvertently abuse the justice system. Organized society in a democratic set-up needs a minimum of discipline for all rights and liberties guaranteed, goes to secure the rule of law on such foundations. Abuse of process was developed by the courts to protect the judicial process from abuse and misuse. Courts have a duty to intervene to put a stop to such misuse of the legal and judicial process."* I consider that the Application attempted to misuse the judicial process and that cannot be permitted. Therefore, there is sufficient cause not to allow the Application.

[13] The Respondent final bone of contention is that the affidavit in support of the Application sworn by Mr. Rajasundaram, Counsel for the Applicant is defective. First, I note that it appears that Counsel is swearing an affidavit on behalf of his client, the Applicant, yet does not state that he is authorised to swear such affidavit. However, the fact that he is Counsel representing the Applicant and swears an affidavit for him that makes the affidavit defective. This is because Counsel cannot place himself in the position of a witness to the case and for that matter swears an affidavit. If Counsel had chosen to swear the affidavit he cannot himself represent the Applicant. I hold that in such circumstances, the Applicant should have sought the assistance of another counsel to argue the application.

[14] Therefore, the Application is refused and the ex-parte judgment delivered on 17th January 2020 maintained.

[15] I make no order as to cost.

Signed, dated and delivered at Ile du Port on 10th September 2020

M Vidot J