**Patel v EA Cargo Handling Services Ltd**

[1974] 1 EA 75 (CAM)

**Division:** Court of Appeal at Mombasa

**Date of judgment:** 14 February 1974

**Case Number:** 2/1974 (26/74)

**Before:** Sir William Duffus P, Law Ag V-P and Musoke JA

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**Appeal from:** High Court of Kenya – Sir Dermot Sheridan, J

*[1] Civil Practice and Procedure – Setting aside – Ex parte judgment – Discretion of court – Whether*

*limited – Civil Procedure* (*Revised*) *Rules* 1948, *O.* 9*A*, *r.* 10 (*K.*).

**Editor’s Summary**

The appellant obtained a default judgment against the respondent, which judgment was set aside by the

High Court. On appeal against that order the appellant contended that before a default judgment can be

set aside the court must be satisfied both that there is a good defence and that there was a cause for the

delay in appearing.

**Held –**

(i) the discretion of the court is not limited (*Evans v. Bartlam* (1) followed);

( ii) the judge had properly exercised his discretion.

Appeal dismissed.

**Cases referred to Judgment:**

(1) *Evans v. Bartlam*, [1937] A.C. 437, [1937] 2 All E.R. 647.

(2) *Kimani v. McConnell*, [1966] E.A. 547.

(3) *Mbogo v. Shah*, [1968] E.A. 93.

**Judgment**

The following considered judgments were read. **Sir William Duffus P:** The appellant, a former

employee of the respondent company, brought this action to recover Shs. 8,820/- for salary in lieu of

leave due to him when his employment was terminated. The respondent company

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failed to enter an appearance within 10 days and the appellant promptly obtained an *ex parte* judgment

for the amount claimed. The respondent company then five days later applied by chamber summons for

the judgment to be set aside under O. 9A, r. 10 of the Civil Procedure (Revised) Rules 1948. Affidavits

and a counter affidavit were filed and the matter was heard by Sheridan, J. who set aside the *ex parte*

judgment. This is an appeal against his order.

The court has a very wide discretion under O. 9A, r. 10 which states:

“Where judgment has been entered under this Order the court may set aside or vary such judgment upon such

terms as are just.”

There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he

does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an

application under this rule, the court must first be satisfied that (*a*) there is a good defence, and (*b*)

further be satisfied as to the cause of the delay in entering an appearance. He relied on various English

authorities and on our decision in *Mbogo v. Shah*, [1968] E.A. 93. In his judgment Newbold, P. adopted

the principles set out by Harris, J. in *Kimani v. McConnell*, [1966] E.A. 547 when he said:

“. . . in the light of all the facts and circumstances both prior and subsequent and of the respective merits of

the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be

imposed.”

I also agree with this broad statement of the principles to be followed. The main concern of the court is to

do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion

given it by the rules. I agree that where it is a regular judgment as is the case here the court will not

usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect

defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J.

put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for

adjudication.

This matter was fully considered by the House of Lords in England in the case of *Evans v. Bartlam*,

[1937] A.C. 437; [1937] 2 All E.R. 647 at p. 651. The English R.S.C. O. 13, r. 10, is similar to our O. 9A,

r. 10 and the following extract from the judgment of Lord Russell of Killowen, in my view, clearly sets

out principles that would equally well apply here:

“It was argued by counsel for the respondent that, before the court or a judge could exercise the power

conferred by this rule, the applicant was bound to prove (*a*) that he had some serious defence to the action,

and (*b*) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said

that, until those two matters had been proved, the door was closed to the judicial discretion, in other words,

that the proof of those two matters was a condition precedent to the existence, or, (what amounts to the same

thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of

the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face

of the wording of the rule. It would be adding a limitation which the rule does not impose. The contention no

doubt contains this element of truth, that, from the nature of the case, no judge could, in exercising the

discretion conferred on him by the rule, fail to consider both (*a*) whether any useful purpose could be served

by setting aside the judgment, and obviously no useful purpose would be served if there were no possible

defence to the action and (*b*) how it came about that

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the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some

serious defence. But to say that these two matters must necessarily enter into the judge’s consideration is quite

a different thing from asserting that their proof is a condition precedent to the existence or exercise of the

discretionary power to set aside a judgment signed in default of appearance.

In the case now under discussion, the judge in chambers thought it proper, in the exercise of his discretion, to

set aside the judgment, and, unless an appellate court is satisfied that the discretion has been wrongly

exercised, and should have been exercised in the contrary way, the judge’s order should be affirmed.”

In this case, however, the affidavits set out both the reasons for the delay and also show a defence on the

merits. The delay is said to be due to a misunderstanding in the respondent company’s office as to the

action to be taken on the summons, and the issue is as to whether there was any leave due or not. The

defence is that the appellant took his leave in full during his period of notice. This shows a defence on

the merits, and an issue that should be tried in order to do justice between the parties. With respect I can

find no substance in this appeal.

I would dismiss the appeal with costs and as Law, Ag. V.-P. and Musoke, J.A. agree, it is so ordered.

**Law Ag V-P:** I agree.

**Musoke JA:** I also agree.

*Appeal dismissed.*

For the appellant:

*IT Inamdar* and *SN Mehta*

For the respondent:

*M Satchu* (instructed by *Atkinson Cleasby & Satchu*, Mombas