

COSTAS CHRISTOFOROU,

Appellant-Defendant,

v.

KYRIACOULLIS A. KYRIACOULLI,

Respondent-Plaintiff.

COSTAS
CHRISTOFOROU
v.
KYRIACOULLIS
A. KYRIACOULLI

(Civil Appeal No. 4413).

Practice—Judgment obtained by default of pleading against defendant—Civil Procedure Rules Order, 26, r. 2—Application to set aside that judgment—The affidavit in support must contain statements of fact showing merit in the applicant's case—So as the Court could properly exercise its discretion under the Civil Procedure Rules, Order 26, r. 14—The plaintiff is entitled to retain the judgment obtained by default unless the defendant can show (in addition to explaining his default) that there is merit in his case, sufficient to justify re-opening of the litigation.

The appellant-defendant applied to the District Court under the Civil Procedure Rules, Order 26; r. 14, to have the judgment given against him by default of pleading set aside. But as the defendant's affidavit contained no statements of fact sufficient to constitute a proper case so that the Court could exercise its discretionary power to set aside the default judgment, the Court refused the application. The appellant-defendant appealed against this dismissal and the High Court in dismissing the application :

Held, (1) the onus rests upon the applicant, however, to satisfy the Court that there is substance in the litigation which the setting aside of the judgment will, necessarily, re-open.

(2) The plaintiff, by taking the proper steps under the Rules, has satisfied the Court, not only of defendant's default, but also of the merits of his claim to the extent of being entitled to judgment. Having obtained such judgment, the plaintiff is entitled to retain it unless the defendant can show (in addition to explaining his default) that there is merit in his case, sufficient to justify re-opening of the litigation.

(3) In this case the affidavit filed in support of the application to set aside the judgment, did not contain the material required to enable the Court to exercise their discretionary powers of re-opening the case under Order 24, r. 14.

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(4) The application was, therefore, rightly refused by the District Court.

Appeal dismissed with costs.

Appeal.

Appeal against the judgment of the District Court of Nicosia dated the 20.12.62 (Action No. 4825/61) whereby defendant's application to have the judgment obtained against him by default of pleading was dismissed.

L. N. Clerides, for the appellant.

N. A. Rolandis, for the respondent.

The facts sufficiently appear in the judgment of the Court.

WILSON, P. : Mr. Justice Vassiliades will deliver the judgment of the Court :

VASSILIADES, J. : We are unanimously of opinion that this appeal can be disposed of on the short ground that the appellant failed to show merit in his application. In the circumstances, we do not propose entering into the other questions raised in this proceeding ; nor do we purport to decide them in this judgment.

The appellant (defendant in the action) applied to the District Court under Order 26, rule 14, to have the judgment obtained against him by default of pleading, set aside. The application was supported by an affidavit sworn by his advocate, who apparently prompted by his sense of duty to his client, took the proceeding in question while his client was away from Cyprus and, as counsel frankly admitted, without having full instructions from his client on the merits and other matters connected with the case.

We appreciate the difficulties of the position in which counsel found himself. And while on this point, I may add that we wish to commend the conscientious and able way in which both counsel in this appeal presented their case. But having said this, we must deal with the appeal as it stands before us on the record.

The affidavit in support of the application to set aside the default-judgment did not contain statements of fact sufficient to show merit in applicant's case. General statements such as : " I have instructions to defend

the above action" (para. 2) ; or, " my client has a defence on the merits " (para. 5) are not sufficient to constitute " a proper case " where the Court should exercise its discretionary powers to set aside under rule 14 of Order 26, a default-judgment obtained under rule 2 of the same Order.

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Mr. Rolandis on behalf of the respondent, conceded, quite rightly, I think, that a judgment obtained for default of pleading, upon an *ex parte* application without notice to the other side, should be set aside, in a proper case, to enable the Court to deal with the substance of the parties' rights and adjudicate thereon. The onus rests upon the applicant, however, to satisfy the Court that there is substance in the litigation which the setting aside of the judgment will, necessarily, re-open.

The plaintiff, by taking the proper steps under the Rules, has satisfied the Court, not only of defendant's default, but also of the merits of his claim to the extent of being entitled to judgment. Having obtained such judgment, the plaintiff is entitled to retain it unless the defendant can show (in addition to explaining his default) that there is merit in his case sufficient to justify re-opening of the litigation.

We are unanimously of opinion that in this case, the affidavit filed in support of the application to set aside the judgment, did not contain the material required to enable the Court to exercise their discretionary powers of re-opening the case under Order 26, rule 14. The application was, therefore, in our opinion rightly refused by the District Court ; and this appeal must be dismissed with costs.

Appeal dismissed with costs.