1982 March 5

[LORIS, STYLIANIDES, PIKIS, JJ.]

TAKIS PHYLACTOU AND OTHERS,
Appellants–Plaintiffs,

v.

EVAGORAS MICHAEL,
Respondent–Defendant.

(*Civil Appeal No.* 6051).

Civil Procedure—Judgment by default—Setting aside of—Discretion of the Court—Principles applicable—Merits of defendant's case—Need to uphold effectively, on the one hand, the right of a party to be heard in his cause and need to ensure expeditious transaction of judicial business on the other—Where conduct of the party applying to set aside judgment is inexcusable, contumelious to the extent of gross disregard for the judicial process or the rights of his adversary the Court may, in its discretion, refuse to set aside the judgment—Conduct of defendant excusable—Nothing advanced before Court of Appeal warranting its intervention with the way the trial Judge exercised its discretion.

Court of Appeal—Discretion—Judicial discretion to set aside judgment given by default of appearance—Review of exercise of—Principles applicable—Court of Appeal particularly reluctant to interfere with the exercise of discretion of trial Judge and will not do so except where the discretion is exercised upon a wrong principle, or where it results in injustice or where the trial Judge went wrong on a specific issue.

Civil Procedure—Judgment by default of appearance—Conditions upon which it may be set aside—Discretion of the Court as to the conditions must be judicially exercised—Costs—Principal consideration that should guide the Court in the exercise of its discretion is the responsibility of each party for costs thrown away—Appellants did nothing to contribute to costs thrown away—Respondent should have been adjudged to pay all costs thrown away in consequence of his default.

Contract—Sale of land—Obligations of purchaser under the contract assumed by third party—Action by seller against purchaser for breach of contract—In an application to set aside judgment given by default of appearance, interpretation of section 41 of the Contract Law, Cap. 149 not the only defence of defendant.

The appellants-plaintiffs sued the respondent-defendant claiming various sums of money under a contract for the sale of land by appellants to respondent. The respondent contested the claim alleging that his obligations under the contract were assumed by a third party in whose name the property was transferred and who agreed to repay the balance of the purchase price. Following the close of the pleadings the action was fixed for hearing; and upon Counsel for the respondent withdrawing with the leave of the Court a new date of hearing was fixed with directions to notify respondent, who was residing abroad, of the new date. The respondent failed to appear on the day fixed for trial, the appellants proved their claim and judgment was given in their favour in the absence of the respondent. Thereafter the Court on the application of the respondent set aside the above judgment having held that the respondent had prima facie a good defence to the claim and that his non attendance at the hearing of the case contained no element of contempt for the Court or disregard for the rights of his opponent. In fact by a letter addressed to the Court some ten days prior to the hearing respondent sought to inform the Court of the difficulties in his way of appearing, a letter that was not apparently placed before the Court prior to judgment being given by default.

In setting aside the judgment the Court deprived the appellant of the costs thrown away in consequence of the default of the respondent and awarded to them the costs of the application for setting aside the judgment.

Upon appeal by the plaintiffs it was contended:

(a) That the trial Judge wrongly held that the facts, relied upon in support of the application for setting aside judgment, disclosed sufficient merits to justify the re-opening of the case because the defendant merely raised a matter of interpretation of a statutory provision, s. 41 of the Contract Law, Cap. 149, that a court,

dealing with an application to set aside judgment, was equally competent to decide, being a pure question of law, as the trial Court that would be seized of the case.

(b) That the trial Judge wrongly deprived the plaintiffs of the costs thrown away in consequence of the default of the defendant.

Held, (1) that the submission of the appellants that the defence of the respondent merely revolved round the interpretation of s. 41 of Cap. 149 or that it raised a pure question of law cannot be sustained; that such defence as was disclosed, entailed the evaluation of the factual allegations made by respondent and their consequential fate on the outcome of the case; that a mixed question of law and fact had to be resolved, pre-eminently suitable for determination by the trial Court; that first and foremost, what was in issue, were the implications of the subsequent intervention of the third parties on the rights of the original contracting parties; accordingly the trial Judge correctly found that the defence disclosed sufficient merits to justify the reopening of the case.

(2) That in dealing with an application to set aside a judgment given by default the task of the trial Judge is primarily to discern whether sufficient merits are disclosed as to justify the re-opening of the case; that in exercising its discretion the trial Court must strive to balance two considerations fundamental for the administration of justice. The need to uphold effectively, on the one hand, the right of a party to be heard in his cause, and the need to ensure the expeditious transaction of judicial business, on the other, which is closely associated with the need to uphold finality of judgments; that where the conduct of the party applying to set aside judgment is inexcusable, contumelious to the extent of gross disregard for the judicial process or the rights of his adversary, the Court may, in its discretion, refuse to set aside judgment; that in this case the trial Judge found the conduct of the respondent excusable; that nothing has been advanced before this Court to warrant its intervention with the way the trial Judge exercised his discretion; that the Court of Appeal is particularly reluctant to interfere with the exercise of discretionary powers by the trial Court, and will not do so, except in one or more of three instances, that is, where the discretion

in exercised upon a wrong principle, where it results in injustice, and where the trial Court went wrong on a specific issue; accordingly the appeal against the order setting aside the judgment given by default of appearance must be dismissed.

(3) That the discretion of the Court as to the conditions that should accompany stay, must be judicially exercised; that, with regard to costs, the principal consideration that should guide the Court in the exercise of its discretion, is the responsibility of each party for costs thrown away; that it is well established that in approving the terms upon which judgment may be set aside, the Court should pay heed to the conduct of the parties in the proceedings; that on any view of the facts, the appellants did nothing to contribute to costs thrown away that were solely occasioned by the default of the respondent; that in face of this reality, there was only one way in which judicial discretion could be exercised, and that was by adjudging the respondent to pay all costs thrown away in consequence of his default; that, therefore, the appeal is partly allowed; and the respondent is ordered to pay, in addition to the costs of the application for setting aside judgment, all costs thrown away in consequence of his default to appear and half the costs of this appeal.

Appeal partly allowed.

Cases referred to:

Lambert v. *Mainland Market* [1977] 2 All E.R. 826 at p. 833.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Orphanides, S.D.J.) dated the 21st December, 1979 (Action No. 1172/75) whereby a judgment given earlier, following the default of the defendant to attend the hearing of the case, was set aside.

P. Ioannides with *Cr. Papaloizou*, for the appellants.

L. Papaphilippou with *G. Pavlides*, for the respondent.

LORIS J.: Having heard counsel argue the appeal before us, we consider it unnecessary to break for our judgment. Pikis, J. will proceed to deliver the judgment of the Court.

PIKIS J.: This is an appeal against the decision of the Nicosia District Court, whereby Orphanides, S.D.J. set aside a judgment earlier given in the cause following the default of the defendant

to attend the hearing of the case. The appeal mainly turns on the propriety of the decision to re-open the case and, secondly, on the terms imposed upon directing that the case be re-opened.

The essence of the submission for the appellants is that the Judge wrongly held that the facts, relied upon in support of the application for setting aside judgment, disclosed sufficient merits to justify the re-opening of the case. In their contention, the respondent, defendant before the trial Court, merely raised a matter of interpretation of a statutory provision, notably s. 41 of the Contract Law, Cap. 149, that a court, dealing with an application to set aside judgment, was equally competent to decide, being a pure question of law, as the trial court that would be seized of the case. Apart from this question of law, it was argued, the facts raised no complication nor did they necessitate adjudication upon for their elucidation.

Section 41, regulating acceptance of performance of contractual obligations by a third party, envisages, according to Indian case law on the interpretation of a corresponding provision of the Indian Contract Law, actual performance by a third party and not a promise to perform in substitution to the obligations of a contracting party. (See *Dutt on Indian Contract*, 4th ed., p. 405, *Pollock & Mulla*, 9th ed., p. 361, and *A. C. Patra on Indian Contract*, p. 689). Consequently, inasmuch as the facts set forth in the affidavit of the respondent before the District Court merely referred to the assumption of the obligations of the respondents by a third party and not their actual performance, the respondent was not absolved of the relevant obligations; hence we were invited to rule that no merits were disclosed by the respondent justifying the setting aside of the judgment earlier given.

The background to the case is that appellants agreed, by virtue of a contract in writing dated 2.11.1973, to sell to the respondent several plots of land situate in the Kyrenia district for £120,000.- payable by instalments specified in the agreement in question. A term of the contract provided that the property might, at the option of the purchasers, be transferred in the name of a third party, a condition that was given effect to, resulting after a point of time in the assumption of the obligations of the respondent by a third party in whose name the

property was transferred and who agreed to repay the balance of the purchase price mortgaging the property as security for repayment. The respondent submitted that, as a result of the stepping-in of the third parties, the respondent was freed from liability under the contract of sale thereafter, and drew attention to an averment in the defence, filed prior to the default of the respondent to appear at the trial, resulting in judgment being given against him, to the effect that the transfer into the name of third parties was not made merely pursuant to the terms of the original contract of sale but was also the subject of a subsequent agreement, amounting to an act of novation.

We are unable to sustain the submission of the appellants that the defence foreshadowed by the affidavit of the respondent merely revolves round the interpretation of s. 41 or that it raises a pure question of law Such defence as was disclosed, entailed the evaluation of the factual allegations made by respondent and their consequential fate on the outcome of the case. A mixed question of law and fact had to be resolved, pre-eminently suitable for determination by the trial Court. It is incorrect that the question raised merely concerned the interpretation of s. 41 of the Contract Law. Other provisions of the Contract Law were at stake as well. But first and foremost, what was in issu , were the implications of the subsequent intervention of the third parties on the rights of the original contracting parties.

Principles upon which judgment given by default of appearance of one party may be set aside:

It would be injudicious on the part of the trial Judge to pronounce either on the correctness of the facts propounded before him at the stage of the application to set aside judgment, or their implications on the rights of the parties. This is properly the province of the trial Court. His task is primarily to discern whether sufficient merits are disclosed as to justify the re-opening of the case. The disclosure of such merits being, as counsel agreed, the foremost consideration governing the discretion of the Court on the subject of re-opening a case.

The principles upon which the discretion of the Court to set aside a judgment given by default are exercised, are well known to the point of making it unnecessary to discuss them by reference to specific cases.

In exercising its discretion, the Court must strive to balance two considerations fundamental for the administration of justice: The need to uphold effectively, on the one hand, the right of a party to be heard in his cause, and the need to ensure the expeditious transaction of judicial business, on the other. The speedy determination of judicial causes is not merely a matter of convenience but an all important factor for the effective vindication of the rights of the citizen. This principle is closely associated with another consideration likewise important for the administration of justice, that is, the need to uphold finality of judgments. If a party is lightly allowed to re-open a case, the imprint of finality, attaching to a judgment, with all that goes with it, and the certainty it imports in the management of human affairs, will disappear with grave consequence to the administration of justice. (See, Observations of Megaw L.J. in *Lambert* v. *Mainland Market* [1977] 2 All E.R. 826, at p. 833 (c-d)).

The effect of the case law is that the Court must not be astute to unseat a party from his right to be heard in his cause, so long as he discloses merits. But the Court may, nevertheless, decline to re-open the case if his conduct is such as to strike at the root of the administration of justice. Where the conduct of the party applying to set aside judgment is inexcusable, contumelious to the extent of gross disregard for the judicial process or the rights of his adversary, the Court may, in its discretion, refuse to set aside judgment.

In this case, the Judge found the conduct of the respondent excusable, taking the view, as one may surmise from the judgment, that his non appearance at the hearing of the case contained no element of contempt for the Court or disregard for the rights of his opponent. In fact, as the Judge pointed out, by a letter addressed to the Court some ten days prior to the hearing, he sought to inform the Court of the difficulties in his way of appearing, a letter that was not apparently placed before the Court prior to judgment being given by default. Nothing has been advanced before us to warrant our intervention with the way the trial Judge exercised his discretion. The Court of Appeal is particularly reluctant to interfere with the exercise of discretionary powers by the trial Court, and will not do so, except in one or more of three instances, that is, where the discretion is exercised—

(a) upon a wrong principle,

(b) where it results in injustice, and

(c) where the trial Court went wrong on a specific issue.

Conditions upon which judgment may be set aside:

There is a second aspect of this appeal, and that relates to the terms upon which judgment was set aside.

It is the case for the appellants that the Judge wrongly deprived them of costs thrown away in consequence of the default of the respondent. The Judge only awarded the appellants the costs of the application and made no provision with regard to costs otherwise thrown away because of the default of the respondent. For the respondent, it was argued that the Judge must have been impressed, though he does not disclose his reasons in this area, by the allegation of the respondent that he is a displaced person. In fact, our attention was drawn to the last-mentioned allegation as an additional factor justifying the dismissal of the appeal on the merits inasmuch as its substantiation at the trial would render the action under any circumstances premature in view of the provisions of the Debtors Relief Law, 24/79.

The discretion of the Court as to the conditions that should accompany stay, must be judicially exercised. With regard to costs, the principal consideration that should guide the Court in the exercise of its discretion, is the responsibility of each party for costs thrown away. It is well established that in approving the terms upon which judgment may be set aside, the Court should pay heed to the conduct of the parties in the proceedings. On any view of the facts, the appellants did nothing to contribute to costs thrown away that were solely occasioned by the default of the respondent. In face of this reality, there was only one way in which judicial discretion could be exercised, and that was by adjudging the respondent to pay all costs thrown away in consequence of his default.

In the result, the appeal is partly allowed; the respondent is ordered to pay, in addition to the costs of the application for

setting aside judgment, all costs thrown away in consequence of his default to appear.

Further, respondent is adjudged to pay half the costs of this appeal.

Appeal partly allowed. Order for costs as above.