1982 September 6.

[SAVVIDES, J.]

KOULOUMBIS PANAYIOTIS,

Plaintiff,

v.

THE SHIP "MARIA" NOW ANCHORED IN THE PORT OF LIMASSOL,

Defendant.

(*Admiralty Action No.* 73/82).

Practice—Judgment—Setting aside of—Application for—May be made by a person whether a party or not who has or can acquire a locus standi in the proceeding—Rule 44 of the Cyprus Admiralty Jurisdiction Order and notes to Order 27 rule 15 of the old Rules of the Supreme Court in England.

The applicant, described in the application, as Martin Mosvold and/or Mosvold Nominees of Huston Texas, applied to set aside the judgment entered in this Action on May 24, 1982, in favour of the plaintiff in respect of wages and other allowances and disbursements due to him as master of the defendant ship.

There was no affidavit accompanying the application, setting out the capacity under which he claimed to be an interested party having a locus standi in these proceedings or showing the merits of the application. The only facts relied upon were those set out in the application which was signed for the applicant by counsel appearing for him and which were as follows:

> "The facts relied upon are apparent on the face of the proceedings, i.e. in an action in rem no consent judgment is possible and, also, the costs, agreed are excessive".

The respondent plaintiff by his opposition raised the objection that the applicant had no locus standi in these proceedings.

Held, that the application in the present case is not supported by any affidavit showing how the interest of the applicant is

involved; that notwithstanding plaintiff's objection that applicant had no locus standi in these proceedings the applicant failed to file any affidavit disclosing his interest entitling him to apply to have the said judgment set aside and nothing has been proved at the hearing as to the legitimate interest of the applicant; that it is well settled that a person whether a party or not in the proceedings can apply to have a judgment set aside provided he has or can acquire a locus standi in the proceedings (see Notes to Order 27 rule 15 of the old Rules of the Supreme Court in England—vide p. 615 in the Annual Practice of 1960); that in the present case, the applicant has not established that he is a person interested in the proceedings and what is the nature of his interest entitling him to intervene to have the judgment set aside; that, therefore, he has no locus standi entitling him to make this application; accordingly the application must fail.

Application dismissed.

Application.

Application by applicant for an order to set aside the judgment entered in this action on the 24th May, 1982 in favour of the plaintiff in respect of wages and other allowances and disbursements due to him as master of the defendant ship.

L. Papaphilippou, for the applicant.

P. Pavlou, for the respondent-plaintiff.

M. Eliades with *A. Skordis,* for the defendant ship, judgment-debtor.

E. Montanios with *P. Panayi* (*Miss*) for M. Montanios, for interveners-plaintiffs in Action No. 58/82.

Cur. adv. vult.

SAVVIDES J. read the following decision. This is an application to set aside the judgment entered in this action on the 24th May, 1982 in favour of the plaintiff in respect of wages and other allowances and disbursements due to him as master of the defendant ship.

The applicant, as described in this application, is one Martin Mosvold and/or Mosvold Nominees of Huston, Texas. There is no affidavit accompanying the application, setting out the capacity under which the said applicant claims to be an interested party having a locus standi in these proceedings or

showing the merits of the application. The only facts relied upon are those set out in the application which is signed for the applicant by counsel appearing for him and which are as follows:

> "The facts relied upon are apparent on the face of the proceedings, i.e. in an action in rem no consent judgment is possible and, also, the costs agreed are excessive."

The application was opposed both by the plaintiff and the interveners-plaintiffs in Action No. 58/82 whereas counsel appearing for the defendant ship did not oppose the application.

By his opposition the plaintiff contends that the applicant has no locus standi in the proceedings and that in any event there was no irregularity about the judgment, whereas counsel for the intervener relied in the opposition on the facts which were apparent on the face of the proceedings.

The application as originally made was extending not only to Action No. 73/82, but also to a number of other actions, in particular, Actions Nos 74/82 - 85/82, in which judgments were also entered against the defendant ship for wages and other allowances due to members of the crew of the defendant ship. At the hearing, however, of the application, counsel for applicant applied for leave to withdraw the application concerning the other actions and restricted it to Action 73/82 only. As a result the application was withdrawn in respect of all other actions and was heard only as far as the judgment in Action No. 73/82 is concerned.

The issues which pose for consideration in the present application are:

(a) Whether the applicant is an interested party having a locus standi in the proceedings.

(b) Whether the judgment in favour of the plaintiff is irregular and has to be set aside.

Whereas under the English Rules and our Civil Procedure Rules (most of which correspond to the English Rules, as in force before the 15th August, 1960), there is provision in a number of rules as to how a judgment obtained in favour of a party can be set aside (e.g. judgment by default of appearance, default of pleadings, failure of either party to appear at the

hearing of the action, etc.), under our Admiralty Rules which were enacted in 1893, the only provision that exists for setting aside a judgment, is under rule 44 which reads as follows:

> "Where any judgment has been given in the absence of either of the parties in accordance with the provisions of Rules 41 & 43 hereof, any party affected by such judgment may apply to the Court or Judge to set aside the judgment and the Court or Judge may set aside the judgment on such terms as to the payment of costs or otherwise as shall appear to be just."

Another provision that does exist is in the case of orders obtained by oral or written applications, under Rule 211, whereby the Court may, on due cause shown, vary or rescind any order previously made.

The lack of specific provisions dealing with all instances under which a judgment by default may be entered, may be found in the nature of our Admiralty Rules under which the exchange of written pleadings is not always necessary; under rules 38 and 39 an oral statement of facts may be made by the parties when appearing before the Court and the Court after hearing the parties and finding the issues before it, shall draw a statement of the facts in dispute upon which the trial will proceed or in lieu of that the Court may order the parties to furnish written pleadings under rule 82. In the latter case, failure by the defendant to file his answer to the petition and failure by the plaintiff to file his reply to the answer where such reply is necessary, within the time limited by rule 83, makes them liable to the sanctions provided by rules 84 and 85 in that they shall not be at liberty, except by leave of the Court or a judge to dispute any of the facts therein alleged.

Though the English Rules of the Supreme Court, which come into play in the exercise by this Court of its Admiralty jurisdiction under rule 237 of our Admiralty Rules, where no provision is contained in the Cyprus Admiralty Rules of 1893, in so far as the same shall appear to be applicable, have undergone extensive amendments since last century to cope with developing realities, our Admiralty Rules have in substance remained the same, save minor modifications, as enacted in 1893. Such rules have to be amended and substituted by new rules to cope with the Civil Procedure Rules and the corresponding English

Rules where such rules are applicable. In a recent judgment of the Full Bench, the following observations were made respecting the need for the redrafting of the Rules of the Supreme Court in its Admiralty jurisdiction, which I adopt in the present case:

"Before concluding with the present case, we wish to stress the need for the redrafting in a more systematic way of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, as well as the Civil Procedure Rules so that provisions which correspond in both rules to be drafted in the same terms. In England the Rules of the Supreme Court have undergone considerable amendments to take into account developing realities. Our Rules of Court are modelled and take cognisance of the English Rules. Therefore, the need for amendment becomes obvious to be brought up-to-date and avoid any confusion when comparison has to be made with the corresponding English Rules. We wish further to add in particular that rule 237 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction which incorporates in general terms the practice of the Admiralty Division of the High Court in England where no provision is contained in the Admiralty Rules, should be substituted by Rules expressly regulating the practice and procedure in this respect, and emanating from our Supreme Court which, under Article 163 of the Constitution and section 69 of the Courts of Justice Law of 1960 (Law No. 14/60) is the competent organ vested with the power of making Rules of Court for regulating the pactice and procedure of the High Court and/or of any other Court established by or under Part X of the Constitution other than Communal Courts established under Article 160. The need for amendment of our Rules has been stressed by this Court in *Almana Engineering* v. *Glyfos Commercial* (1981) 1 C.L.R. 273 at p. 289, in which reference is also made to *General Engineering Co. Ltd. v. Seddon Atkinson Vehicles Ltd.* (1975) 1 C.L.R. 278."

(See *Asimenos* v. *Paraskeva* (1982) 1 C.L.R. 145 at p. 168).

Rule 44 of our Admiralty Rules is similar to Order 27 rule 15 of the old Rules of the Supreme Court in England (see Annual Practice, 1960).

Note. Reference is made to the English Rules in force prior to the 15th August, 1960 in view of the judgment in *Asimenos v. Paraskeva* (supra).

Reading the notes to the said rule in which cross-reference is made to the rules, concerning default of appearance, default of appearance at trial, default in giving discovery, the following is stated at page 615:

> "*May be set aside.*–Application.–The application may be by motion or summons. In Q.B.D. it is usually made by summons to a Master. Any person whether a party or not who has or can acquire *a locus standi* may make the application. (*Jacques v. Harrison,* 12 Q.B.D. 136, 165.)"

And further at the same page,

> "*Regular Judgment.*–If the judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e., an affidavit stating facts showing a defence on the merits (*Farden* v. *Richter* [1889], 23 Q.B.D. 124. 'At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason', per Huddleston, B., at p. 129, approving *Hopton* v. *Robertson,* [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 (n.); and see *Richardson* v. *Howell,* 8 T.L.R. 445).
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> *Irregular judgment.* – If it is desired to set the judgment aside for irregularity, the irregularity must be specified in the summons or notice of motion (0. 70, r. 3). The affidavit in support should also state the circumstances under which the default has arisen, and should disclose the nature of the defence, see (Chitty F. 122; Chitty Arch., 333). Where a judgment is obtained irregularly the defendant is entitled ex debito justitiae to have it set aside (*Anlaby* v. *Praetorius,* 20 Q.B.D. 764)."

Also in the Annual Practice 1979 we read the following additional notes at p. 128 under Order 13, rule 9 which is the one which has substituted the former rule.

> "This Rule, however, should be compared and if necessary read with other rules conferring powers on the Court to set aside or vary any judgment or proceedings, viz., setting aside proceedings generally, 0. 2, supra; setting aside

judgment under 0. 14, r. 11, infra; setting aside judgment in default of defence, 0. 19, r. 9, infra; setting aside judgment in default of discovery or inspection of documents, 0. 24, r. 16, infra; setting aside judgment in default of answering interrogatories, 0. 26, r. 6, infra; setting aside default judgment at trial, 0. 35, r. 2, infra."

And at the same page under the heading, "Application by third party":

"The Rule is designed to enable judgments by default to be set aside by those who have, or can acquire, a locus standi; it does not give a locus standi to those who have none (*Jacques* v. *Harrison* [1883] 13 Q.B.D. 136). A third party who desires to apply to set aside a judgment must show that he has a direct interest in so doing and must either do so in the name of the defendant with his leave, or he must make both the plaintiff and the defendant parties to the application and ask for leave to intervene (ib.; *Sedgwick, Collins & Co.* v. *Rossis Insurance Co.*, [1926] 1 K.B.. 1; affd. In H.L. sub nom. *Eployers' Liability Ass. Corp.* v. *Sedgwick, Collins & Co.*, [1927] A.C. 95, where garnishees were held not entitled to apply)."

It has been the practice of this Court both in the exercise of its civil jurisdiction under the Civil Procedure Rules as well as in the exercise of its Admiralty Jurisdiction that an application to set aside a judgment by default should be accompanied by an affidavit setting out the facts relied upon. The only exception that appears to exist under the Civil Procedure Rules is under Order 48, rule 9(h) to the effect that an application for an order setting aside a judgment obtained by default of appearance under Order 17, rule 10, which is irregular on the face of the proceedings shall be made by summons but need not be accompanied by affidavit unless required by the Court. Such provision, however, applies only to civil proceedings and not in Admiralty proceedings and in the marginal note there is no cross-reference to the English Rules but only to the old Cyprus Order 20, rule 2 from which it originated. In any event, Order 17, rule 10 does not come into play in the present case as the applicant does not allege that the judgment sought to be set aside is a judgment by default of appearance but a judgment obtained by consent.

Having dealt with the provisions under the Rules of Court, I am coming now to consider the issues before me.

The first issue is whether the applicant is an interested party, having a locus standi in these proceedings. The application in the present case is not supported by any affidavit showing how the interest of the applicant is involved. The facts relied upon in support of the application as set out therein, are that such facts are apparent on the face of the proceedings and in particular that no consent judgment is possible in an action in rem. It was taken as granted by the applicant that the applicant who is described as Martin Mosvold and/or Mosvold Nominees is an interested party entitled to make such application. The respondent-plaintiff by his opposition raised the objection that the applicant has no locus standi in these proceedings. Notwithstanding such objection, the applicant failed to file nay affidavit disclosing his interest entitling him to apply to have the said judgment set aside and nothing has been proved at the hearing as to the legitimate interest of the applicant. It is well settled that a person whether a party or not in the proceedings can apply to have a judgment set aside provided he has or can acquire a locus standi in the proceedings (vide Notes in the Annual Practice 1960 at p. 615 supra). In the present case, the applicant has not established that he is a person interested in the proceedings and what is the nature of his interest entitling him to intervene to have the judgment set aside. Therefore, he has no locus standi entitling him to make this application. For this reason, the application fails.

Having found as above, I consider it unnecessary to go into the merits of the application.

In the result, the application is dismissed with costs in favour of the respondent-plaintiff and the interveners (plaintiffs in Action No. 58/82) against the applicant.

Costs to be assessed by the Registrar.

Application dismissed. Order for costs as above.