Alterfin CVBA v Timo & another (Civil Suit 447 of 2015)
[2023] KEHC 18328 (KLR) (Commercial and Tax) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 447 OF 2015

A MABEYA, J

MAY 31, 2023

BETWEEN

ALTERFIN CVBA ..... PLAINTIFF

AND

ADOK TIMO ..... 1ST DEFENDANT

REGISTERED TRUSTEES OF ARCHDIOCESE OF KISUMU .. 2ND DEFENDANT

RULING

1. The application before Court is dated August 30, 2021. It was brought under Order 22 Rule 6, 18 Order 10 Rule 4(2) and 11 Order 12 Rule 7, Order 9 Rule 9 and 10 of the *Civil Procedure Rules 2010*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* 2010.

2. The same sought the setting aside the judgment/decree dated July 15, 2016 pending the hearing of the suit and that the applicants be granted leave to file their annexed draft statement of defence out of time.

3. The grounds for the application were set out on the face of the application and in the supporting affidavit sworn by Rev Fr Moses Nicholas Omollo on August 30, 2021. It was deponed that the applicant was never served with notice of entry of judgment and only knew about the judgment upon threat of execution from auctioneers.

4. That the applicants had instructed the firm of Ken Omollo & Co Advocates to act for them and the said firm entered appearance on behalf of the applicants. It was deponed that the applicants never heard from the firm again.

5. That the applicants subsequently engaged the firm of M/S Peter M Warindu and Co Advocates to defend the suit and that they had a strong defence against the claim which raised serious triable issues which ought to be examined by the Court. That the respondent had commenced execution irregularly

and against order 22 rule 18 which makes a notice to show cause mandatory whilst executing a decree after 1 year.

6. The respondent opposed the application vide the replying affidavit sworn by Pkania C Kiplang'at on September 22, 2021. It was deponed that the application was intended to protract post judgment litigation and deny the decree holder the fruits of its judgment. That the applicants admitted to having entered appearance on October 28, 2015 thus were fully aware of the suit. That the applicants failed to file defence within the stipulated timelines and request for judgment was made on February 4, 2016. That no explanation was tendered for such failure.

7. It was further contended that the judgment entered on February 4, 2016 was regular and can only be set aside where sufficient cause is shown by the applicant. That the draft defence only contained mere denials and did not raise any triable issues. It was also contended that a notice of entry of judgment was served on the applicants on August 8, 2016 as per the annexed affidavit of service but they failed to settle the sum.

8. That the applicants were also served with the garnishee proceedings instituted by the respondent and still failed to settle the judgment sum or set aside the judgment. That the delay to file defence was inordinate and the application was delaying justice on the part of the respondent.

9. The application was canvassed by way of written submissions. The applicants were dated February 8, 2023 whereas those of the respondent were dated February 13, 2023. This Court has considered those submissions and pleadings.

10. The main issue for determination is whether the interlocutory judgment entered dated July 15, 016 ought to be set aside and consequently whether leave to file the draft defence should be granted.

11. Courts are guided by the provisions of Article 159(2)(d) of the *Constitution* and section 1A and 1B of the *Civil Procedure Act* in administering justice. The court's focus ought to be on substantive justice, rather than procedural technicalities and the just, efficient and expeditious disposal of cases.

12. Order 10, of the Civil Procedure Rules, 2010 addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10 rule 4 empowers the court to enter interlocutory judgment in cases where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages.

13. On the other hand, rule 9 gives the plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defence. While Rule 11 empowers the court to set a side or vary a judgment that has been entered under Order 10.

14. The Court has the discretion to set aside an *ex parte* or interlocutory judgment. In *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR, it was held that: -

> " The Courts are not required to consider the merits of a defence in an application of this nature, although the applicant has a defence to the counter-claim which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues."

15. In *Kenya Commercial Bank Ltd vs Nyantange &Another* (1990) KLR 443, Bosire J, (as he then was) held that: -

> " Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just."

16. The defendants' case was that the interlocutory judgment was defective for failure to be served with the notice of entry of judgment. However, there is before this court an affidavit of service dated August 10, 2016 contents of which proof service upon the applicants.

17. Secondly, the applicants themselves admitted that they entered appearance through their former advocates being the firm of Ken Omollo & Company Advocates on October 28, 2015 thus they were aware of the existence of the suit.

18. The only reason given is that the former advocates on record for the applicants entered appearance and then went mute. The said advocates did not update the applicants and they therefore instructed the new law firm to defend them. Obviously, it is a case of a mistake or negligence of an advocate.

19. While this Court considers that the respondent has a lawful judgment in its favour, on the other hand the applicant have not been heard. It has been said timelessly that mistakes of an advocate should not ordinarily be visited on a client. The fact that the applicants instructed an advocate on time who entered appearance within time shows that they were not inconsiderate.

20. I have looked at the claim, it is quite substantial. I have also looked at the draft defence, it cannot be said to be a sham. It is at least arguable. I have already stated that the applicants acted with dispatch after being served with the summons and instructed an advocate who seems to have disappeared to thin air, according to the applicants. The applicants cannot therefore be said to have cared less on the legal processes.

21. Whilst I note that the interlocutory judgment was entered in 2016 and that the application to set it aside was being brought in 2021, the Court has to balance the two competing interests of the parties herein. The respondent is entitled to the fruits of its judgment while on the other hand, the applicants are entitled to be heard. The latter lost that right, a fundamental right under Article 50 of the *Constitution* of Kenya, because of the inaction on the part of its erstwhile advocates.

22. While an order for thrown away costs can compensate the respondents if the application is allowed, to disallow the application will forever bar the applicants form the seat of justice. They will be condemned to pay a whooping sum of Kshs 50,246,576/99, as per the attachment dated August 24, 2021, without having been heard.

23. In this regard, I would take the course that will cause less injustice. I will allow the application and set aside the interlocutory judgment herein. The defendant to file and serve its defence within 14 days of the date hereof. However, the applicants will have to pay thrown away costs of the respondent assessed at Kshs 75,000/-. The said sum to be paid within 45 days of the date hereof in default execution to issue.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

A MABEYA, FCIArb

JUDGE