Mohanson Food Distributors v Kenya Commercial Bank Limited (Civil Case E023 of 2020) [2023] KEHC 18936 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18936 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E023 OF 2020

DKN MAGARE, J

MAY 31, 2023

BETWEEN

MOHANSON FOOD DISTRIBUTORS .... PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED .... DEFENDANT

RULING

1. The defendant/Applicant filed two applications dated 2/6/2021 and another that will not be dealt with today The two applications were to be canvased by way of written submissions by dint of the order of the Court made on 26/7/2022. However, I am unable to deliver the Ruling in the two applications, together reasons I shall enumerate shortly.
2. There is on record interlocutory Judgment entered on 9/2/2021 in default of Appearance and defence with stipulated time.
3. The matter was set for formal proof on 5/7/2021. The Application was filed and placed before Justice Chepkwony on 7/6/2021. The defendant filed a second application. Both these applications have been in the court considers since them.
4. The plaintiff had been asking for time to file written submissions for a long period of time.
5. When the mater came before me on 21/2/2023 I ordered that the application dated 3/6/2021 be heard on 7/3/2023. The matter was placed for 15/3/2023 to address the Court on how to deal with the related matter.
6. On 10/3/2023 I was given a different narrative. I directed that the matter be heard on 19/4/2023. On 19/4/2023 the plaintiff indicated that they have not replied to the Application dated. I gave 7 days and ordered ruling to be today.

7. Therefore, though the two applications were to be heard together, the parties have been fixing only the Application dated 2/6/2021. More fundamentally however is that the 2nd Application dated 2/6/2021 raises issues of res judicata and res judicata. They are matters that can only be raised where there is a defence on record.

8. Order 2 Rule 4 (1) provides as doth: -

> " Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
>
> (3) In this "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land."

9. Therefore, the defences of res subjudice and res judicata should and must arise from the defence. The Defendant cannot file a defence before the Application dated 2/6/2021 is heard and determined. Whichever way the second application is dealt, with, it is bound to be prejudicial to one party. A party cannot be heard on an application other setting aside while there is interlocutory judgment. In the case of *Patel -v- EA Cargo Handling Services Ltd* (1974) EA 75, the Court posited as doth: -

> " 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. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

10. The parties shall deal with the second application after the Ruling on the 1st Application. The Two applications are incompatible and as such cannot have one Ruling. I shall give directions on that application after making the Ruling herein.

11. The discretion the court uses in arriving at a just decision has been discussed in many cases. It is fairly settled and as such it is like walk through a garden path.

12. The factors to consider include the following as enunciated in the case of *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR, which set down the established parameters for exercise of discretion the Court.: -

    i. The defendant has a real prospect of successfully defending the claim; or

ii. It appears to the court that there is some other good reason why;

iii. The judgment should be set aside or varied; or

iv. The defendant should be allowed to defend the

13. The court does not however have discretion, where the request for judgment is improper or service was not done. Without service, the defendant has a right to defend.

Defendant/Applicants submissions.

14. The request for judgment was made while there was a valid defence on record. The same was made during the time there was a moratorium on parties to refrain from taking adverse action, execution, including execution in view of the prevalence of a pandemic of global nature. The execution processes were lifted some time in 2022.

15. The Applicant made the application to set aside stating that very obvious fact. However, the same was opposed, though conceded partly in the submissions. I have perused the court file and find as a fact, that at the time of request for judgment, there was a valid defence on record. The same is conceded. I am not amused that parties cannot agree when there was obvious mischief.

16. Peruse the file and noted that indeed there is on record a memorandum of Appearance dated 28/12/2020.

17. A notice of appointment dated 28/12/2020 and defence on record. The said documents were filed prior to the entry of interlocutory judgment. I note that this was also during the height of Covid – 19, where directions had been given for suits, among them Mombasa HCCC 14 of 2003 and Mombasa HCC 207 of 1999, 208 of 1999.

The Respondents submissions

18. Vide paragraphs 7, 8 and 9 concedes that there was a defence on record, as at the time of entry of interlocutory judgment. The rules are the handmaidens of Justice. In *Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another* [2015] eKLR, the Court of Appeal posited as doth: -

> ''It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of *the Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.''

19. As earlier stated, there is no limit to my discretion. Unless, of court I decide to fetter the same. *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, this Court held as follows:

> " 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. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the count

has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

20. Though the submissions are on both Applications I shall concentrate on only the parties referring to the 1st Application. The Court of Appeal sitting here in Mombasa had this to say in *Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others* [2019] eKLR,

> " 24. In our view, the factors which the Judge took into account are undoubtedly relevant matters for consideration in an application to set aside an ex parte judgment with which the court was dealing. We are fully in agreement with the Judge when he expressed:
>
> "The request for the default judgement was premature, irregular and overtly untenable. Where such facts present themselves to court, the court has no discretion to exercise. It can only answer to the principle of law that nothing put on a nullity can stand. The court has a duty to set aside the judgement as a matter of right and ex debito justitiae."

21. The position taken by the Judge is consistent with the decision of this Court in the case of *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR on which the Judge relied to the effect that once it comes to the notice of the court that a judgment is irregular, the court does not have to be moved to set it aside. It can do so suo motto without venturing into considerations whether the intended defence raises triable issues or whether there was delay in applying to set aside the irregular judgment.

22. In the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, referred above, the Court of Appeal stated as doth: -

> " The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal*, Koteh, AIR 1955 SC 664, at 711:
>
> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."
>
> The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In *Frigonken Ltd v. Value Pak Food Ltd*, HCCC NO. 424 of 2010, the High Court expressed itself thus:
>
> > "If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

23. The Defendant postulated that they have a good defence in that the matter is res judicata and res subjudice. They set out several other defences. I need not consider any when it is a matter of right. The court has no discretion. However, a party requesting for judgment when there is no default of appearance must be assuage the other party. Costs appear to be a soothing sacrifice for the party wrongly forced to file such applications.

24. Section 27 of the *Civil Procedure Act* provides as doth; --

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

25. In the circumstances I allow the application date 2/6/2021, set aside interlocutory judgment, and find that the defence file and on record is proper.

26. In the circumstances given that the Defendant is successful costs of Ksh. 25,000/= for the application dated 2/6/2023 shall suffice. I shall issue ruling on the Application dated immediately upon delivering this Ruling.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 31ST DAY OF MAY, 2023.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Sanjeev Khagram

Mr. Henry Kariuki for the defendant

Court Assistant - Firdaus