



REPUBLIC OF KENYA



KENYA LAW
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**Shemgrant v AIG Kenya Insurance Company Ltd (Civil Case E217 of 2020)
[2023] KEHC 21886 (KLR) (Civ) (14 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E217 OF 2020**

**AN ONGERI, J
AUGUST 14, 2023**

BETWEEN

AGYEI SHEMGRANT PLAINTIFF

AND

AIG KENYA INSURANCE COMPANY LTD DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 14/3/2023 brought under Article 50 of the Constitution of Kenya 2010, Sections 1A, 1B, 3 and 3A, 63 e of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 10 Rules 1, 4, 5, 6, 9 and 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking the following orders;
 - i. That this application be certified as urgent and be heard ex parte in the first instance.
 - ii. That this honourable court be pleased to grant leave to the firm of Tindi Munyasi and Company Advocates to come on record for the defendant/applicant.
 - iii. That pending the inter-partes hearing and determination of this application, this honourable court be pleased to stay all the proceedings herein and or vacate the mention of this suit slated for April 18, 2023.
 - iv. That this honourable court be pleased to set aside the ex-parte judgment entered against the defendant/ applicant and all consequential orders therein upon such terms as the court may deem fit.
 - v. That upon the grant of prayers 2, 3 and 4 above, this honourable court be pleased to grant leave to the defendant/applicant herein to file its statement of defence together with the list of documents, witness statement within a specific time this honourable court deems fit to grant.



- vi. That the costs of this application be in the cause.
2. The application is based on the following grounds;
 - i. That the defendant/applicant was served with all the pleadings and summons to enter appearance on January 13, 2021 but inadvertently failed to enter appearance and file a statement of defence to that effect.
 - ii. That the omission on the part of the defendant/ applicant to enter appearance and file its defence on time was due to a mistake which is highly regretted and which mistake was due to closure of the defendants offices due to COVID 19 Pandemic.
 - iii. That the defendant has since learnt that the plaintiff's suit had proceeded ex-parte (undefended, submissions filed and is slated for mention on April 18, 2023 for the trial court to give date of delivery of judgment.
 - iv. That the defendant/applicant is reasonably apprehensive that if the application herein is not heard expeditiously and all the proceedings stayed, the judgment will be delivered and thereafter the plaintiff/ respondent will proceed to execute the judgment to the defendant/ applicant's detriment thereby rendering this application nugatory.
 - v. That the defendant/applicant stands to suffer substantial loss and damage if the orders sought herein are not granted.
 - vi. That any prejudice suffered by the plaintiff/respondent can be adequately compensated by way of costs.
 - vii. That this application has been brought without inordinate delay upon notice of the judgment.
 - viii. That if the orders sought herein are not granted the applicants shall be condemned unheard contrary to the provisions of Article 50 of the Constitution of Kenya 2010 and the rule of natural justice.
 - ix. That if the orders sought are not granted at this point, grave injustice, substantial hardship and inconvenience would be visited upon the defendant/applicant.
 - x. That this honourable court has wide and unfettered discretion to set aside its judgment and this is one appropriate instance that this honourable court ought to exercise such discretion.
 - xi. That the defendant/applicant is willing to abide by any favourable conditions to be set by this honourable court.
 - xii. That it is in the interest of justice that the application herein be certified as urgent and heard on priority.
 3. The application is supported by the supporting affidavit of Rose Munyasi sworn on March 14, 2023 in which she reiterated the grounds stated above.
 4. This court has considered both the supporting affidavit to the application and the replying affidavit opposing the application together with the submissions by both parties.
 5. The issues for determination are as follows;
 - i. Whether the firm of Tindi Munyasi and Company Advocates should be granted leave to come on record.



- ii. Whether stay of proceedings should be granted in this case.
 - iii. Whether the interlocutory judgment and ex parte proceedings should be set aside.
 - iv. Whether the defendant should be granted leave to defend this suit.
6. On the issue as to whether the firm of Tindi Munyasi should be granted leave to come on record, I find that the same is not required.
 7. I find that there was no other advocate acting for the defendant and therefore Order 9 of the Civil Procedure Rules does not apply.
 8. The firm of Tindi Munyasi having filed a notice of appointed are therefore properly on record.
 9. On the issue as to whether the proceedings herein should be stayed, I find that no judgment date has been given since the court had directed that this judgment be delivered on notice. The application was filed before delivery of judgment and therefore the prayer for stay of proceedings has been overtaken since the plaintiff already testified in this case.
 10. On the two last issues as to whether the interlocutory judgment should be set aside and the defendant be granted leave to defend this suit, I find that the court has a discretion to set aside an interlocutory judgment.
 11. However, the said discretion should be exercised judiciously and the reasons for failure to defend the suit should be taken into account.
 12. The court must also consider whether the defendant has a defence that raises triable issues.
 13. A triable issue does not necessarily mean one that will succeed but one that should proceed to trial.
 14. I find that the defendant has not attached a draft defence to enable this court consider whether the defendant has any triable issues.
 15. In the current case I find that the interlocutory judgment was entered on March 3, 2021 and the case proceeded for formal proof on September 29, 2021. The current application was filed on March 14, 2023 but there is no draft defence attached to the application.
 16. I have considered the affidavit in support of the application dated March 14, 2023 and I find that the defendant does not deny having been served with the summons to enter appearance and file a defence.
 17. I find that the application herein which was filed 2 years after the interlocutory judgment was entered has been brought after unreasonable delay considering that the summons to enter appearance were served and therefore the Defendant/ Applicant knew about the case.
 18. The Defendant/applicant has failed to demonstrate that it has a defence that raises triable issues.
 19. I find that the application dated March 14, 2023 lacks in merit and the same is dismissed with no orders as to costs. To allow this application would amount to assisting an indolent party.
 20. Judgment will be delivered on November 10, 2023 since the plaintiff has filed submissions.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF AUGUST, 2023.

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A. N. ONGERI



JUDGE

In the presence of:

.....

for the Plaintiff

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for the Defendant

