



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Mwangi & another (Civil Case 414 of 2014)
[2023] KEHC 21377 (KLR) (Civ) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21377 (KLR)

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

CIVIL

CIVIL CASE 414 OF 2014

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

SAMUEL MUTHEMBA CHEGE PLAINTIFF

AND

JOHN MWANGI 1ST DEFENDANT

APOLLO TOURS AND TRAVEL LTD 2ND DEFENDANT

RULING

1. The application coming for consideration is the one dated December 16, 2020 seeking the following orders;
 - i. That this application be certified as urgent, service of the same be dispensed with and the application be heard ex-parte in the first instance.
 - ii. That pending inter-partes hearing and determination of this application this honourable court be pleased to issue an order staying execution of the judgment and decree herein dated July 31, 2018.
 - iii. That this honourable court be pleased to set aside the default judgment entered on November 25, 2015 and all consequential orders and the defendants be granted unconditional leave to defend this matter in terms of the draft defence annexed to the application.
 - iv. That this honorable court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.
 - v. That costs be in the cause.



2. The application is supported by the affidavit of Asif Padamshisworn on December 16, 2020 in which he deposed that the defendant's insurer Kenindia Assuarncce Compnay Limited received a demand letter dated December 1, 2020 from the respondents' advocates informing it that unless the decretal amount is paid within 14 days the plaintiff will proceed to execute.
3. He deponed that the judgement entered on November 25, 2015 is irregular and consequently the final judgment entered on July 31, 2018. That the defendants have a defence which raises triable issues which are worth interrogation at full trial. That the plaintiff will not suffer any prejudice which cannot be adequately compensated by costs if the application herein is allowed.
4. The plaintiff/respondent filed a replying affidavit opposing the application sworn on January 19, 2021 in which he deposed that in May 6, 2013 he was hit by the defendant while crossing the road. The matter was reported and on March 10, 2014 the defendant and his advocates were served with a demand letter and an intention to sue dated February 13, 2014. On March 3, 2015 his advocates instructed its court process server to serve the defendants with summons to enter appearance together with the Plaintiff, verifying affidavits, plaintiff's witness statement and Plaintiff's list of documents.
5. Although the defendants were served with all the requisite document they ignored putting in their defence and as a consequence the court entered a default judgement on August 31, 2018. On September 27, 2018 his advocates wrote a letter to the defendants informing them of the default judgement and asked them to remit the decretal sum of Kshs 1,051,890. The defendants insurance respondent to the letter and requested that he accord them with 20% concession on liability and in response he rejected the proposal.
6. He deponed that the defendants have since refused to remit the decretal sum and have not advanced grounds to warrant the granting of the orders sought in this application.
7. Subsequently the plaintiff passed away and an application dated July 8, 2022 was filed seeking substitution of the plaintiff Samuel Muthemba Chege(deceased) with Grace Muthoni Beautah which application was allowed unopposed on 13//2022.
8. The parties filed written submissions in the application dated December 16, 2020 as follows; the defendants submitted that the defence raises triable issues. That from it the defendants have denied the averments in the plaint and in the alternative pleaded negligence on the part of the plaintiff setting out the particulars of negligence. The defendants further argued that they have raised the issue of contributory negligence and it would be necessary to allow the defendants to tender evidence in support of the issue.
9. It was the defendant's submission that they are desirous of defending their suit and since the defence has been brought to the courts attention it is only fair for it to be considered. That a case arising out of a claim for negligence is not straight forward and ought not to be determined without hearing both sides. In addition the plaintiffs cannot suffer irreparable damage because of any delay occasioned by setting aside judgement as it can adequately be compensated for by an order for costs.
10. The plaintiff submitted that the 2nd defendant director Asif Padamshi admitted that the subject motor vehicle is its insured hence the police abstract is correctly filled and the correspondences and notices issued to the insurer bind the defendants in terms of third party insurance and liability.
11. The plaintiff submitted that the 2nd defendant was silent about the whereabouts of the subject motor vehicle at the material time and have not provided evidence as to whether the driver named as the 1st defendant was their employee or drove with their authority. That this is a material issue in determining contributory negligence.



12. The plaintiff submitted that the insurer does not deny service of the demand letter and statutory notice and therefore is obligated to satisfy the judgement entered. The plaintiff argued that the application herein is an afterthought and that the defence has no issue that genuinely raises triable issues. He urged the court that in the interest of justice the application be dismissed with costs.
13. The issues for determination in this application are as follows;
 - i. Whether the stay of execution of the ex parte judgment should be granted.
 - ii. Whether the ex parte judgment should be set aside.
 - iii. Whether the defendant/applicant has a defence that raises triable issues.
 - iv. Who pays the costs of the application?
14. On the issue as to whether stay of execution should be granted, I find that the same is spent since no execution was levied.
15. On the issue as to whether the ex parte judgment should be set aside, I find that the plaintiff will not suffer prejudice that cannot be compensated by an award of damages.
16. In *Sebei District Administration v Gasyali & others [1968] EA 300* Sheridan J. observed that: -

' The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court'
17. In the case of, *Tree Shade Motor Limited vs DT Dobie Co Ltd CA 38/98*, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence.
18. It is in the interest of justice to allow the defendant to be heard.
19. On the issue as to whether the defendant has a defence that raises triable issues, I find that the defendant has attached a draft defence that raises triable issues.
20. A triable issue does not mean one that will succeed. The Court of Appeal stated in *Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR* as follows:

' A preliminary finding of triable issues made at an interlocutory stage does not at all guarantee that the respondent will succeed after trial, just that the courts and the law have set very stringent measures to ensure every litigant is given an opportunity to ventilate their case. See the case of; Isaac Awuondo v Surgipharm Limited & Another[2011] eKLR the Court of Appeal had to reiterate the following principles in *Moi University v Vishva Builders Limited - Civil Appeal No 296 of 2004* (unreported) this Court said:-

'The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.

As we know even one triable issue would be sufficient – see *HD Hasmani v Banque Du Congo Belge [1938] 5 EACA 89*. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd. [1974] EA 75 at P 76* Duffus P said:-



'In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication.'

21. I find that the defendants have raised the issue of contributory negligence and it would be necessary to allow the defendants leave to defend the suit.
22. On the issue of costs, I find that the defendant is obligated to pay thrown away costs.
23. The application dated December 16, 2020 is allowed on the following conditions;
 - i. That ex parte judgment be and is hereby set aside upon payment by the defendants of thrown away costs assessed at Kshs 30,000.
 - ii. That the defendants be and are hereby granted leave to defend the suit.
 - iii. That the defendants are granted leave to file and serve their defence within 15 days of this date.
 - iv. That the plaintiff be at liberty to file any response thereto within 15 days upon service on themselves of the defence.
 - v. That the case be prosecuted within 90 days of this date.

Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the 1st Defendant**

..... **for the 2nd Defendant**

