



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO E001 OF 2020

DAVID RUHARA KABAYA.....1ST PLAINTIFF

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

ANN NYARURIRU KAMAU.....INTERESTED PARTY

As consolidated with

CIVIL SUIT NO E002 OF 2020

DAVID RUHARA KABAYA1ST PLAINTIFF

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

PETER GICHERU KARANJA.....INTERESTED PARTY

As consolidated with

CIVIL SUIT NO E003 OF 2020

DAVID RUHARA KABAYA.....1ST PLAINTIFF

GITHIGA TRAVELLERS SACCO LIMITED.....2ND PLAINTIFF

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

GEOFFREY WANJALA SITINI.....INTERESTED PARTY

RULING

1. **DAVID RUHARA KABAYA** (hereinafter **David**) and **GITHIGA TRAVELERS SACCO LIMITED** (hereinafter the **SACCO**) filed the three cases stated above, seeking for an order of declaration that **XPLICO INSURANCE COMPANY LTD** (hereinafter **Insurance**) is liable to pay the amount in the judgment of the cases before **Githunguri Senior Principal Magistrate's court cases No. 71, 72 and 75 of 2018**. In those three stated cases before Githunguri Magistrate's Court the three interested parties obtained judgment against David and the SACCO for damages for injuries they suffered following a motor accident involving motor vehicle registration NO. KBR 729S, a Nissan Matatu.

2. The Insurance was served with the summons in those three consolidated suits before this Court. Those summons were served on the Insurance on 5th February, 2021. The Insurance was required to file a memorandum of appearance within 15 days of service.

3. On 22nd February, 2021, at the request of David and the SACCO, interlocutory judgment, in default of appearance, was entered against the Insurance.

4. Before court is an application of Notice of Motion filed by the Insurance dated 25th February, 2021. The Insurance seeks an order setting aside that interlocutory judgment. That prayer is based on Order 10 Rule 111 of the Civil Procedure Rules (hereinafter the Rules). That Rule provides:-

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

5. A rich jurisprudence has developed from the provision of the above Rule. That jurisprudence was comprehensively discussed in the case **GULF FABRICATORS VS. COUNTY GOVERNMENT OF SIAYA (2020) eKLR.**

“39. This position was confirmed by the Court of Appeal in CA No. 6 of 2015 JAMES KANYITA NDERITU V MARIES PHILOTAS GHIKA & ANOTHER [2016] eKLR where it was held:-

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see MBOGO & ANOTHER V SHAH (SUPRA); PATEL V EA CARGO HANDLING SERVICES LTD [1975] EA 75, CHEMWOLO & ANOTHER V KUBENDE [1986] KLR 492 AND CMC HOLDINGS VS NZIOKI [2004]1 KLR 173).”

In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. 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 underline the importance of the right to be heard as follows in SANGRAM SINGH V ELECTION TRIBUNAL, KOTCH, AIR 1955 SC 664, AT 711:-

“There must be never present to the mind the fact that ours 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 in them.”

6. With the above discussion in mind, I need to determine whether the interlocutory judgment entered in favour of David and the SACCO was regular or irregular.

7. As stated before the Insurance was served with the summons and plaint on 5th February, 2021. The Insurance was required to file an appearance within 15 days of service. By application of the provision under **Order 50 Rule 8** of the Rules, when 15 days expired will become clear. That Rule provides that where an act is required to be undertaken within a number of days, computation of the days is reckoned exclusively of the first day and inclusive of the last days. By reason of that Rule, 5th February, 2021 was not reckoned in the computation of the 15th day to file an appearance. It follows that the 15th day within which the Insurance was required to file its appearance fell on 20th February, 2021.

8. The 20th February, 2021 was a Saturday. The courts do not open its office or rather its registry on Saturdays. Order 50 Rule 3 of the Rules provide:-

“Where the time for doing any act or taking any proceedings expires on a Sunday or other day on which the offices are closed and by reasons thereof, such act or proceeding cannot be done or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

9. That provision shows that the Insurance was required to file its appearance on the next day the court registry would open. That was

Monday 22nd February, 2021. The Insurance, in other words, had up to 22nd February, 2021 to file its appearance. Yet this is the day that default judgment was entered against the Insurance in default of filing an appearance.

10. The above consideration distinctly shows that the interlocutory default judgment entered against the Insurance on 22nd February, 2021 was irregular. This is because judgment was entered before the Insurance was in default of filing an appearance. This judgment therefore as set out in the case ***GULF FABRICATORS VS. COUNTY GOVERNMENT OF SIAYA*** (supra) shall be set aside *ex debito justitiae* (as a matter of right). This is because judgment was entered against the Insurance prematurely.

11. Before concluding on this Ruling however, I wish to deal with two matters. Firstly is an issue raised by the Insurance and second is the plaint filed by David and the SACCO without leave.

12. The Insurance in advancing its application under consideration, objected to the correspondence relied upon by David and the SACCO. Those correspondence were attached to the affidavit sworn by David and dated 6th April, 2021. David attached letters written by the Insurance to the Law firm of *Nyaywa, Ngigi & Kibet Advocates* and others written by that said law firm to the Insurance. *Nyaywa, Ngigi & Kibet Advocates* acted for David and the SACCO on the instruction of the insurance. Those correspondences related to the court actions before the Githunguri magistrate's court, referred to herein before. In one letter written by the Insurance to that law firm, the Insurance instructed the law firm to enter an appearance and defence for David and the SACCO. The instructions to file that appearance and the defences in Githunguri magistrate's court were in the cases where David and the SACCO were sued by the three persons, named herein as interested parties, for damages suffered by them following the motor vehicle accident. The deposition of the Insurance which sought those correspondences to be expunged was as follows:-

“... the respondents (David and the SACCO) have produced privileged correspondence and/or documents between the defendant (the Insurance) its officers and advocates in the course of its mandate as an insurance company.”

13. Although the Insurance did not state so, I believe it relied on **Section 134** of the Evidence Act. That section provides:-

“(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:-

‘Provided that nothing in this section shall protect from disclosure–

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.”

14. That Section requires determination of who was the client in the cases filed before Githunguri Magistrate's Court. Although the instructions to file appearance and defence in those cases at Githunguri Magistrate's Court were issued by the Insurance, undoubtedly the client were David and the SACCO. They were the parties the law firm represented. There was therefore no breach of privilege in David and the SACCO having those correspondence. There was no breach of privilege and there would therefore be no basis to expunge those correspondences.

15. The other issue I wish to highlight hereof is that David and the SACCO filed another plaint on 5th February, 2021. This I believe was due to misunderstanding of this Court's order by its ruling of 18th December, 2020. By that Ruling, this Court ordered **Civil case No. E001 OF 2020** be consolidated with **Civil cases No. E002 and E003 of 2020**. **Civil Case No. E001 of 2020** was **E002 of 2020** ordered to be the lead file followed by and that was followed by **E003 of 2020**. David and the SACCO were not permitted, following that Ruling, to file another fresh plaint which is they did. It follows that the plaint filed on 5th February, 2021 in **Civil Case No. E001 of 2020** is filed without leave of this Court and is hereby struck out with no orders as to costs.

DISPOSITION

16. In the end, and in respect to the Notice of Motion dated 25th February, 2021, I grant the following orders:-

(a) The interlocutory judgment entered in default of appearance, hereof, on 22nd February, 2021 is hereby set aside *ex debito justitiae*.

(b) The defendant, **XPLICO INSURANCE COMPANY LIMITED** shall file a memorandum of appearance and defence in respect of Civil Suit No. E001 of 2020 as consolidated with Civil Suit No. E002 and E003 of 2020 within 7 days from this date hereof.

(c) The costs of the Notice of Motion dated 25th February, 2021 shall be in the cause.

RULING DATED and DELIVERED at KIAMBU this 17th day of FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Plaintiffs: - Mr. Banda

For Defendant: - Mr. Mugwe

For Interested Parties: -

(i) Peter Gicheru : - No appearance

(ii) Geoffrey Wanjala : - No appearance

(iii) Ann Nyaruiru Kamau : - No appearance

RULING delivered virtually.

MARY KASANGO

JUDGE