



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 96 OF 2015

JOHN OMOLLO NYAKONG t/a GANJEE & SONS.....PLAINTIFF

-VERSUS-

1. COUNTY GOVERNMENT OF KWALE

2. INTER-GOVERNMENT RELATIONS TECHNICAL COMMITTEE.....DEFENDANTS

RULING

1. The Court is called upon to determine the Notice of Motion dated 7/10/2020 seeking that the judgement entered against the 2nd defendant on 10/7/2020 be set aside. The application is supported by the Affidavit of Mary Kiti, counsel for the applicant. The gist of that Affidavit is that the 2nd defendant, was only joined to the proceedings by virtue of being the successor of the Transition Authority whose duty and function is to facilitate cooperation between the national and County Governments Part of which is to validate the inventory of all existing assets and liabilities of government at both levels as well as those of other public entities.

2. Having been joined the applicant bemoans having not been accorded a chance he be heard by the judgment entered against it on account of failure to file an appearance and defence. Nothing absolutely is said about the date of service and the nature of defence it intends to mount as would be expected of an application of this nature. It seems the applicant is content to say *'just set aside the default judgment irrespective of the reasons for default and look the other side regarding what happens after setting aside'*. That in my view is a casual way to mount a challenge expected to attract exercise of judicial discretion.

3. The application was opposed by the plaintiff on the strength of the Replying Affidavit sworn on 14/10/2020. The substratum of that opposition is that the application is an afterthought and an abuse of the court process for failure to advance any reason for delay to file a defence within time having been served way back on the 27/5/2020. It was also argued that there is no triable issue capable of being advanced even if the judgment was set aside because the debt due to the plaintiff is not contested but admitted while the two defendant engage in finger pointing against each other.

4. The application was argued orally with the applicant's counsel emphasizing that his client is a government agency to whom government proceedings apply and therefore no judgment could have been legally entered without the leave of the court as was done herein.

5. For the respondent, the argument advanced was the trite position of the law remains that where a default by party leads to an order being made against such party, the law demand that an explanation for delay be offered to the satisfaction of the court and that nothing at all was said why no, legal steps were never taken by the applicant.

6. The law on setting aside a default judgment is not in doubt. It is, simply put, that where a regular judgment has been entered the party seeking setting aside must demonstrate to the court plausible reason for delay and to demonstrate that there is a triable issue to be canvassed. However, where the judgment is not regularly entered, then the court has no discretion to exercise but must set aside the judgment as of right otherwise expressed as *ex-debito justitiae*^[1].

7. A judgment is regular when all the legal pre-requisites are met in seeking and obtaining it. In the matter at hand it is not debatable that the defendants are government agencies. To obtain a judgment against them, it is not enough that evidence of service be availed. It is mandatory that leave be sought and obtained pursuant to a formal application that must be filed and served.

8. Order 10 Rule 8, Civil Procedure Rules provide: -

“No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day”.

9. The Rule leaves no doubt and invites no argument on the duty to seek leave of the court before entering a default judgment against government and its departments. There is just no alternative beyond seeking and obtaining leave of the court. In ***Gulf Fabricators Ltd vs County Government of Siaya, [2020] eKLR, Aburili J***, when confronted with similar facts did say and observe: -

“...I find that the application for leave to enter judgment against the defendant/respondent was never served upon the Defendant/Respondent and therefore the entry of Judgment against the defendant respondent was by all means irregular and must be set aside and vacated as it violates order 10 rule 8 Civil Procedure Rules”.

10. An irregularity in entry of judgment to mind, therefore, is not confined to service of summons alone. It must also address other requirements of the law like in this case, the obligation that leave of the court be sought and obtained beforehand before a judgment in default is entered against the government. In my opinion, a judgment that is entered in fragrant affront of the positive provision of the law stand out to be more than just irregular. I consider anything done contrary to the law to be unlawful and illegal and incapable of defence or favour in the eyes of the law. It must be so declared so that courts of law remain true to the rule of law.

11. In totality, I do find that the judgment entered in favour of the plaintiff against the 2nd defendant on the 10/7/2020 was entered contrary to law, and was therefore a nullity ab initio and must be set aside as of right to the 2nd defendant and as an obligation of the court to enforce fidelity to the law.

12. Having so set aside and to achieve the dictate that court business be handled expeditiously, I direct that the 2nd defendant shall file and service its defence to the suit within 14 days from today.

13. On costs, even though the 2nd defendant has succeeded, the application was necessitated by its failure to act within time as expected and it would be an act in blessing such failure to award the costs occasioned by its default. I direct that the costs of the application be in the cause.

Dated, signed and delivered at Mombasa this 26th day of February 2021

Patrick J O Otieno

Judge

[1] James Kanyita Nderitu vs Maries Philotos Ehika’2016]eKLR