REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 25 OF 2015

CHARLES WASIKE ..... PETITIONER

VERSUS

THE CATHOLIC ARCHDIOCESE OF KISUMU

(TUMSIFU AGENCY – SIFA GARDENS) .....RESPONDENT

RULING

The application dated 24th September 2020 was brought by the Defendants, **CATHOLIC ARCHDIOCESE OF KISUMU (TUMSIFU AGENCY – SIFA GARDENS)**, seeking to set aside the Judgment which was entered on 16th March 2016.

1. It is common ground that the Defendants were duly served with the Plaint. Thereafter, the Defendants entered Appearance through the firm of **WASUNA & COMPANY ADVOCATES**.

2. However, the Defendants failed to file any defence to the suit.

3. On 16th March 2016 the learned Deputy Registrar entered Judgment in favour of the Plaintiff, **CHARLES WASIKE**, following the Defendant's failure to file a defence.

4. It is the Defendants' case that they only became aware of the Judgment when auctioneers proclaimed their properties, in execution of the Decree.

5. The Defendants view the judgment as irregular, because;

> ***"…. the Plaintiff/Respondent was never examined by the court by way of formal proof to actually verify the plaintiff's claim as required by law."***

6. Secondly, the Defendants asserted that they were never served with any Notice of entry of the judgment, as required by the law.

7. The Applicants contend that they have a good Defence, which raises triable issues, which ought to be determined through a trial.

8. In answer to the application, the Plaintiff filed both Grounds of Opposition and Replying Affidavit. The following facts can be discerned from the said answer to the application;

(a) Suit was filed on 2nd July 2015.

(b) The Plaint and Summons were served on 13th July 2015.

(c) The Defendants entered appearance, through the firm of Wasuna & Co. Advocates on 17th July 2015.

(d) On 14th September 2015, the Plaintiff filed a Request for Judgement in default of Defence.

(e) The learned Deputy Registar of the High Court entered Judgement on 16th March 2016.

(f) A Decree was issued on 21st June 2017.

(g) The Plaintiff filed a Bill of Costs, for taxation, on 5th April 2019.

(h) The Taxing Officer delivered the Ruling on taxation on 30th July 2020.

9. In the light of the fact that advocates for Defendants participated in the proceedings of taxation, the Plaintiff said that it was therefore;

> ***"DISHONEST, FALSE and MISLEADING for the Defendant to allege that they only came to know about the judgment when the Auctioneer proclaimed their properties ……."***

10. Secondly, the Plaintiff pointed out that his suit was for a liquidated claim, and that therefore, there was no need for any formal proof.

Was the suit for a liquidated claim?

11. In the case of **CIMBRIA EAST AFRICA LIMITED Vs KENYA POWER & LIGHTING COMPANY LIMTED, HCCC NO. 279 OF 2016**, the Court noted thus;

> ***"A claim does not become a liquidated demand simply because it has been quantified. To qualify as a liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic."***

12. The claim herein was for the sum of Kshs 13,007,917.83, which is made up of the sum of Kshs 3,800,000/= which the Plaintiff had paid to the Defendants as the Purchase Price for a house which he was buying from the

Defendants; together with interest thereon a *"Commercial Rates"* of 18%, from 1st January 2014 to December 2013.

13. In the Plaintiff's understanding, the suit was for a liquidated claim.

14. Therefore, pursuant to the provisions of **ORDER 10 Rule 4** of the **Civil Procedure Rules**, the Plaintiff was entitled to request for Judgment after the Defendants failed to file a Defence.

15. On 16th September 2015, the Plaintiff filed a Request for Judgment for

> ***"the Liquidated Claim of Kshs 13,007, 917.82 together with interest at Court Rates from 01/01/2014 and costs as prayed in the Plaint."***

16. On 16th March 2016, the Deputy Registrar entered **INTERLOCUTORY JUDGEMENT** against the Defendant.

17. There is no explanation why the Deputy Registrar made the decision to only grant Interlocutory Judgment.

18. Ordinarily, an interlocutory judgment would only be granted when the Plaint has a claim for pecuniary damages or for detention of goods with or without a claim for pecuniary damages, as the court would be required to assess the damages or the value of the goods: That is what **Order 10 Rule 5** stipulates.

19. The grant of interlocutory judgment presupposes that the Plaintiff would still be required to lead evidence, so as to enable the court assess the pecuniary damages or the value of the goods.

20. When the plaint has a claim for a liquidated demand only, and the Plaintiff requests for judgment in default of either Appearance or Defence, the Court is supposed to enter judgment for that liquidated demand.

21. In this instance, the Plaintiff said that he paid Kshs 3,800,000/= as the Purchase Price for a maisonette at Sifa Gardens Estate. That can be described as an ascertained sum.

22. However, the Plaintiff also said that the Defendant had;

> ***"…… refused, failed and/or neglected to avail to the Plaintiff any Sale Agreement, Transfer, Discharge or Notification of Completion documents or handed over the house to the Plaintiff."***

23. Nonetheless, the Plaintiff went ahead to calculate interest at the rate of 18%, which he described as *"Commercial Rates."*

24. In the absence of ascertained terms of a contract, there might arise the question about the basis upon which the Plaintiff determined the applicable rate of interest.

25. In **"THE SUPREME COURT PRACTICE" VOLUME 1,** at page 33, the learned authors said;

> ***"A liquidated demand is in the nature of a debt, i.e a specific sum of money, due and payable under or by virtue of a contract."***

26. In this instance, the sum which appears to be in the nature of a debt is the amount of Kshs 3,800,000/= which the Plaintiff paid to the Defendants.1

27. I believe that the interest which the Plaintiff is claiming, and which he has added to the money he had paid out originally, is in the nature of compensation. Although the Plaintiff quantified the interest payable between November 2006 and December 2013 that did not make the claim for interest into a liquidated demand.

28. Whilst I appreciate that the Deputy Registrar did not give any reason for only granting Interlocutory Judgment, it is conceivable that the lack of definite terms, that under-pinned the claim for interest which the Plaintiff loaded onto the principal ascertained debt of Kshs 3,800,000/=, may have informed the action taken by the said Deputy Registrar.

29. However, I am also fully alive to the fact the Deputy Registrar later issued a Decree for the sum of Kshs 13,007,917.83. By so doing, the Deputy Registrar appears to have confirmed that the *"Interlocutory Judgment"* which was entered on 16th March 2016, was for the whole claim. That would imply that there was no need for any formal proof, after the Decree was issued, because there was then no outstanding claim.

30. I find that the conduct of the Deputy Registrar was inconsistent, because by granting an interlocutory judgment she implied that there were still some pending issues which would need to be addressed before finality was attained: yet she later issued a Decree which captured the totality of the Plaintiff's claim.

31. But in my considered opinion, the claim as drawn in the Plaint was not for a liquidated demand. Therefore, there ought to have been a formal proof, to enable the Plaintiff present evidence to prove that he was entitled to the interest claimed.

Setting aside a default Judgement

32. Pursuant to the provisions of **Order 10 Rule 11** of the **Civil Procedure Rules**;

> ***"Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just."***

33. In principle, the learned Deputy Registrar was entitled to enter judgment in default of defence. It would therefore follow that the *"interlocutory judgment"* herein was regular.

34. But the Decree issued thereafter did not reflect the interlocutory nature of the judgment.

35. It is well settled that even a regular judgment may be set aside or varied. In the case of **PATEL Vs E.A. CARGO HANDLING SERVICES LTD [1974] E.A. 75**, the Court said;

> ***"There are no limits or restrictions on the Judge's discretion to set aside or vary an exparte judgement except that if he does vary the judgement, 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 conditions on itself or fetter the wide discretion given it by the rules."***

36. The Defendants main reason for failing to file their Defence was that their advocate did not keep them informed.

37. The Plaintiff has satisfied the court that he duly served the Defendants' advocates with a Notice requiring them to file a Defence, after the collapse of intended negotiations.

38. As the Defendants had instructed an advocate to act for them, it is deemed that when their advocate was served, the Defendants were served.

39. A party who is represented by an advocate cannot expect that the other party would serve both the advocate and the party.

40. However, in real terms, the advocate may fail to communicate with his client, or the client may fail to communicate with his advocate.

41. In this case, the Defendants did not say that there was no communication between them and their advocates. Their complaint is directed at the Plaintiff for 2 things;

> ***(a) Failure to serve a Hearing Notice for Formal Proof, as the Deputy Registrar had granted Interlocutory Judgment; and***
>
> ***(b) Failure to serve a Notice of Entry of Judgment, as required by Order 22 Rule 6 of the Civil Procedure Rules.***

42. In respect to Formal Proof, I have already held that when the learned Deputy Registrar entered interlocutory

judgement, that could have been understood to imply that before final determination of the suit, there would be

formal proof.

43. But it would also imply that if the Defendants were

waiting to be served with a Notice for Formal Proof, they were aware of the interlocutory judgment. If that be the case, then the Defendants have failed to provide an

explanation for the delay in seeking to set aside the interlocutory judgment. Or is it perhaps their position that because they were waiting for Formal Proof, they did not deem it necessary to have the interlocutory judgment set aside?

44. However, that is not what the Defendants have said; their position is that they knew not about the judgment until the Auctioneer arrived at their premises, in the process of the execution of the Decree.

45. If the Defendants did not know about the judgment until the auctioneer commenced proclamation of their assets, the Defendants cannot have been waiting for Notice in

respect to the Formal Proof.

46. As the advocates, by their conduct, were aware of the judgment, and they even participated in the process of taxation of the Plaintiff's Bill of Costs, that implies that the said advocates failed to communicate to their clients about the judgment.

47. Of course, if the advocates abdicated their responsibility to inform his clients about what was happening, and also to seek instructions from the said client, that would be a very serious failing on the part of the advocates.

48. Some courts have held the view that when advocates make mistakes, which then cause their clients to be faced with consequences which could possibly have been avoided, it is the advocates who should be called upon to compensate the clients.

49. However, I subscribe to the school of thought which believes that;

> ***"Blunders will continue to be made from time to time, and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits.***
>
> **……**
>
> ***I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline"*** - per Apaloo J. (as he then was) in **PHILIP CHEMWOLO & ANOTHER Vs AUGUSTINE KUBENDE (1982 – 88) KAR 103**.

50. A similar view was expressed by Briggs J.A in **SHABBIR DIN Vs RAM PARKASH – ANAN [1955] 22 EACA 48**, at page 51, when the learned Judge said;

> ***"I consider that under Order IX Rule 20 the discretion of the court to set aside an exparte judgement is perfectly free and the only question is whether upon the facts of the particular case, it should be exercised.***
>
> ***In particular, mistake or misunderstanding of the appellants' legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case."***

51. In this case, it is my considered opinion that the grant of an interlocutory judgment may have led to the belief that before a final judgment would be entered, there would be a process of Formal Proof.

52. Secondly, from the facts stated in the Plaint, it is arguable whether or not the claim was for a liquidated demand.

53. I find that the case proceeded due to a mistake on the part of the advocates of the Defendants.

54. However, I also find that the Defendants cannot escape responsibility for the said failure, because an advocate cannot act without the instructions from his client. It is not enough that the Defendants had given instructions to their advocates, when the Plaint was served.

55. As the Defendants have not demonstrated that they had given full instructions to enable the advocates file a Defence, it is conceivable that the failure to file the Defence was partially attributable to the Defendants.

56. Ultimately, a case belongs to the parties; not their advocates! Therefore, parties are under an obligation to regularly, continually and consistently communicate with their advocates, especially through a medium of communication which is verifiable.

57. The Defendants' failure to show the court the steps that they had taken, between the time when they issued the first instructions to their

advocates, and the time when they first became aware of the judgment suggests that the Defendants must bear part of the blame for the failure to file a Defence.

Notice of Exparte Judgement

58. Pursuant to **Order 22 Rule 6** of the **Civil Procedure Rules** stipulates as follows;

> ***"Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:***
>
> ***Provided that, where judgement in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."***

59. The application for execution in this case is dated 11th September 2020, and it was filed on even date. However, the said application was not filed together with a copy of the Notice which the Plaintiff had served upon the Defendants, to notify them that interlocutory judgment had been entered against them.

60. Accordingly, the process of execution ought not to have been undertaken, because of non-compliance with the requirement set out in **Order 22 Rule 6** of the **Civil Procedure Rules**.

61. In the final analysis, I find that the Defendants have made out a case that justifies the setting aside of the judgment in default of defence. I therefore set aside the said judgment, and allow the Defendants a period of 14 days to file and serve their Defence.

62. However, as the Plaintiff had no role in the Defendants' failure to file their Defence, I cannot burden them with the costs of the application herein. The Defendants will pay all the thrown-away costs incurred from the date when the Deputy Registrar entered judgment, until the issuance of the Certificate of Taxed Costs.

63. For the avoidance of any doubt, and also for guidance, the Bill of Costs dated 5th April 2019 would be a good reference point, from item Number **24** up to item Number **39**; **BUT** excluding item Number **36**.

64. As regards the Auctioneer's costs, each of the parties will meet half of the same. I so order because the Defendants' failure to file a Defence led to the stage of execution, whilst on the part of the Plaintiff, he moved to that stage without providing proof of service of Notice of the Judgment in default of Defence.

65. If the parties fail to agree on the thrown-away costs, the same will be taxed.

66. And if the parties fail to agree with the Auctioneer on his costs, the same will be taxed.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **23rd** day of **March** 2021

FRED A. OCHIENG

JUDGE