



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 350 OF 2015

THE INTERNATIONAL AIR

TRANSPORT ASSOCIATION.....1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED.....2ND PLAINTIFF

VERSUS

SAYARI AFRICA LIMITED.....1ST DEFENDANT

RAY CHARLES MUSAU.....2ND DEFENDANT

PETRONILLA MUTHEU KITHUMA.....3RD DEFENDANT

RULING

1. The application dated 14th November 2019 is brought under Articles 50 and 159 of the Constitution of Kenya, Section 3 and 3A of the Civil Procedure Act Order 9 and Order 51 of the Civil Procedure Rules. The applicant seeks the following orders;

1) Spent

2) THAT pending the hearing and determination of this application the warrants of arrests issued on 24th/10/2019 be lifted by an order of this honourable court

3) THAT the honourable court be pleased to grant leave to the defendants to cross examine Mr. Nixon Kamadi regarding the contents of his affidavit of service dated 17th September 2015 at the hearing of this application

4) THAT the honourable court be pleased to set aside its ex parte judgment of 30th September 2015 and reinstate the suit for hearing on its merits.

5) THAT upon reinstating the plaintiffs suit for hearing, the honourable court be pleased to grant leave to the defendants to enter appearance and file their defence to the suit herein

6) THAT in the alternative to the prayers above this honourable court does refer this matter to the honourable chief magistrates court which has the competent jurisdiction

7) The costs of this application be borne by the plaintiff

2. The application is premised on the grounds on the grounds that the applicants were not personally served with the pleadings in the matter and that his advocate did not inform him that default judgment and warrants of arrests had been issued against him. The applicants contend that they have a formidable defence and counterclaim to the plaintiffs' claim. The 2nd applicant swore the supporting affidavit wherein he explains why he was not able to attend court.

3. The respondents opposed the application through the replying affidavit of the 2nd plaintiff's Company Secretary **Ms Karen Njagi** who avers that defendants were duly served with Summons to Enter Appearance and Plaint through their advocate who went ahead to initiate an out of court negotiation in the matter. She states that the defence and counterclaim do not raise any triable issues and that the same is a sham. She avers that the Decree holders would suffer great prejudice if the application is granted as their right to enjoy the fruits of their judgment will be thwarted.

4. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicants have made out a case for the granting of the prayers for the setting aside of the ex parte judgment and the transfer of the case to the Lower Court.

Setting Aside

5. The provisions dealing with setting aside a default judgment are set out under Order 10 Rule 4(1) of the Civil Procedure Rules (CPR) which stipulates that: -

“where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

6. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. In **Patel v E.A. Cargo Handling Services Ltd** (1974) EA 75 the court held that: -

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, 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 to fetter the wide discretion given it by the rules.”

7. Similarly, in **Shah v Mbogo** (1967) EA 166, it was held that: -

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

8. Like all discretionary powers of the court, the discretion to set aside default judgments must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must however be evaluated on its unique facts and circumstances. One of the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. This therefore calls for interrogation of the Applicant's case in order to discern if it raises any triable issues.

9. In the oft cited case of **Patel v E.A. Cargo Handling Services Ltd** (supra) the Court held that: -

“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.”

10. Similarly, in **Tree Shade Motors Ltd v D.T. Dobie & Another** (1995-1998) IEA 324, it was held that: -

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

11. In the instant case, I note that the suit was filed on 16th July 2015 and the Summons to Enter Appearance issued on 28th July 2015 and allegedly served on the defendants' advocates on 28th August 2015. The Defendants did not enter appearance or file a defence even though they were, under the rules, required to enter appearance within 15 days of service of the summons.

12. The applicants submitted that the judgment entered against them was irregular owing to the lack of proper service of the summons upon the defendants. Further the applicants submit that the affidavit of service is defective for want of compliance with the provisions of Order 5 rule 15 of the Civil Procedure Rules. On their part, the respondents argued that the applicants were duly served with the Summons to Enter Appearance and the service was acknowledged by the defendants' advocates who thereafter initiated negotiations with a view to settling the matter.

13. One of the prayers that the applicants sought in this application was for leave to cross examine the process server regarding the contents of his affidavit of service in respect to the summons. It is apparent that the applicants abandoned this prayer as they did not pursue it and instead opted to proceed with the main application for setting aside.

14. I have perused the process server's affidavit of service dated 17th September 2015. He states that, on the instructions of the 3rd defendant, he effected service of the summons on the applicants' advocates (Nyamweya Mamboleo & Co. Advocates) offices. Neither the 3rd defendant

nor the defendants' said advocates have denied that summons were duly served on the defendants' advocates. I therefore find that there was proper service of summons on the defendants and that the default judgment entered on 30th September 2015 was regular owing to the failure, by the defendants, to enter appearance or file a defence.

15. In *James Kanyिता Nderitu & another v Marios Philotas Ghikas & Another* [2016] eKLR the court observed;

“an irregular default 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).”

16. The next issue for determination is whether the applicants have a defence on merit that raises triable issues. In *Continental Butchery Limited v. Nthiwa* [1978] KLR the court held: -

“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”

17. I have considered the draft defence attached to the applicants' supporting affidavit and I note that the defendants deny owing the plaintiffs the amount of money claimed in the plaint. The defendants further state that they have over time made considerable payments which reduced the amount in dispute. The defendants have also indicated that they have a counterclaim to the plaintiffs' claim. In my considered view the defence raises triable issues that would require interrogation at by subjecting the case to a hearing.

18. The court did not however lose sight of the fact that the instant application was filed in November 2019 which is over 4 years after the entry of the impugned default judgment. Having found that the defendants were duly served with the Summons to Enter Appearance and Plaint, it is clear that the defendants went to slumber after issuing instructions to their advocates to act for them. The delay in filing the application has not been explained and this court can only arrive at the irresistible conclusion that the defendants may be out to delay the finalization of the case.

19. For the above reasons, I find that while it will serve the interest of justice to grant the applicants' prayer to set aside the default judgment, such setting aside should be subject to conditions that will protect the interests of the plaintiffs who had progressed with the case up to the execution stage.

20. Regarding the issue of whether the case should be transferred to the Chief Magistrates' Court, I note that the plaintiffs' claim is for Kshs. 8,766,827 and USD 40,543.33. Going by the prevailing dollar exchange rates to the Kenyan Shilling of about Kshs. 110 to a dollar, the claim in dollars translates to about 4,459,766.30 making a total of Kshs. 13, 226593.30.

21. Considering that the Chief Magistrate's court has pecuniary jurisdiction not exceeding Sh. 20 million in terms of section 7(1) (a) of the Magistrate's Courts Act, I find that the instant case should have been filed before the Lower Court and I therefore find that the prayer for its transfer to the said court is merited.

22. In conclusion I find that there is merit in the instant application and I therefore allow it in the following terms: -

a) The ex parte judgment entered on 30th September 2015 is hereby set aside on the following conditions;

i) That the defendants shall within 45 days from the date of this ruling deposit, as security, the sum of Kshs.4 Million and USD 20,000 in an interest earning account in a bank of repute to be held in the joint names of the advocates for both parties pending the hearing and determination of the suit.

ii) That the defendants shall file and serve their defence to the claim within 7 days from the date of this ruling.

b) In the event of failure to comply with the conditions in a) i) and ii) hereinabove, the setting aside orders shall be automatically vacated and the default judgment reinstated, in which case, the plaintiffs will be at liberty to proceed with the execution of the decree.

c) I direct that this matter be transferred to the Milimani Chief Magistrates' Court for hearing and determination.

d) I award the costs of this application to the plaintiffs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF APRIL 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN

LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Esilaba for Defendants/Applicants

Mr. Wamae & Allen for Plaintiffs/Respondents

Court Assistant: Sylvia.