



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. E161 OF 2020**

**ALICE WAMBUI & 105 OTHERS ..... APPLICANTS**

**VERSUS**

**INTER-WEB GLOBAL FORTUNE LTD .....1<sup>ST</sup> DEFENDANT**

**MANASES KURIA KARANJA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before Court is a Notice of Motion dated 15/12/2020. It was brought under *Order 10, Rule 10 of the Civil Procedure Rules, Articles 22 and 23 of the Constitution of Kenya 2010, Order 51 Rules 1 and 4 of the Civil Procedures Rules 2010 and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act.*
2. The application sought an order that default judgment be entered against the defendants in terms of the request for judgment dated 15/12/2020. The application was supported by the affidavit of **Dominic Mnj'aru** sworn on 15/12/2020.
3. It was the plaintiff's case that they filed the plaint dated 26/5/2020 seeking special and general damages against the defendants for breach of various contracts entered between them and the defendants. That they experienced difficulties in serving the defendants with the pleadings and summons. As a result, they applied for substituted service which was allowed on 3/11/2020.
4. They published the notice for substituted service on 7/12/2020 but the defendants failed to appear or file any defence. In the premises, they prayed for judgment in default.
5. The defendants opposed the application vide the replying affidavit of **Manases Kuria Karanja** sworn on 1/3/2021. He stated that he is a director of the 1<sup>st</sup> defendant. That despite the publicized notices, he was unaware of this suit due to his persecution, various arrests and detention by the police in various criminal cases against him.
6. That the applicants were interested parties in the criminal matters and their advocates were always aware of the defendants' whereabouts and that the orders for substituted service were therefore unnecessary and were fraudulently obtained.
7. The application was argued orally. **Mr. Makokha**, Learned Counsel for the plaintiffs submitted that substituted service was published on 7/12/2020. That according to *Order 6 Rule 1 of the Civil Procedure Rules*, the respondents were to enter appearance within 10 days of the publication. That the 1<sup>st</sup> defendant only entered appearance on 6/1/2021 while the 2<sup>nd</sup> defendant entered appearance on 29/1/2021. That since then, neither of the defendants had filed any defence.
8. That under *Order 7 Rule 1*, the defendants had 14 days within which to file their defences after entering appearance. That neither any reason for the delay had been offered nor a case for extension of time to file the defence had been made. The case of **Continetal Butchery vs Ndhiwa (1978) eKLR** was cited in support of those submissions and the Court was urged to grant the orders sought.
9. **Mr. Ombwayo**, Learned Counsel for the defendants opposed the application. He submitted that the defendants needed an opportunity to defend the case. That the operations of the 1<sup>st</sup> defendant were stopped by the police in September, 2020 and the 2<sup>nd</sup> defendant had been in police custody severally hence unaware of the existence of this case.
10. That the applicants were aware of the respondents' whereabouts. That since the notices were published on 7/12/2020, there was no inordinate delay in the filing of the defence. That since the present application was filed on 15/12/2020, that was before the lapse of 10 days for entering appearance. In the premises, the application was made in bad faith. It was urged that the application be dismissed.

11. I have carefully considered the depositions of the parties and their respective submissions. This Court is called upon to make a determination on whether interlocutory judgment should, in the circumstances of this case, be entered in default of defence.

12. **Order 10 rule 6 of the Civil Procedure Rules 2010** provides: -

*“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”*

13. In **Gulf Fabricators v County Government of Siaya [2020] Eklr**, it was held that: -

*“It must be appreciated that service of summons to enter appearance and plaint upon the Defendant in a suit is crucial. In addition, before the court can be asked to proceed and grant leave to the plaintiff to apply for interlocutory judgment and before such interlocutory judgment leading to formal proof hearing in unliquidated claims is entered and or issued, the court must be satisfied that summons to enter appearance and plaint were properly served upon the defendant, as stipulated in the law”.*

14. It is not in dispute that the pleadings and summons in this case were served by way of substituted service on 7/12/2020 with leave of court. It was upon this publication that the defendants entered appearance on 6/1/2021 and 29/1/2021, respectively. I therefore find that the summons to enter appearance, plaint and amended plaint were properly served upon the defendants who duly entered appearance.

15. It should be noted that the request for judgment and the present application were filed barely 8 days after the publication of the notice of substituted service. According to the summons, the defendants had 15 days from 7/12/2020 to enter appearance. Since time did not run from 21/12/2020 to 13/1/2021, the latest the defendants could enter appearance was 14/1/2021.

16. In view of the foregoing, both the present application and the request for judgment were premature. It does not matter that the defendants have to-date not filed a defence. No judgment can be entered on the basis of the Request For Judgment dated 15/12/2020 or the present application which were both made prematurely. They could only have been validly made after the 14/01/2021, which is not the case.

17. Accordingly, the application is dismissed with costs. The parties may take such steps as they may deem necessary in law to safeguard their respective interests.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**