



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 61 OF 2020

JOHN MAIGA WAMBUA.....PLAINTIFF

VERSUS

POLYCAP O. NYAKUNDI.....DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 4th January, 2021 brought by the defendant. It is premised on the provisions of Articles 48, 50(1), 159(2) of the Constitution of Kenya, Sections 1A, 1B, 3, 3A and 95 of the Civil Procedure Act, Order 10 Rule 11, Order 12 Rule 7, Order 22 Rule 22, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The defendant seeks the following orders -

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to order a stay of execution of the request for judgment endorsed on 02.11.2020 pending the hearing and determination of the application;

(iv) That the Honourable Court upon grant of orders 3 and 4 above (sic) be pleased to grant the defendant/defendant leave to file its memorandum of appearance, statement of defence, herein attached, and any other consequential documents thereupon;

(v) Spent; and

(vi) That the costs of this application be provided for.

2. The application is anchored on the grounds on the face of it and is supported by an affidavit sworn on 4th January, 2021, by Pauline Waruhiu, the Legal Counsel of Directline Assurance Limited. The plaintiff on 25th January, 2021 filed a replying affidavit sworn by him on 22nd January, 2021.

3. The application was canvassed by way of written submissions. The defendant's submissions were filed on 29th March, 2021 by the law firm of Kimondo Gachoka & Company Advocates while the plaintiff's submissions were filed by the law firm of Kinyua Muyaa & Company Advocates on 3rd March, 2021.

4. Ms. Julu, learned Counsel for the defendant submitted that failure to defend this suit by the defendant was not intentional since he was never served with a hearing notice and that by the time he became aware of the existence of the suit herein, the plaintiff had already procured an endorsed interlocutory judgment.

5. In submitting on the issue of stay of execution, she relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 which provides that where judgment has been entered under the said Order, the Court may set aside or vary such judgment and any other consequential decree or order upon such terms as are just.

6. She further submitted that stay of execution is pertinent as the plaintiff had served upon the defendant correspondence threatening execution and also because the amount demanded by the plaintiff is substantial. She stated that if it is paid out to the defendant and/or the orders sought herein are not granted, the defendant will not be able to recover the same from the plaintiff, whose source of income is unknown to the defendant. Ms Julu relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui** [2018] eKLR, where the

Court in allowing an application similar to this one held that the plaintiff bears the evidential burden of proof that he is not a man of straw as alleged. She stated that it was expected that the plaintiff in the said case would have deponed to show the means she had to refund the decretal sum, in the event that the appellant was successful in the appeal. It was also stated that in the said case, it was enough for the defendant to depone that she was not able to refund the decretal amount.

7. It was submitted by Ms. Julu that in the present case, the plaintiff had not demonstrated to this Court that upon payment of such amounts, he would be able to refund the same if or when this Court makes a decision against him. She further submitted that in the replying affidavit sworn on 25th January, 2021, the plaintiff had made no attempt to contradict the defendant's need for stay of execution.

8. On the issue of setting aside the interlocutory judgment, Ms. Julu relied on the provisions of Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules, 2010. She also relied on the cases of **Shah v Mbogo** 1967 EA 116, **Pithon Waweru Maina v Thuku Murigiria** 1982-88 I'KAR 171 HCCC No. 1330 of 2001 and **Patel v E. A Cargo Handling Services Limited** [1975] where the principles which Courts should consider in setting aside interlocutory judgments were laid down. She stated that the main duty of the Court is to do justice between the parties.

9. Ms. Julu submitted that it is trite law that as far as possible, all matters must be heard and determined on merits at a full hearing where all the issues raised in the pleadings can be fully canvassed and documents scrutinized under cross-examination. She cited the case of **Rao Jaivirsinthinji t/a Darbar Wholesalers & 3 others v Prudential Drycleaners Ltd Nbi** [2004] eKLR, where the Court held that in exercising its discretion, a Court should consider whether or not the affected party can reasonably be compensated by costs for the delay and must remind itself that to deny a party a hearing should be the last resort of the Court.

10. She also submitted that there was no inordinate delay in filing the application for setting aside the interlocutory judgment which shows that the defendant is still interested in defending his case. She relied on the case of **Mash Bus East Africa Limited & another v Insurance Regulatory Authority & 3 others** [2017] eKLR, where Judge Mativo defined the term inordinate delay as an amount of delay which leads the Court to an inescapable conclusion that it is inordinate. Ms. Julu submitted that the interlocutory judgment was endorsed on 2nd November, 2020 and that on 3rd November, 2020, the defendant filed its statement of defence and memorandum of appearance and as such, there was no tangible delay that could be attributed to the defendant.

11. On the issue of costs, Ms. Julu relied on Section 27 of the Civil Procedure Act which provides that the costs of and incidental to all suits shall be at the discretion of the Court and that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason order otherwise.

12. On her part, Ms. Muyaa, learned Counsel for the plaintiff submitted that granting stay in terms of prayer 3 of the application would be contrary to law and would occasion injustice upon the plaintiff as there is no prayer for setting aside the default judgment in the present application and that an order for stay of execution cannot be granted to remain in place indefinitely hence prayer 3 is untenable. She stated that since prayer 4 is pegged on prayer 3, the said prayer was equally untenable as this Honourable Court lacks jurisdiction to admit a second defence by the same party or to admit a statement of defence where there is a default judgment, in the absence of a prayer to set aside such default judgment.

13. The defendant's Counsel submitted that the request for judgment that was endorsed on 2nd November, 2020, was lodged on 27th October, 2020 and that prior to lodging the request for judgment, the defendant was served thrice with summons to enter appearance. She indicated that the first instance was on 8th September, 2020 by email, the second instance was on 25th September, 2020 by WhatsApp through the defendant's last known and used mobile telephone number and that the third instance was effected upon him personally at his insurers M/S Directline Assurance Company Limited's offices along Moi Avenue Mombasa on 7th October, 2020.

14. She further stated that the plaintiff followed up with the defendant, his insurers and his Advocates on record to act on the summons but their pleas bore no fruit. She indicated that the present application dated 4th January, 2021 was not filed in Court until 19th January, 2021. She indicated that the defendant had not offered any explanation as to why the said application could not be made from 4th November, 2020 when the plaintiff received the defendant's initial statement of defence dated 28th October, 2020 under protest, with remarks that there was already judgment in default of appearance in place. She stated that the defendant's Advocates were put on notice of such judgment over and above the formal written notice of entry of default judgment dated 4th November, 2020, served upon both the defendant and his insurers.

15. Ms. Muyaa argued that the level of indolence and disregard for the Court process on the part of the defendant, his insurers and Advocates is not only evident from the length of time it took them to act on Court summons or the time it took them to draw the present application. That in the absence of an explanation for such delay, the defendant's actions demonstrate mischief and an unjust attempt to derail the hearing of this suit.

16. She submitted that under the provisions of Order 10 Rule 11 upon which the defendant's application is partly premised, this Court may only set aside and/or vary default judgment upon such terms as are just. The plaintiff's Counsel pointed out that since there is no prayer for setting aside of the default judgment, this Court cannot exercise its jurisdiction and discretion to set aside the default judgment conditionally.

17. The plaintiff's Counsel submitted that the grant of orders for stay of execution is premised upon conditions set out under Order 22 Rule 22 of the Civil Procedure Rules. The key conditions are that sufficient cause has to be demonstrated and that when an order for stay of execution is granted it shall subsist just for a reasonable time to enable a judgment debtor to apply to the Court that passed judgment or to an appellate Court for some further remedy touching on that judgment. She contended that the application for stay in this matter had not been made subject to any application before this Court or any pending intended appeal. She submitted that the application herein fails to meet the basic tenets set by law and ought not to be allowed to remain in place for an unreasonable duration of time or at all.

18. Ms. Muyaa stated that the plaintiff expects a positive outcome from the formal proof hearing of this case and as such, his financial

position is irrelevant. She further stated that the defendant would suffer no prejudice if the plaintiff executed for the special damages awarded, as he may eventually withhold the equivalent of what the plaintiff collects as special damages if it is proved that the plaintiff for some reason was not entitled to collect any measure of those special damages. On the question of what amounts to substantial loss, the plaintiff's Counsel placed reliance on the case of **Victory Constructions v B.M (minor suing through next friend one PMM [2019] eKLR.**

19. It was submitted by Ms. Muyaa that the defendant had not made an offer for security for his due performance but had instead stated that the plaintiff could be compensated by way of payment of reasonable throw away costs. She submitted that this Court ought to weigh the likely consequences of granting the orders sought and lean towards a determination that is least likely to lead to an undesirable or on absurd outcome.

ANALYSIS AND DETERMINATION.

20. This Court has considered the application filed herein and the affidavit filed in support thereof. The Court has also gone through the replying affidavit by the plaintiff and the written submissions by both Counsel. The issue that arises for determination is whether the application dated 4th January, 2021 is merited.

21. In the affidavit filed by the defendant's Legal Counsel, she deposed that by dint of the rights of subrogation under the relevant policy, Directline Assurance Limited instructed the law firm of Kimondo Gachoka & Company Advocates to defend this matter on its behalf. That acting on the said instructions, the said firm drew up a statement of defence and a memorandum of appearance and filed them in Court on 3rd November, 2020. That upon service of the said documents, they were received under protest by the plaintiff on 4th November, 2020 in the guise that interlocutory judgment had been endorsed against the defendant on 2nd December, 2020.

22. The defendant's deponent averred that the interlocutory judgment on liability and special damages amounting to Kshs. 252,489.00 was endorsed on 2nd November, 2020 against the defendant. She deposed that the plaintiff wrote to the defendant threatening execution and attachment of movable and/or immovable assets lying anywhere in this country or the arrest and his committal to civil jail for 6 months unless the debt was paid in full. She stated that they are desirous of defending this suit on its merits thus this Court in the interest of justice, should not allow the mistakes and omissions of the defendant's insurer and/or Advocate to be meted on the defendant.

23. She also averred that its Advocates on record had since drawn up the intended statement of defence which raises triable issues, a memorandum of appearance and all incidental documentation in the quest to defend this suit. She deposed that there is imminent danger of execution by the plaintiff since he could be in the process of attaching Tuk Tuk registration Number KTWA 854V Piaggio, thus the grant of the prayers herein was essential.

24. The deponent also deposed that in the event that the orders sought were not granted, the defendant would suffer irreparable loss. She further deposed that the application herein had been made without any unreasonable delay.

25. The plaintiff in his replying affidavit averred that his Advocates on record filed the suit herein on his behalf on 27th August, 2020 and effected service of summons upon the defendant but he failed to act on those summons at all, prompting them to request for endorsement of judgment in default of defence as against the defendant. He also said that the judgment was endorsed on 2nd November, 2020.

26. The plaintiff further averred that the defendant was personally served with Court summons to enter appearance for the third time on 7th October, 2020, vide a letter dated 7th October, 2020 addressed to the defendant with a copy to his insurers putting them on notice of the intended request for judgment if no appearance was entered within 48 hours. The plaintiff deposed that in the event that the orders for stay of execution are granted, it would occasion immense prejudice upon him. He averred that he is now a paraplegic with no income at all and with no ability to work hence the said damages would go a long way to pay for a bit of his daily upkeep as he waits for a final award of this Honourable Court.

27. It was stated by the plaintiff that the defendant would suffer no prejudice if the order sought was not granted since he was not contesting the judgment endorsed on 2nd November, 2020.

28. The application dated 4th January, 2021 has been brought under the provisions of Order 22 Rule 22 of the Civil Procedure Rules among other orders. Order 22 Rule 22(1) of the said Rules provides as hereunder-

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.” (emphasis added).

29. In view of the above, it is evident that stay of execution is not given indefinitely but only for a reasonable time. It is noteworthy that when the application herein was brought under certificate of urgency, the Trial Judge granted stay of execution pending the hearing and determination of the application herein. The Judge also granted leave to the firm of Kimondo Gachoka & Company Advocates to come on record for the defendant. This Court is therefore left to determine whether or not to grant the defendant leave to file its memorandum of appearance, statement of defence and any other consequential documents and who should bear the costs of this application.

30. The plaintiff has an interlocutory judgment in place which was endorsed on 2nd November, 2020. Judgment was entered on liability and for special damages at Kshs. 252,489.00 with interest from the date of filing until payment in full in favour of the plaintiff, subject to formal

proof. The said interlocutory judgment has not been varied and/or set aside neither is there an application in place to do so. In the absence of such an application and/or a prayer seeking to set aside the interlocutory judgment in the present application, this Court cannot grant leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents.

31. It is not in dispute that there is neither a pending appeal against the said interlocutory judgment that was entered on 2nd November, 2020 nor is there an application seeking to set aside the said interlocutory judgment. Therefore, granting leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents would be an exercise in futility as the interlocutory judgment would still subsist.

32. Since the defendant invoked the provisions of the Sections 1 A & 1 B of the Civil Procedure Act, I find it necessary to consider the “overriding objective” under the said provisions and also Article 159(2)(d) of the Constitution of Kenya, 2010.

33. In **Civil Litigation and Dispute Resolution: Vocabulary Series, Legal English Books Publishers, 2013**, Michael Howard defines the Overriding Objective as hereunder -

“as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”

34. In **Hunker Trading Company Limited vs Elf Oil Kenya Limited** [2010] eKLR, the Court held that Section 1A of the Civil Procedure Act came in, to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The duty of the Courts in performing such mandate under Section 1B of the Civil Procedure Act are -

(a) The just determination of the proceedings,

(b) The efficient disposal of the business of the Court,

(c) The efficient use of the available judicial and administrative resources,

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,

(e) The use of suitable technology.

35. In **Adrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication and Technology & 8 others** [2017] eKLR, the Court held that:

“Considering the above provisions which introduced the oxygen principle, in Deepak Chamanlal Kamani & another vs Kenya Anti-Corruption Commission [2010] eKLR the court drew comparisons to the Woolf reforms which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of Biguzzi vs. Rank Leisure PLC [1999] 1 W.L.R 1926 in which Lord Woolf himself talked about the concept of overriding principle objective as follows: -

“Under the {Civil Procedure Rules} the position is fundamentally different. As rule 1.1 makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings.....”

In the above cited case of Kamani vs Kenya Anti-Corruption Commission (supra) the court had this to say: -

“It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment...-----This to our understanding means sections 3A and 3B of cap 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court”

In this regard, I stand guided by the above quotation from the case of Kamani vs Kenya Anti-Corruption Commission (supra) that the amendments did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases.”

36. This Court finds nothing in the overriding objective to suggest that it can grant leave to the defendant to file its memorandum of appearance, statement of defence and any other consequential documents where there is an interlocutory judgment in place that is yet to be varied and/or set aside.

37. Article 159(2)(d) of the Constitution of Kenya, 2010 which the defendant also relied on provides that in exercising judicial authority, the Courts and Tribunals shall administer justice without undue regard to technicalities of procedure. It would however be giving a long shot at nothing if this Court was to invoke the said provisions in this application as it would still not cure the defendant’s oversight in failing to

apply for the setting aside of the interlocutory judgment. Therefore, the defendant cannot seek refuge under Article 159(2) of the Constitution in the present circumstances.

38. It is trite that Court orders are not given in vain. Pursuant to the explanation given hereinabove, this Court finds that the present application was not well thought out and is fatally defective for lack of seeking for all the orders that would have assisted the defendant.

39. The upshot is that the application dated 4th January, 2021 is bereft of merit and the same is struck out with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF –

MR. MUTHURI HOLDING BRIEF FOR MS MUYAA FOR THE PLAINTIFF

MS NANNUNGI HOLDING BRIEF FOR MS JULU FOR THE DEFENDANT

MR. OLIVER MUSUNDI – COURT ASSISTANT.