



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 285 OF 2018

CYTONN INVESTMENTS MANAGEMENT PLC.....PLAINTIFF

VERSUS

ERIC ASUMA T/A THE KENYAN WALLSTREET....DEFENDANT/APPLICANT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 2nd July 2021 brought by the defendant/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of Eric Asuma. The applicants sought for an order that the judgment in default of appearance dated 10th June 2021, defence and all other consequential orders be set aside and that the defendant be given unconditional leave to defend the suit.
2. The plaintiff/respondent opposed the Motion by filing the replying affidavit sworn by his Senior Legal Associate, Ms. Faith Nyiva Claudi on 10th August 2021.
3. When the Motion came up for interparties hearing before this court, the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.
5. A brief background of the matter as seen in the record is that on 6th December 2018 the Plaintiff/Respondent filed and served the Plaintiff and an application for temporary injunction seeking orders that the Defendant/Applicant be restrained from making any defamatory comments about the Respondent and that they issue immediate apology through the same media. This honourable court granted the respondent a temporary injunction and hearing of the main suit was scheduled.
6. That on 10th December the applicants appeared before this honourable court with their previous advocates Hassan Madowo Said Advocates and they requested to be served with the Plaintiff for the second time of which they were served. The applicant did not file the defence within the prescribed 14 days after which he filed a Notice of Change of Advocates dated 6th May 2021 almost two years later.
7. The record shows that on 28th May 2021 the respondent filed an application for entry of judgment against the applicant for failure to file a defence within the required time. The court issued an order granting the respondent's application and prayers sought in the plaintiff.
8. The said orders have prompted the Motion now before this court.
9. In his affidavit Mr. Eric Asuma stated that they had filed a Replying affidavit for the application for default judgment and served the same to the Respondent. However it was heard and determined ex parte and a default judgment was entered before they had an opportunity to be heard. The applicant further stated that they had been trying to settle the matter out of court.
10. In response, Ms. Faith Nyiva Claudi stated that the Respondent filed their Replying affidavit on 24th June 2021 and served them on 28th June 2021 which was nineteen days after the respondent served them the application and fourteen days after the order was issued.
11. Further, that they had been directed by the court to comply with Order 11 of Civil Procedure Rules but the Defendant/Applicant did not. That there was no leave sought to file the defence out of time.
12. From my perusal of the record, I note that the application dated 28th May 2021 was allowed on grounds that the applicant had not responded to the same on time.

13. Upon considering the rival positions above, it is clear that the inadvertence was on the part of the applicant's previous advocate who failed to enter the defence on time from the beginning. The current advocate also failed to respond to the application to enter a default judgment on time and the fact that they did not seek for leave from this honorable court to file the defence out of time.

14. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence.

15. The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: **Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.**

16. This discretion 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: **Shah v Mbogo [1969] EA 116,123 BC Harris J.**

17. It is a matter of legal principle that the mistake of an advocate ordinarily ought not to be visited upon a client. This was the position taken by the Court of Appeal in the case of **Ahmed v Highway Carriers (1986) LLR 258 (CAK)** when it held that:

“...a litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights”.

18. The impugned default judgment though was not entered because the Applicant had not been served but was entered due to the inadvertence of the current and previous advocates who have been on record and have in one way or the other not filed the defence on time or responding to the application on the default judgment.

19. The fact also is that the applicant had been trying to settle the matter out of court and this would have been a reason for the delay in proceeding further as they may have agreed on an out of court settlement.

20. The actions deprived the Applicant an opportunity to be heard and was therefore condemned unheard. For the above reasons I am satisfied that the motion has merit and must succeed.

21. The right to be heard was underscored by the Supreme Court of India in **Sangram Singh v Election Tribunal Kotah 1955 AIR 425** thus;

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

22. Consequently, the application dated 2nd July 2021 is hereby allowed. The default judgment entered on 10th June 2021 and all consequential orders are hereby set aside. The Defendant/ Applicant should file a Defence in 15 days. Costs to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant/Applicant