



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 340 OF 2012

BEN OTIENO OWAGA1ST RESPONDENT

NOEL SHEUNDA NYONGESA.....2ND RESPONDENT

BEN OTIENO OWAGA AND

NOEL SHEUNDA NYONGESA

(Suing as administrators ad litem of the Estate of

MICHELLE AITTAH OWAGA (Deceased)

-VERSUS-

ELIAKIM OWALLA.....1ST APPLICANT

KAPTKWATA SAW MILLS LTD.....2ND APPLICANT

RULING

1. Judgment in this case was delivered on the **12/10/2017** against the defendants jointly and severally.

By an application dated 1/4/2019 the defendants, now the applicants approached the court, under **Order 10 Rule 11, Order 22 rule 25 of the Civil Procedure Rules, and Section 1A, 1B and 3A of the Civil Procedure Act** for **ORDERS:**

1). *No 1 to 4 Spend.*

5). *That this Court be pleased to set aside the ex-parte /interlocutory judgment herein and all consequential orders entered by the court in default of appearance upon conditions it deems just and expedient.*

6). *That this Honourable court be pleased to grant the defendants leave to file and serve their defence out of time.*

7). *That the defendants draft defence hereto annexed be deemed to be duly filed.*

8). *That costs of the application be in the cause.*

On the grounds, as appears at the face of the application and particularly that there was no proper service of summons upon the defendants or the insurer, and that the defendants have a good defence that raises triable issues.

2. An affidavit in support of the application was sworn by Anne Kanake a legal officer of Jubilee Insurance Company Ltd, the insurer of the Defendant's accident motor vehicle on the material date, the 29/3/2018, and a further affidavit by the said Anne Kanake sworn on the 3/5/2019.

3. The application is opposed by a Replying Affidavit filed on the **18/4/2019** and sworn on the **17/4/2018** by the Administrator of the Estate of the deceased, one Ben Otieno Owaga, the 1st plaintiff with authority of the 2nd plaintiff.

I have considered the affidavit evidence and the annexures thereto.

4. The gist of the application is what the applicant terms as lack of proper service of the summons to the defendants, as well as failure to serve the **Statutory Notice under Section 10 of Cap 405, Laws of Kenya** upon the insurer.

It is the applicants disposition at as a result, they were unaware of the existence of the case, and only came to know about its existence in November 2018 when they were served with summons to enter appearance in **Milimani Commercial Court Case No. 9226 of 2018**, being a declaratory suit arising from the judgement in respect of this application.

It is further deponed that the court file could not be traced for perusal up to the 22/3/2019 with assistance of the deputy registrar.

5. The respondents in their Replying Affidavit reiterate that they served the summons and plaint upon the defendants by way of advertisement, pursuant to a court order dated 26/2/2014.

The court order is annexed and marked **BOO – 1**. The 1st defendant was served by a single advertisement in the Daily Nation Newspaper while the 2nd defendant, being a Ugandan National was served in the Uganda's New Vision Newspaper as directed by the court. The advertisements are annexed and marked **BOO- 2**, together with the payment receipts. They are both dated October 16, 2014.

6. It is upon the above service that interlocutory judgment was entered against the defendants in default of appearance, opening the way for formal proof hearing of the suit.

I note that the insurance Company failed to co-operate with the plaintiffs advocates who, prior to the filing of the application for leave of the court had sought their assistance by several letters as to the identity of their insured who was a non Kenyan, the vehicle having foreign registration, including assistance from the Law Society of Kenya to intervene on their behalf. I have seen several letters addressed to Jubilee Insurance Company, and duly received, by appending its rubber stamp with dates upon receipt – **BOO-4**.

7. I have also seen a **Statutory Notice Pursuant to Section 10 of Cap 405 dated 9/5/2010**, and marked **BOO-3**. It was served on 31/12/2012 by recorded hand delivery, and referred to in all correspondence by e-mail. It is instructive that all the letters referred to, addressed to Jubilee Insurance were all received by appending thereto its rubber stamp with receipt dates.

Also noted is that upon entry of the ex parte judgment, by a letter dated 24/8/2018 the insurer was duly notified thereof, and settlement proposals called for, not once but several times. These letters were hand delivered, and the delivery notes are attached as exhibits. No single response by the insurance company was received by the plaintiff's advocates.

8. The insurance company was not a party to the case, and therefore no summons were issued for service upon itself. I have taken the liberty to state the above facts and events to show that at all material times, the insurance company, though not a party to the case was aware and had knowledge that there was a case instituted against its insured. Indeed the entry of judgment against the defendants was served upon it. It is therefore not true that the defendants insurer was not aware of the institution and existence of the suit as deponed to by the legal officer.

9. By the plaintiffs annexures by way of letters to the insurer, up to seeking assistance through the law society, I am satisfied that indeed the plaintiff had made sufficient efforts to trace the whereabouts of the defendants and the only option was to seek leave of court to effect service by advertisement in the newspapers.

The court has not been told that there was a successful appeal if at all, or that the order of the court to effect service by advertisement was set aside or varied.

10. The court has unlimited discretion to set aside or vary a judgment in default upon terms that are justified in light of all facts and circumstances both prior to and subsequent, and upon merits – **Kimani –Vs- Mc Connel (1966) EA 547, and cited by the Court of Appeal in Philip Kipto Chemwolo & Mumias Sugar Co. Ltd –Vs- Augustine Kubende**.

11. **Order 5 Rule 6, 7 and 8 of the Civil Procedure Rules** provides for the modes of service of summons.

Rule 8(1) envisages that

“Whenever it is possible, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient”.

Rule 17 provides for substituted service. Substituted service under an order of the court shall be as effectual as if it had been made on the defendants purportedly.

Rule 17 (4) is explicit that service by advertisement is as good as personal service.

12. In this instant application, it has not been stated, by the defendants, that they were not properly served with the summons. None of them swore an affidavit to that effect.

The legal officer who swore the supporting affidavit represents the interests of the insurer of the defendants accident vehicle. There was no disposition that she also represented the defendants. She did not state that she had authority from the defendants to swear the affidavit on their behalf. To that extend, it cannot be said with any legal authority and persuasion, that her averments that the defendants were not served with summons have any truth. I decline to accept such depositions. I am therefore satisfied that the defendants were served with the summons pursuant to the court order for service by Advertisement in the Newspapers.

13. The default judgment that ensued cannot be said to have been irregular. It was regular as against the defendants who were the only parties to the suit. This is the position in this application. In **Civil Appeal No. 6 of 2015 James Kanyiita Nderitu & another Vs. Marios Philotas Ghikas & another (2016) the Court of Appeal** rendered

“that under Order 10 rule 11 CPR the court has unfettered discretion in determining whether or not to set aside a default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance, or defence, as the case may, the length of time that has elapsed since the default was entered, where the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default judgment, among others.”. – See also **Mbogo & another Vs. Shah** and **CMC Holdings Vs. Nzioki (2004)** and **KLR 173**.

14. However if the default judgment was irregular by failure to serve the defendant with summons, the court will set it aside without consideration as to whether the intended defence raises triable issues or the inordinate delay. It will be set aside as a matter of right, if the party against whom it is entered has been condemned unheard – as stated in the case **Frigorken Ltd –Vs- Value Pak Food Ltd, HCC NO.424 OF 2010**.

15. Upon the above, it is the court, taking into account the facts and circumstances, to exercise its discretion whether to set the regular default judgement aside or not.

In the first instance, I am of the opinion that the applicants who is evidently the insurance company, in guise of representing the defendants, has come to court in bad faith. I am not persuaded that the reasons for failure to file a Memorandum of appearance was sufficiently explained. I say so because it is evident that the defendants were properly served by advertisement and the insurance company too was served with the statutory notice under **Section 10 (1) of Cap 405**, and numerous correspondence both by recorded delivery and email were sent to it, but non elicited any response. It was also served with the Notice of entry of judgment. Despite the above proven service, it did not wake up, but continued to sleep. It was only awakened by a realization that a decree had been drawn and obtained, and execution would ensue.

16. Further the period of delay to come to court of over two years in my view was inordinate and not sufficiently explained. Judgment was entered on 12/10/2017. The notice of Entry of Judgement was served to the insurer and the decree was obtained and issued on the 12/7/2018.

By letters written to the Deputy Registrar to assist trace the court file were written on the 14/2/2019. The Advocates filed their notice of appointment in April 2019. It has not been sufficiently explained why a judgment delivered over two years ago ought to be set aside.

17. I have considered the intended defence annexed to the application. It consists of general denials, including occurrence of the accident.

It is trite, that a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bonafide, and the court is satisfied that it is a sham.

In the case **Blue Sky EPZ Ltd Vs. Natlia Polyakora & Another (2007) e KLR**, the court held that

“-----in the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue”.

18. Considering the totality of circumstances hereto, the prejudice that would be occasioned to the respondents if the application is allowed would outweigh all other factors. The respondents have in their hands a decree, ready to execute, with expectation of getting fruits of their judgement, then that expectation is dashed by setting aside the judgment, for no good reasons. This would not be in the interest of justice. Justice is two way, and the interests to both parties must be considered.

19. In the circumstances, I proceed to **dismiss the application dated 1/4/2019** with costs.

The interim orders of stay of execution dated the 25/4/2019 are hereby discharged and vacated.

Delivered, signed and dated at Nakuru this 12th Day of March 2020.

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J.N. MULWA

JUDGE