



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 583 OF 2010

MULTIPLE HAULIERS (EA) LIMITEDPLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 18th September 2019 brought under *Article 50 (2) (g) of the Constitution of Kenya; Sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3 and 5 (1), Order 10 Rule 11, Order 12 Rule 7, Order 18 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules* and all other enabling provisions of the law.

2. The application was filed by the *Kenya Wildlife Service* (the applicant) which is the defendant in this case seeking the following prayers:

i. Spent.

ii. That this Honourable Court be pleased to set aside the ex parte proceedings and orders made in the suit.

iii. That this Honourable Court be pleased to grant leave to the defendant/applicant to amend its defence.

iv. That this Honourable Court be pleased to give directions as to the main hearing of the suit.

v. That costs of the application be in the cause.

3. The application is anchored on grounds stated on its face and the depositions made in the supporting affidavit sworn by *Ms. Doreen Mutunga*, the applicant's Ag. Corporation Secretary. In the grounds premising the motion and in the supporting affidavit, the applicant contends that upon being served with copies of the plaint and summons to enter appearance, the same were passed on to its insurers *Kenindia Assurance Company Limited* (the insurer) who in turn appointed and instructed the firm of *Jackson Omwenga & Company Advocates* to defend it in the suit.

4. The deponent further avers that the aforesaid firm of advocates entered appearance and filed a defence dated 4th July 2011; that by letter dated 27th January 2014, the insurer requested the applicant to provide it with a list of its witnesses and their witness statements; that it expected its insurer through its advocates to handle the matter to conclusion but sometime after June 2019, the insurer informed the applicant that it was withdrawing its defence of the suit; that on instructing the current advocates on record, they perused the court file and discovered that the previous advocates who had been instructed by the insurer ceased acting with leave of the court after their application dated 20th July 2017 was allowed.

5. In addition, the deponent deposed that the applicant had been informed by its advocates on record that the respondent filed an amended plaint seeking KShs.10,882,600 but the previous advocates failed to file an amended defence and that it was not clear how the amended plaint was filed and whether it was served on their erstwhile advocates.

6. It is the applicant's case that it only got to learn that hearing proceeded *ex parte* after instructing the current advocates; that it now faced the risk of having judgment entered against it in the sum of KShs.10,882,600 and that it was only fair and just to allow the application which in its view was filed timeously.

7. The application is opposed. *Clive Critchlow*, the respondent's General Manager Operations and Customer Relations swore a replying affidavit filed in court on 6th November 2019. He denied the applicant's claim that it recently got to learn about the exit of its previous advocates from the current advocates and annexed a letter dated 19th September 2017 which informed the applicant of that development and invited it to attend the court registry on 21st September 2017 to fix a mutually convenient hearing date; that the respondent has at all times

been served with hearing notices but it chose not to attend the court; that the amended plaint was filed by consent of the parties and the same was served on its previous advocates; that allowing the application will be highly prejudicial to the respondent since it has already closed its case and that in any case, the draft amended defence consists of mere denials and does not raise any triable issues.

It is the respondent's case that the application was filed in bad faith with the intention of delaying justice and ought to be dismissed with costs.

8. By consent of the parties, the application was canvassed through written submissions. The applicant filed its submissions on 6th December 2019 while those of the respondent were filed on 8th December 2019. In their submissions, counsel on record reiterated and buttressed the positions taken by their respective clients in support and in opposition to the motion.

9. I have carefully considered the application, the affidavits on record, the parties' rival submissions and the authorities cited. I have also perused the court record.

10. Before delving into the merits or otherwise of the application, I think it is important to outline a brief background against which the application was filed.

The court record shows that the respondent *Multiple Hauliers Limited* filed suit against the applicant on 29th November 2010 seeking special damages in the sum of KShs.5,264,600 for material damage occasioned to its motor vehicle registration number KAS 328N/ZC 4932 as a result of an accident attributed to the negligence of the applicant or its servant or agent. Upon service of summons, the applicant entered appearance on 11th January 2011 through its former advocates *Jackson Omwenga & Company Advocates*.

11. The record also reveals that the applicant did not thereafter file a statement of defence within the prescribed time whereupon the respondent applied for entry of interlocutory judgment which was duly entered on 14th February 2011.

Subsequently, the applicant filed an application seeking to set aside the default judgment. The application was compromised through a consent which was executed by the parties on 20th June 2011 and filed in court on 28th June 2011. In that consent, the parties agreed that the defendant's statement in defence dated 11th March 2011 be deemed as duly filed and served. The consent was however not brought to the attention of the court till 16th January 2019 when it was adopted as an order of the court.

12. The record also shows that after executing the aforesaid consent, the respondent sought for leave to amend its plaint which leave was granted on 5th June 2013 also by consent of the parties. The respondent then filed its amended plaint enhancing its claim from KShs.5,264,600 to KShs.10,882,600 together with costs of the suit and interest. The applicant did not file an amended defence to respond to the respondent's new claim.

13. On 18th September 2017, the applicant's erstwhile advocates sought and obtained leave to cease acting for the applicant. The suit was subsequently fixed for hearing on 12th February 2019 and as the applicant was personally served with a hearing notice but failed to attend the court, hearing proceeded *ex parte*. The plaintiff (respondent) called three witnesses and closed its case on the same date.

The case was pending filing of the respondent's written final submissions when the applicant appointed the current advocates who then filed the instant application.

14. Having set out the context in which the application was filed, let me now turn to a consideration of whether or not the applicant has demonstrated that it is deserving of the orders sought but before I do so, I wish to correct the impression created by the parties in their submissions that case proceeded for formal proof in the absence of the applicant. This is not the actual position because there was no interlocutory judgment by the date hearing took place as the default judgment entered on 14th February 2011 had already been set aside by consent of the parties.

15. It is however important to note that before case proceeded for hearing, the respondent had requested for interlocutory judgment for the applicant's failure to file an amended defence to the amended plaint which request had not been acted upon. Though it is not clear from the court record whether or not the applicant had been served with the amended plaint which is an issue I will address shortly, even assuming that the applicant had been so served but failed to file an amended defence, such a request could not have been entertained in any event since it was unprocedural and irregular considering that under *Order 8 Rule 6* of the *Civil Procedure Rules* (the Rules), where a party has pleaded to a pleading which is subsequently amended and served on him under *sub Rule (1)* but that party does not file an amended pleading in response within the 14 days prescribed under *Order 8 Rule (2)*, he is taken to rely on the original pleading in answer to the amended one. Since the applicant had already filed a statement of defence which was still on record at the time the request was made considering that the defence had not been struck out, default judgment could not have been entered in the circumstances.

16. I therefore agree with the position taken by *Mabeya J* in *Armstrong Freddie Kasuku V Standard Chartered Bank Kenya Limited*, [2013] eKLR when he stated as follows:

"It is quite explicit that where a party fails to amend a pleading after an order of amendment has been given by the court, the order ceases to have effect and the party is taken to rely on the original pleading. ... For the foregoing reasons, I hold the view that it was wrong for the plaintiff's advocate to request for judgment in default of the defence yet the original defence was still on record and had not been struck out."

17. That said, I find that the only issue for my determination in this application is whether this court should exercise its discretion in favour

of the applicant by setting aside the *ex parte* proceedings.

18. The applicant has argued in its submissions that the proceedings were in fact a nullity and ought to be set aside as a matter of right as they were based on an amended plaintiff which was not served on it. For this proposition, the applicant relied on the authority of **Patrick Omondi Opiyo T/A Dallas Pub V Shaban Keah & Another, [2018] eKLR** where the Court of Appeal held that failure to serve an amended plaintiff on a defendant rendered *ex parte* proceedings or judgment predicated on the amended plaintiff a nullity and that the same ought to be set aside *ex debito justitiae*.

19. The respondent strongly denied that claim and maintained that the amendment to the plaintiff was made by consent of the parties.

20. I have perused the court record. I note that the Notice of Motion dated 26th October 2012 which sought leave to allow the respondent to amend its plaintiff in terms of the draft amended plaintiff annexed to the application was allowed by consent of the parties recorded on 5th June 2013. The draft amended plaintiff is the pleading that is on record. There is nothing to show that another amended plaintiff was subsequently filed.

21. The purpose of service of pleadings is to notify the opposite party of the filing or existence of a suit or other pleadings and since the applicant was well aware of the court order which allowed the respondent to amend its plaintiff in terms of the draft annexed to the application which both parties compromised, the applicant cannot now be heard to say that it was not served with the amended plaintiff. That argument falls flat on its face because clearly, in the circumstances of this case, service of the amended plaintiff was completely unnecessary.

The decision in **Patrick Omondi Opiyo t/a Dallas Pub V Shaban Keah & Another [Supra]** is therefore inapplicable in this case.

22. Having said that, I now wish to consider whether the applicant is deserving of the orders sought. At the outset, I note that a majority of the authorities cited by the parties involved the setting aside of *ex parte* or interlocutory judgments.

Though what is sought to be set aside here is different, it is my considered view that the principles espoused in those authorities also apply to cases such as the present one where what is sought to be set aside are *ex parte* proceedings.

23. There is a plethora of authorities enunciating the principles which guide courts in exercising its discretion in deciding whether or not to set aside *ex parte* or default judgments. The Court of Appeal in **Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited V Petra Development Services Limited, [2016] eKLR** while referring to its earlier decision in **Pithon Waweru Maina V Thuku Mugiria, [1983] eKLR** enumerated those principles as follows:

“(a) Firstly, there are no limits or restrictions on the judge's discretion 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. Patel v EA Cargo Handling Services Ltd (1974) EA 75 at 76 C and E.

(b) Secondly, this discretion is intended so 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 course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48...

Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel (1966) EA 547, 555 F). The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7).”

24. Applying the above principles to the present application, given the material placed before me, it is clear that the applicant was aware as from 19th September 2017 that its previous advocates *M/S Jackson Omwenga & Company Advocates* had ceased acting on their behalf since it was notified of this fact through the respondent's letter of even date. The applicant has not denied having received the said letter. There is also evidence in the court record confirming that thereafter, the respondent served the applicant with two hearing notices before hearing proceeded *ex parte* as evidenced by the affidavits of service sworn by *Joseph Opilo Owili* on 31st August 2018 and 18th January 2019 respectively.

25. In my view, the applicant has displayed lack of diligence and indolence in the manner in which it has conducted itself in this matter. I say so because despite being aware that its erstwhile advocates had been discharged from the proceedings, it failed to take steps to appoint another firm of advocates to either file an amended defence in response to the respondent's amended plaintiff or to attend court on the dates suit was fixed for hearing.

26. Be that as it may, I am alive to the fact that this is a court of justice and as often said, justice is a double edged sword. It cuts both ways. Substantive justice requires that as far as possible, cases should be determined on merit so that where hearing has proceeded *ex parte*, a defendant who has demonstrated interest to defend the suit should be given an opportunity to do so unless doing so would cause irredeemable damage or prejudice to the plaintiff.

27. In applications of this nature, the court is called upon to weigh the interests of both parties and consider the prejudice each party is

likely to suffer should the application be decided one way or the other. In this case, if the application is dismissed, the applicant would be thrown out of the seat of justice since the case will be determined without it having participated in the hearing although should that happen, the applicant would only have itself to blame since it was availed of the opportunity to participate in the hearing which it squandered by ignoring hearing notices.

However, as correctly stated by the Court of Appeal in *Pithon Waweru Maina V Thuku Mugiria, [supra]* as adopted in *Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited V Petra Development Services Limited, [supra]* denying a litigant a hearing should be the last resort of a court.

28. On the other hand, if the application is allowed, the respondent will no doubt suffer prejudice in terms of inconvenience and further delay in the determination of its suit but in my view, this is a prejudice which can adequately be compensated by an award of costs.

29. Given the colossal amount claimed by the respondent in its amended plaint which the applicant now wishes to respond to in its intended amended defence, I think that in the wider interests of justice, the application should be allowed. I consequently allow the application in terms of prayers (ii) and (iii). The applicant will file and serve its amended defence within 14 days of today's date.

30. Due to its lack of diligence and in order to compensate the respondent for the inconvenience of having to start its case all over again, the applicant is condemned to pay the respondent thrown away costs in the sum of KShs.40,000 to be paid within 14 days of today's date.

31. It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 30th day of April 2020 through electronic mail with the written consent of the parties in compliance with the practice directions issued by the Honourable Chief Justice aimed at mitigating the spread of the COVID-19 pandemic.

C. W. GITHUA

JUDGE