



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 190 OF 2016**

**ELIJAH ADUL.....PLAINTIFF**

**VERSUS**

**PATRICK LANG'AT .....1<sup>ST</sup>DEFENDANT**

**NATION MEDIA GROUP.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants' Notice of Motion application dated and filed on 19<sup>th</sup> July 2019 sought setting aside of the interlocutory judgment that was entered against them on 17<sup>th</sup> March 2017 and any consequential orders and that the draft defence annexed thereto be deemed as having been properly filed and served upon payment of the requisite court fees.
2. The said application was supported by the Affidavit of the 2<sup>nd</sup> Defendant's Legal Officer, Sekou Owino. The same was sworn on 19<sup>th</sup> July 2019 on behalf of both Defendants herein. He stated that Summons to Enter Appearance were served upon the 2<sup>nd</sup> Defendant on 25<sup>th</sup> July 2019 whereupon they embarked to ascertain who the author of the Article was to enable them file a defence and comply with the provisions of Order 11(sic). He averred that he forgot the matter when he went on leave only to see the same on the cause list of 5<sup>th</sup> February 2019.
3. He pointed out that their advocates had informed them that they had a good defence which had raised triable issues and that if the matter proceeded on formal proof, they would have lost a chance to defend themselves. He indicated that the Defendants were willing to abide by any conditions that the court would deem fit to grant.
- 4.. It was their contention that the present application had been filed without undue delay, in good faith and with full disclosure and thus urged this court to grant the same.
5. In opposition to the said application, on 25<sup>th</sup> June 2019, Arnold Magina, advocate, swore a Replying Affidavit on behalf of the Plaintiff herein. He pointed out that the Summons to Enter Appearance, Notice of Entry of Judgment and Hearing Notice of formal proof were duly served upon the aforementioned Sekou Owino over a period of three (3) years.
6. It was his averment that the present application was an abuse of the court process specifically calculated to further delay the fair trial of the matter herein as it was served on the eve of the date of formal proof. He therefore asked this court to dismiss the said application with costs to him as it lacked merit.
7. In support of their case, the Defendants relied on the case of **Patel vs EA Cargo Handling Services (1974)EA 75** amongst other cases where the common thread was that the main concern of the court is to do justice to parties and that it will not impose conditions on itself to fetter its wide discretion. Further holdings in the cases were to the effect that a court will not set aside interlocutory judgment unless it had been shown that the defence had merit and that such setting aside would be granted on terms that were deemed to be just.
8. They submitted that they had pleaded fair comment in their draft defence which could only be demonstrated if they were given an opportunity to file their Statement of Defence and witness statements. They further averred that they were ready to pay thrown away costs to compensate the Plaintiff for any inconveniences caused.
9. On his part, the Plaintiff submitted that the Defendants had not invoked the enabling provision to enable the court grant them the orders they had sought. In this regard, they referred this court to the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commissions & 6 Others [2013] eKLR** where it was held that Article 159 (2)(d) of the Constitution of Kenya, 2010 and the oxygen principles were not meant to aid in the overthrow of rules of procedure because things had to be done to give assurance of outcomes with a measure of confidence, certainty and clarity.

10. He asserted that the Defendants had not offered a plausible reason to explain why no defence was filed within the prescribed time. In this regard, he relied on the case of **Prime Bank Limited vs Paul Otieno Nyamodi [2014] eKLR** where the said consideration of failure to advance a plausible reason was made.

11. Notably, under Order 10 Rule 11 of the Civil Procedure Rules, 2010, the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides as follows:-

**“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”**

12. Section 95 of the Civil Procedure Rules gives the court power to enlarge time where any period has been fixed or prescribed for doing any act. It states that:-

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

13. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”**

14. It was therefore clear from the aforesaid provisions that the court has power to set aside the interlocutory judgment and allow the Defendants herein to file a suitable defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been advanced to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time causing delay in the conclusion of his case especially if the matter had already been fixed for formal proof such as was in this case.

15. The explanation that was advanced by the Defendants deponent fell short of what would have been expected in a case for the setting aside of an interlocutory judgment. The said Legal Officer explained the cause of the delay for not filing a defence within the prescribed time when he was served the Summons to Enter Appearance but failed to explain why the present application was not filed immediately the Defendants were served with the Notice of Entry of Judgement on 6<sup>th</sup> March 2017. Notably, the present application was filed so close to the date of the formal proof that had been slated for 16<sup>th</sup> September 2019 leading this court to conclude that the same was intended to scuttle the hearing.

16. Having considered the circumstances prior to the filing of the present application, this court came to the firm conclusion that the handling of this matter by the said Legal Officer, left a lot to be desired. There was evidently lack of diligence on his part. He ought to have exercised due care and diligence to give their advocates proper instructions and in good time.

17. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

18. Further in the case of **Prime Bank Limited vs Paul Otieno Nyamodi** (Supra), it was held that it did not follow that just because a mistake had been made, a party should suffer the penalty of not having his case heard on merit.

19. A court should not assist a party who had **“deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”** as was held in the case of **Shah vs Mbogo** (Supra). However, having had due regard to the cases of **John Peter Kiria & Another vs Pauline Kagwiria [2013] eKLR** and **Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR** amongst several other cases where their gist was that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence and that at all possible times, cases should be heard on merit, this court was persuaded to find and hold that despite the very poor handling of this matter by the 2<sup>nd</sup> Defendant's Legal Officer, it was only fair and just to allow the Defendants to exercise their fundamental right to be heard as enshrined in Article 50 (1) of the Constitution of Kenya.

20. The fact that the Defendants filed the present application in an attempt to be given an opportunity to defend the case herein persuaded this court to find and hold that it would not be in the best interests of justice to deny them an opportunity to be heard. The prejudice that the Plaintiff would suffer for the delay in the conclusion of his case by having it heard on merit was one that could be compensated by way of costs.

21. Notably, this court was not persuaded that their application should be dismissed for having invoked the wrong provisions of the law as had been argued by the Plaintiff herein. Indeed, Order 2 Rule 14 of the Civil Procedure Rules stipulates that:-

**“No technical objection may be raised to any pleading on the ground of any want of form.”**

22. Further, Order 51 Rule 10 of the Civil Procedure Rules provides that:-

**“1. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**2. No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

23. This court took the considered view that failure to invoke the correct provision in an application was a technicality that could be cured by Article 159(2)(d) of the Constitution of Kenya that mandates courts to administer justice without undue regard to technicalities. Citing a provision was not a rule of procedure and consequently, the case of Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commissions & 6 Others (Supra) that was relied upon by the Plaintiff was clearly distinguishable from the facts of this case.

#### **DISPOSITION**

24. For the reasons foregoing, the upshot of this court’s decision was that the Defendants’ Notice of Motion application dated and filed on 19<sup>th</sup> July 2019 was allowed in the following terms:-

**1. THAT the interlocutory judgment that was entered against the Defendant on 17<sup>th</sup> March 2017 for failure to file a defence and all consequential orders therein be and are hereby set aside.**

**2. THAT the Defendants are hereby directed to file and serve their Statement of Defence and all requisite documentation within twenty one (21) days from the date of this Ruling.**

**3. THAT all subsequent pleadings shall be filed in accordance with Order 7 of Civil Procedure Rules.**

**4. THAT the Defendants shall pay to the Plaintiff thrown away costs in the sum of Kshs 100,000/= within fourteen (14) days from the date of this Ruling.**

**5. THAT in the event the Defendants shall not have paid to the Plaintiff the thrown away costs ordered in Paragraph 24 (4) hereinabove and shall not have filed and served their Statement of Defence and requisite documentation as aforesaid, the Plaintiff shall be at liberty to apply for striking out of the Statement of Defence that shall have been filed and/or where not filed and served, to proceed with formal proof as against the Defendants herein.**

**6. Costs of the application will be in the cause.**

25. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of April 2020**

**J. KAMAU**

**JUDGE**