



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 265 OF 2016

JACKLINE WANJIRA NJERU.....PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....1ST DEFENDANT

METROPOL CREDIT REFERENCE BUREAU.....2ND DEFENDANT

RULING

1. The 2nd Defendant's Notice of Motion application dated and filed on 16th May 2019 sought setting aside of the interlocutory judgment that was entered against it on 5th February 2018 and any consequential orders and that time be enlarged for it to file a defence within seven (7) days of the date of the order.
2. The said application was supported by the Affidavit of its advocate, Job Nyasimi Momanyi, which was sworn on 16th May 2019. He stated that it filed a Notice of Motion application seeking to set aside the said interlocutory judgment but the Ruling was delivered on 20th July 2017 without notice to it. He explained that that was the reason why the 2nd Defendant did not file its defence within twenty one (21) days as had been directed in the said Ruling.
3. He admitted that although they were served with a Hearing Notice for 14th February 2019, they inadvertently failed to diarise the matter in their diary and consequently, he failed to attend court on the said date.
4. It was its contention that judgment was irregularly entered against it and that because the Plaintiff would not suffer any prejudice, it was thus in the interest of justice that the 2nd Defendant be allowed to file its defence as the same raised triable issues.
5. In opposition to the said application, on 16th July 2019, the Plaintiff filed a Notice of Preliminary Objection of even date on the ground that the said application was *res judicata* and hence was frivolous, vexatious and an abuse of the court process, She sought that the same be dismissed with costs to her.
6. The court noted the 2nd Defendant's submissions that 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.
7. It placed reliance on the cases of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** and **James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] eKLR** where the common thread was that a court could only do an act where it had jurisdiction to do so and that such jurisdiction was only derived from the Constitution of Kenya and or other written law. It was its argument that the order that was issued on 5th February 2018 was irregular as it was made without any formal application.
8. The 2nd Defendant had also submitted that under Section 95 of the Civil Procedure Rules, 2010, the court has power to enlarge time where any period has been fixed or prescribed for doing any act. It referred this court to the case of **Prime Bank Limited vs Paul Otieno Nyamodi [2014] eKLR** where 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.
9. The court carefully considered the 2nd Defendant's application for the setting aside of the interlocutory judgment and noted that Serгон J dealt with a similar issue in his Ruling of 20th July 2017. He rendered himself as follows:-

i. The interlocutory judgment entered herein against the 2nd defendant in default of filing a memorandum of appearance and or defence and all consequential orders and actions based on the said interlocutory judgment be and are hereby set aside.

ii. The Applicant is granted leave to file its defence within 21 days of this order.

iii. Costs of the application to abide the outcome of this suit.

10. There was no indication on the court file that the orders of the said learned judge had been set aside and/or vacated whether by itself and/or the Court of Appeal. The orders therefore stayed in place. However, interlocutory judgment was entered on 5th February 2018 after the 2nd Defendant failed to file a defence as had been ordered and the matter set down for formal proof.

11. The court noted although the fact that the orders it had sought in its application dated 5th December 2016 were similar to the prayers it had sought herein, the circumstances under which the interlocutory judgment was re-entered on 5th February 2018 were different from the circumstances under which the interlocutory judgment was entered against it on 17th November 2016.

12. This court read all the submissions by the parties as regards the doctrine of *res judicata* but for the aforesaid reason, came to the conclusion that the application could not therefore have been said to have been *res judicata* as had been ably submitted by the Plaintiff and objected to by the 2nd Defendant.

13. It did, however, appear that the 2nd Defendant was not present when the Ruling of Serگون J was read on 20th July 2017. Only the Plaintiff and the 1st Defendant had been represented at the time of its delivery. Njuguna J directed that the matter be mentioned on 5th June 2017 before Serگون J but it appeared that the matter was not listed. The matter was subsequently listed for mention on 24th July 2017. Evidently, the Ruling was delivered on 20th July 2017 and the matter was not listed for mention on 24th July 2017.

14. A perusal of the court record shows that proceedings were not consistent with the dates when the matter was to come up in court. There was need to give the 2nd Defendant the benefit of doubt despite there having been evidence of a lack of diligence on its advocates' part.

15. In the Ruling of Serگون J, the advocates appear to have misplaced their file and did not therefore file a defence within the prescribed time. They appear not to have diligently followed up the matter and despite been served with a Hearing Notice on 28th January 2019, they did not attend court. On 14th February 2019, they failed to attend court after they inadvertently failed to diarise the said date.

16. The handling of this matter by the 2nd Defendant's advocates left a lot to be desired. There was evidently lack of diligence on their part. They ought to have exercised due care and diligence to follow up the matter as failure to do so greatly prejudiced the 2nd Defendant herein.

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. 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 has 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 2nd Defendant's advocates, it was best to allow the 2nd Defendant its fundamental right to be heard as enshrined in Article 50 (1) of the Constitution of Kenya, 2010.

19. Indeed, courts should exercise discretion but the same should not be exercised to 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 [1967] EA 166** at page 123B.

20. The Plaintiff's assertion that she had already testified and had in fact filed her Written Submissions and was awaiting delivery of judgment herein was not a sufficient reason to deny the 2nd Defendant an opportunity to be heard. The prejudice that she would suffer if the case was heard on merit was one that could be compensated by way of costs.

DISPOSITION

21. For the reasons foregoing, the upshot of this court's Ruling was that the 2nd Defendant's Notice of Motion application dated and filed on 16th May 2019 was allowed in the following terms:-

1. THAT the interlocutory judgment that was entered against the 2nd Defendant for failure to file a defence on 5th February 2018 and all consequential orders be and are hereby set aside.

2. THAT the 2nd Defendant is hereby directed to file and serve its Statement of Defence 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 2nd Defendant shall pay to the Plaintiff throw 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 2nd Defendant shall not have paid to the Plaintiff the thrown away costs ordered in Paragraph 21 (4) hereinabove and shall not have filed and served its Statements of Defence 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 2nd Defendant herein.

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

22. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of April 2020

J. KAMAU

JUDGE