



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 7 OF 2019**

**IN THE MATTER OF THE ADVOCATES ACT**

**PACIFICA BONARERI NYAKINA .....PLAINTIFF/RESPONDENT**

**VERSUS**

**ROSE OBAGA T/A OBAGA & CO. ADVOCATES.....DEFENDANT/ RESPONDENT**

**RULING**

1. This ruling is in respect of the application dated 14<sup>th</sup> July 2020. It is expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The orders sought are;

- a. Spent;
- b. Spent;
- c. That the court be pleased to declare the proceedings herein and subsequent judgment herein as improper, irregular, null and void *ab initio*;
- d. That this honorable court may be pleased to set aside the ex-parte judgment and decree herein and all subsequent proceedings herein proceed to dismiss the originating summons herein or make such orders as it may deem fit; and
- e. That the costs of this application be provided for.

2. The brief background of the application is that the plaintiff herein filed Originating Summons claiming that the applicant had received a decretal sum of Kshs. 3,496,071.14 while acting on her behalf in Kisii Chief Magistrate's Court Case Number 752 of 2005. She claimed that the applicant had refused to account for the monies which had been paid into her account, despite numerous demands for her to do so, hence the Originating Summons to be allowed to execute against her firm.

3. When the applicant failed to enter appearance or file a defence, the plaintiff filed a request for judgment under Order 10 Rule 4 of the Civil Procedure Rules. On 10<sup>th</sup> December 2019, the Deputy Registrar entered interlocutory judgment against the applicant for Kshs. 3,496,071.14 pending formal proof.

4. The applicant now challenges the interlocutory judgment on the grounds set out at the foot of her application and the affidavit sworn in support of the application. Essentially, the applicant wants the interlocutory judgment set aside and the Originating Summons dismissed for the reason that the procedure laid out in Order 52 Rule 10 and the timelines set out in Order 37 Rule 16 & 18 of the Civil Procedure Rules were not adhered to. The applicant also claims that she was not served with the Originating Summons and further contends that the Deputy Registrar lacked jurisdiction to make the orders she made. She also claims that she had a good defence to the plaintiff's case but was denied the chance to present it before court.

5. The plaintiff did not file a response to the application dated 14<sup>th</sup> July 2020.

**ANALYSIS AND DETERMINATION**

6. The Originating Summons by the plaintiff was brought pursuant to **Order 52 Rule 4(1) & (2)** which provides;

*4(1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—*

(a) the delivery by the advocate of a cash account;

(b) the payment or delivery up by the advocate of money or securities;

(c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;

(d) the payment into or lodging in court of any such money or securities;

(e) the delivery up of papers and documents to which the client is entitled.

(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.

7. The procedure for conducting proceedings under **Order 52 Rule 4** is a simplified and speedy process set out in **Order 52 Rule 10** thus;

10(1) An originating summons under this Order shall be made returnable for a fixed date before a judge in chambers and, unless otherwise directed, shall be served on all parties at least seven clear days before the return date.

(2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.

8. The applicant rightly states that under the foregoing provisions, there is no need to enter appearance or file a response. The Originating Summons acts as both pleadings and summons to enter appearance. The date on which the application is returnable to the judge should be indicated on the face of the application which should be served on the respondent 7 days before the return date.

9. This legal position is fortified by the decision of the Court of Appeal in **Harit Sheth t/a Harit Sheth Advocate v K. H. Osmond t/a K. H. Osmond Advocate CIVIL APPEAL NO. 276 OF 2001 [2011] eKLR** where the Court held;

*Order 5 rule 1(2) has no application to proceedings brought by Originating Summons. Order 37 of the Civil Procedure Rules sets out the procedure for bringing suit by Originating Summons. The Rules Committee has in form 26 provided standard forms to guide litigants on how to draw an originating summons and such summons is generally drawn as a chamber summons. Although it is a suit by definition, no separate summons to enter appearance is needed. The originating summons originates the suit and is at the same time a summons to enter appearance. True, the appellant did not, in the originating summons invite the respondent to enter appearance in terms of the standard form but that, is not a fundamental omission, the respondent having responded to the originating summons by timeously filing grounds of opposition to it. Besides, under order 52 rule 10, no appearance needed to be entered by the defendant on service upon him of the originating summons filed under Order 52 rule 7”.*

10. The record shows that once the Originating Summons was filed, it was placed before the court for directions on 11<sup>th</sup> November 2019. On that day, the court directed that the application be heard *inter partes* on 19<sup>th</sup> November 2019 but the matter did not proceed as scheduled. Seeing that the respondent had not entered appearance or filed a response to the application, the plaintiff filed the request for judgment.

11. From the provisions of Order 52 Rule 10 which I have reproduced above, the respondent was not required to file a response or enter appearance. It is my considered view that where the respondent is duly served but fails to attend court on the return date, the matter may proceed *ex parte* as opposed to invoking the powers of the Deputy Registrar under Order 49 Rule 2 (a). That said, the court is bestowed with unfettered discretion to set aside a judgment entered in default of appearance in **Order 10 Rule 11**, which provides;

11. *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. The principles for setting aside a default judgment were spelt out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** thus;

*“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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”*

13. More recently, the Court of Appeal in **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another Civil Appeal No. 6 of 2015 [2016] eKLR** held;

*From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the 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 be; the length of time that has elapsed since the default judgment was*

*entered; whether 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 other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).*

*In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.*

14. The applicant claims that she was not served with the Originating Summons and that she had to obtain a copy of the same from the court. The respondent did not file a response to the application but there is on record an affidavit of service sworn on 7<sup>th</sup> October 2019 by one Francis Ongati. In that affidavit the process server deposed that he served the Originating Summons at the firm's office at their branch in Kisii as well as Nairobi on 5<sup>th</sup> September 2019 and on 17<sup>th</sup> September 2019 respectively. Unless the process server is cross examined on the contents of his affidavit, the issue of service remains a case of, "he said, she said."

15. Nevertheless, I am inclined to allow the application for the reason that the applicant filed her application timeously given the difficulties she experienced due to the current measures restricting court operations as a result of the COVID-19 pandemic.

16. Further, the applicant has raised a good defence which raises triable issues and she should be allowed to defend the suit. She contends that there never existed an advocate-client relationship between her and the plaintiff and that the plaintiff did not have the legal capacity to engage an advocate at the material time. She is also of the view that the Originating Summons is fatally defective for non compliance with the mandatory provisions of the law and that it fails to disclose a cause of action.

17. For these reasons I allow the application dated 14<sup>th</sup> July 2020 in the following terms;

- a. The *ex parte* judgment entered on 10<sup>th</sup> December 2019 is hereby set aside;
- b. The costs of this application shall be in the cause.

**Dated and Delivered at Kisii this 23rd day of September, 2020.**

**A. K NDUNG'U**

**JUDGE**