



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 354 OF 2007**

**DATALOGIX LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**EUNICE WANGUI MBUGUA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF POLICE ..... 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 25<sup>th</sup> October 2018 in which the 3<sup>rd</sup> defendant, the Hon. Attorney General of the Republic of Kenya seeks the setting aside of an interlocutory judgment entered against him on 21<sup>st</sup> May 2012 for failure to file a memorandum of appearance and defence. The 3<sup>rd</sup> defendant (hereinafter the applicant) also prays for leave to file a defence to the plaintiff's amended plaint and that costs of the application be provided for.
2. The background against which the application was filed as can be ascertained from the court record is that initially, the plaintiffs had sued Kenya Pipeline Company Limited, The Commissioner of Police and the 3<sup>rd</sup> defendant for special, general, aggravated and exemplary damages for unlawful arrest, false imprisonment, malicious prosecution and defamation together with costs and interest at court rates from 20<sup>th</sup> April 2006 until payment in full.
3. It is apparent that after the defendants were served with the plaint and summons to enter appearance, only the 1<sup>st</sup> defendant entered appearance. Consequently, the plaintiffs filed a chamber summons dated 16<sup>th</sup> January 2012 seeking court's leave to enter interlocutory judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for failure to enter appearance or to file their statements of defence.
4. The application was scheduled for hearing on 1<sup>st</sup> March 2012. On that date by consent of the parties, the 2<sup>nd</sup> defendant was struck out of the suit with no orders as to costs. Hearing of the application with respect to the orders sought against the 3<sup>rd</sup> defendant was adjourned to 21<sup>st</sup> May 2012. On that date, counsel for the 3<sup>rd</sup> respondent did not attend the court and the application was allowed with the result that interlocutory judgment was entered against the 3<sup>rd</sup> defendant.
5. The court record further reveals that on 9<sup>th</sup> June 2015, the plaintiffs were allowed to withdraw their suit against the 1<sup>st</sup> defendant. In the premises, as matters now stand, this suit is between the plaintiffs and the 3<sup>rd</sup> defendant.
6. Having set out the context in which the application was filed, I now turn to address the merits or otherwise of the application. The application is anchored on grounds stated on its face and is supported by an affidavit sworn by *Mr. Joseph Ngumbi*, a senior state counsel in the office of the 3<sup>rd</sup> defendant. In the few grounds supporting the motion and the brief depositions made in the supporting affidavit, the 3<sup>rd</sup> defendant has urged this court to find that his failure to enter appearance or file a defence to the plaintiffs' claim was purely unintentional and ought to be excused. The main reason advanced for the applicant's failure to file a defence within the stipulated time is that the original office file went missing and it was only reconstructed in January 2018 long after interlocutory judgment had been entered; that considering the colossal sums being claimed in the suit as can be seen from the amended plaint, it was in the interest of justice to allow the 3<sup>rd</sup> defendant to defend the suit and that in any event, if the application was allowed, the plaintiffs are not likely to suffer any prejudice which cannot be compensated by an award of costs.
7. The application is opposed. There is a replying affidavit sworn by *Mr. John Njaaga Gitau* on behalf of the plaintiffs. The deponent denied the applicant's claim that failure to enter appearance or to file a defence was occasioned by the disappearance of the applicant's office

file. Mr. Gitau averred that the applicant was well aware of the plaintiffs' application to have interlocutory judgment entered against his office as he was represented when the application dated 16<sup>th</sup> January 2012 was first fixed for hearing and that thereafter, the applicant snubbed the plaintiffs' proposal inviting him to file a defence so that the application could be withdrawn to pave way for hearing of the suit on merit; that the applicant is not deserving of the orders sought as he has failed to give a candid and reasonable explanation for failure to enter appearance or file a defence which can be exemplified by his failure to annex a draft of his intended defence; that this is an old case and the plaintiffs will suffer great prejudice if the application was allowed.

8. The application was argued orally before me on 29<sup>th</sup> January 2019. Learned counsel *Mr. Ngumbi* represented the applicant while *Mr. Wagara* appeared for the plaintiffs (respondents). In their submissions in support and in opposition to the motion, learned counsel on record expounded on the depositions made in the affidavits filed by their respective clients. *Mr. Wagara* in his submissions reiterated that though the plaintiffs were opposed to the motion, if the court was inclined to allow the application, they should be awarded thrown away costs in the sum of KShs.50,000. This prayer was not opposed by *Mr. Ngumbi* in his submissions.

9. I have carefully considered the application, the affidavits on record and the oral submissions made by counsel on record for the parties. I have also read the court record.

The court's jurisdiction to set aside or vary interlocutory judgment and any consequential orders is donated by *Order 10 Rule 11* of the *Civil Procedure Rules*. This Rule gives the court wide and unfettered discretion to set aside default judgment or any consequential decree or order on terms it considers just. However, the court's discretion must be exercised judiciously taking into account the facts and circumstances of each case as well as the wider interests of justice.

10. Some of the factors which should guide the court in the exercise of its aforesaid discretion is the explanation given for failure to enter appearance or file a defence within time; the length of time that has passed since the interlocutory judgment was entered; whether the intended defence raises triable issues and the prejudice either of the parties was likely to suffer if the application was allowed or dismissed- ***See: Patel V EA Cargo Handling Services Limited, [1974] EA 75 and Mbogo & Another V Shah, [1968] EA 93.***

11. It is important to point out at the outset that as a general rule, if there is evidence to prove that a default judgment was entered before the defendant was served with summons to enter appearance, the judgment ought to be set aside as a matter of right. The above factors only apply to assist the court in the exercise of its discretion in deciding whether or not to set aside default judgment where there is evidence that the defendant was properly served with summons to enter appearance but failed to do so within the prescribed time. Another important consideration for the court in this scenario is whether it has been demonstrated that the intended defence raises triable issues.

12. The above principles are encapsulated in the well established principle that the exercise of the court's discretion under *Order 10 Rule 11* of the *Civil Procedure Rules* is aimed at avoiding injustice or hardship resulting from accident, inadvertence or excusable error but it is not meant to assist a defendant who has deliberately sought to obstruct or derail the course of justice.

13. Turning to the instant case, it is not disputed that the 3<sup>rd</sup> defendant was properly served with summons to enter appearance but the applicant nevertheless failed to do so or file a defence within the stipulated time. As stated earlier, the reason given for the applicant's failure to enter appearance or file a defence on time is that the original office file went missing and was only reconstructed in January 2018.

14. Whereas it may be true that failure to enter appearance or to file a defence within time was caused by the unavailability of the applicant's office file, the applicant has not explained why it took his office about six years to reconstruct a single file and why the instant application could not have been made earlier. As correctly submitted by *Mr. Wagara*, it is evident from the court record that the applicant was aware of the plaintiff's intention to have interlocutory judgment entered against him as far back as 1<sup>st</sup> march 2012 when the application for leave to enter interlocutory judgment was scheduled for hearing. Since that time, it appears that the applicant's office went to sleep as far as this matter is concerned and only woke up on 11<sup>th</sup> October 2018 when learned state counsel *Mr. Ngumbi* attended the court.

I say so because since March 2012, nothing stopped the applicant from seeking to reconstruct his file from the records available in the court file. It has also not escaped my notice that no explanation has been given why the applicant had to wait till January 2018 to reconstruct his file and that even after reconstructing the file, it took the applicant over one year to file the instant application. Again, no explanation has been given for this delay.

15. Be that as it may, the court record shows that although interlocutory judgment was entered about six years ago, the applicant cannot be blamed for the prolonged delay in the prosecution of the plaintiffs claim by way of formal proof. The record shows that for some time, the parties were exploring out of court settlement and it is not until 25<sup>th</sup> September 2017 when the suit was certified ready for hearing after the plaintiffs complied with all pretrial requirements.

16. In view of the foregoing, though there is no doubt that the applicant has demonstrated lack of diligence and seriousness in the manner in which his office has handled this matter, I find that the plaintiffs have also not been keen or proactive in the prosecution of their case. They took a period of over five years to set down the suit for formal proof. Having taken into account all the material placed before me including the court record, it is my finding that there is nothing to suggest that the instant application has been made in bad faith with the aim of obstructing or delaying the course of justice.

17. I must admit that given the age of this case and the time that has passed since the interlocutory judgment was entered and considering the nature of the prayers sought by the applicant and the consequences of either granting or dismissing the application, I have agonized over how to determine the application in a manner that best satisfies the ends of justice and does not cause prejudice to either of the parties. I say so because I am alive to the principle that courts exist to serve substantive justice to all parties to disputes before it. Both parties deserve justice. Substantive justice as contemplated by *Section 159* of the Constitution requires that wherever possible, parties to a dispute should be given an opportunity to be heard before their dispute is determined on merit. On the other hand, parties who have instituted suits and are ready to prosecute the same have a constitutional right to have their claims determined expeditiously.

18. I have considered the pleadings in the amended plaint. I find that besides the claim for general, exemplary and aggravated damages for unlawful arrest, false imprisonment, malicious prosecution and defamation, the plaintiffs are claiming from the 3<sup>rd</sup> defendant a whopping KShs.267,518,112 in special damages. Needless to state, the special damages are pegged on the claims for false imprisonment, malicious prosecution and defamation.

19. If the application is dismissed, the applicant will be condemned unheard on liability for the aforesaid claims. Such an action will clearly undermine the dictates of substantive justice and will violate the applicants valued and constitutional right to be heard on the dispute before the same is conclusively determined. The effect of such a decision would be to completely shut out the applicant from the doors of justice as far as the determination on liability for the aforesaid claims is concerned.

20. Although in civil proceedings the Hon. Attorney General is a party just like any other party in a suit and should be treated as such, it is important to remember that the Hon. Attorney General is the custodian of public interest and any judgments passed against his office which carry financial obligations are settled from public coffers. In the circumstances, in applications such as the one under consideration, the court should carefully scrutinize the pleadings and find out whether there is any public interest disclosed therein and if there is, such public interest should be weighed against the interests of the respondents to enable the court reach decision which is just and fair to all the parties. I must hasten to add that each case will have to be decided on its own facts and circumstances.

21. In this case, as stated earlier, though interlocutory judgment was entered on 21<sup>st</sup> May 2012, the suit was certified ready for hearing on 25<sup>th</sup> September 2017. It was set down for hearing on 22<sup>nd</sup> February 2018 when it was adjourned at the instance of the applicant and a few days later, the current application was filed. In the premises, considering the history of this case and the fact that formal proof hearing had not even taken off, it is my finding that allowing the application will not occasion the respondents any prejudice that cannot be compensated by an award of costs.

22. For all the foregoing reasons, I am persuaded to find that the interests of justice require that the application be allowed. Accordingly, I find that the Notice of Motion dated 25<sup>th</sup> October 2018 is merited and it is hereby allowed. In order to fast track hearing of the suit given its age, the application is allowed on the following terms:

- (i) The applicant will file and serve its defence to the amended plaint within 14 days of today's date.
- (ii) The plaintiffs will be at liberty to file and serve a reply to the defence within 14 days of service of the defence.
- (iii) The parties shall comply with all pre-trial requirements within 30 days of expiry of the timelines set out above.
- (iv) In default of compliance with condition (i) above, the orders setting aside the interlocutory judgment entered on 1<sup>st</sup> March 2007 will stand vacated.

23. On costs, the plaintiffs are awarded thrown away costs in the sum of KShs.50,000 since the proposal to this effect was not opposed by the applicant. The amount shall be paid within the next 30 days.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> day of March, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ngumbi for the 3<sup>rd</sup> defendant

No appearance for the plaintiffs

Mr. Salach: Court Assistant