



**Gachoni Enterprise Ltd v Nyaga & another (Environment & Land Case 561 of 2015) [2023] KEELC 19961 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19961 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 561 OF 2015  
AA OMOLLO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**GACHONI ENTERPRISE LTD ..... PLAINTIFF**

**AND**

**DAVID NJERU NYAGA ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN NJERU NYAGA (BOTH T/A NJERU NYAGA & CO  
ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> Defendant/Applicant filed this application dated 3<sup>rd</sup> March 2020 brought under the provisions of Order 10 rules 9 and 11. The orders sought are:
  - a. That the Court be pleased to set aside the interlocutory judgement entered and dated 20<sup>th</sup> August 2015 and all consequential orders and allow the 2<sup>nd</sup> Defendant unconditional leave to defend the suit
  - b. The costs of the application be provided for
2. The application was supported by the grounds listed on its face and the affidavit sworn by the 2<sup>nd</sup> Defendant *inter alia* that the interlocutory judgement entered on 20.8.2015 were suspended by the Deputy Registrar on 18.8.2015. The Applicant deposed that he has a good defence to the Claim because he has never dealt with the Plaintiff.
3. The Plaintiff opposed the application vide a replying affidavit sworn by Mr Peter Mbogua on 20<sup>th</sup> June 2022 and who deposed to be a director of the Plaintiff. He stated that the interlocutory judgement was entered after the Applicant failed to enter appearance and file defence within 15 days from 14<sup>th</sup> July 2015. The Plaintiff urged that the 2<sup>nd</sup> Defendant has not offered any plausible reason for his failure



to enter appearance. Mr Mbogua urged the court to dismiss the application for being frivolous and without any merit.

4. The 2<sup>nd</sup> Defendant filed brief submissions dated 7<sup>th</sup> March 2023 and stated that the Plaintiff dealt exclusively with the 1<sup>st</sup> Defendant. Further that the attempt to sue the 1<sup>st</sup> and 2<sup>nd</sup> Defendants separately is untenable in law as long as they are sued as partners in Njeru, Nyaga & Co. Advocates.
5. The Plaintiff filed submissions dated 4.4.2023 and cited the provisions of order 10 rule 11 of the [Civil Procedure Rules](#) and case law *inter alia Patel Vs EA. cargo Handling Services* (1974) EA 75 as per Duffus J 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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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.”

6. The Plaintiff also submitted on the Court of Appeal in the case of, *Thorn Plc vs Macdonald* (1999) CPLR 660 where that court stated that; while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant, and any failure by the defendant to provide a good explanation is a factor to be taken into account.
7. I have perused the record and note that the suit is still at the pre-trial stage. There is no doubt that the Plaintiff obtained judgement in default of appearance against the 2<sup>nd</sup> Defendant on 20.8.2015. The Plaintiff has raised the issue of delay in bringing the present application but does not explain why he had not prosecuted his suit from August 2015 after he obtained the default judgement. The record does show that he even applied for substituted service in 2016 in respect of the 3<sup>rd</sup>-6<sup>th</sup> Defendants. Further, there is no prejudice the delay in bringing the application has occasioned to the Plaintiff.
8. Subsequently, on 19<sup>th</sup> April 2018, the Plaintiff sought for an interlocutory judgement as the 3<sup>rd</sup> to 6<sup>th</sup> Defendants but the Deputy Registrar declined the request. The DR stated that after perusing the Plaintiff, she noted that the prayers sought in the Plaintiff do not justify for entry of interlocutory judgement and proceeded to decline the request. The Hon DR directed the parties to appear before the judge for directions.
9. The Plaintiff as filed is not a liquidated claim and in so far as the record shows, the interlocutory judgement has been entered as against the 2<sup>nd</sup> Defendant only. It is pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are partners in the law firm of Njeru, Nyaga & Co Advocates and in light of the fact that the 1<sup>st</sup> Defendant has entered appearance and filed a defence, the Plaintiff in opposing the application ought to have highlighted that the claims against the two defendants are severable. If they are not, I do not find any basis for his refusal that the 2<sup>nd</sup> Defendant be granted leave to file a defence out of time.
10. The Principle for setting aside interlocutory judgement as stated in the *Patel v E.A Cargo Handling Services* supra is to do justice to all the parties. In this instance, it is my opinion and I so hold that doing justice means giving both parties an opportunity to present their case which includes liberty to file a defence. Consequently, I find merit in the application and allow it in terms of prayer (a) and each party to bear their costs of the application.
11. The 2<sup>nd</sup> Defendant shall file and serve his statement of defence together with his documents if any within 15 days of delivery of this ruling.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023**

**A. OMOLLO**

**JUDGE**

