



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NO. 12 OF 2018

TATA AFRICA HOLDINGS (KENYA).....PLAINTIFF

-VERSUS-

JULIUS NYAKUNDI NYAGUOKA.....1ST DEFENDANT

EMILY CHEPNG'ETICH.....2ND DEFENDANT

KENYA TRACTORS AND

EQUIPMENT LTD.....3RD DEFENDANT

RULING

1. The defendants hereof filed their Memorandum of Appearance by their advocates on the 17th April 2018. No statement of defence was filed 14 days thereafter as provided under **Order 7 rule 1 of the Civil Procedure Rules (CPR)**.

On the 8th May 2018 the plaintiff requested for judgment upon the liquidated claim of Kshs.20,367,205/= and the same was duly entered and a decree drawn on the same day, 8th May 2018.

On the 22nd May 2018, the Defendants filed a statement of defence out of time and without leave of the court.

2. By a **Notice of Motion application dated 20th September 2018** the Defendants through their Advocates Musyoki Mogaka & Co. Advocates sought for orders

(1) that leave be granted to the defendants to file their defence out of time.

(2) that the Defence annexed thereto be deemed as duly filed and served upon payment of the requisite filing fees.

3. The grounds advanced for the defendants failure to file the defence within time are stated on the face of the application and in the supporting affidavit sworn by Omari Mogaka advocate counsel handling the case.

4. The application is opposed by a replying affidavit sworn on the 28th September 2018 by the plaintiffs accountant Edwin Too.

5. I have considered the pleadings as well as counsel submissions.

Order 10 of the CPR states the consequences in default of filing a defence. In the matter of a liquidated claim, **Rule 4** allows the plaintiff to obtain a final judgment together with costs on the claim.

That is what the plaintiff did and rightfully so.

Under Order 10 rule 11 CPR a defendant may apply to set aside or vary such judgment and any sequential decree upon terms the court may deem just.

6. The defendant's application is brought under **Order 50 rule 6, Order 51 CPR and Article 50(1) and 159 of the Constitution of Kenya**.

The reasons advanced for the application is that the advocate who was handling the case in the law firm left the firm without handing the file over to Mr. Omari Mogaka Advocate now in conduct of the defence case. He urges that no prejudice will be occasioned to the plaintiff if leave is granted to file a defence out of time.

7. The plaintiff in opposing the application submits that the advocate alleged to have left the defendants advocates firm is not disclosed nor the time he is alleged to have left nor when it was discovered that no defence was filed in the matter.

8. The principles upon which an *ex parte* judgment may be set aside were stated in the case **Patel –vs- E.A Cargo Handling Services Ltd – (1974)** and reiterated in many other decisions, thereafter that

- The courts discretion to set aside or vary an *ex parte* judgment is not restricted or limited.
- It can be set aside upon terms that are just
- Main concern of the court is to do justice
- Courts will set aside a regular and valid judgment only if satisfied that there is a defence on merits, but not to mean a defence that must succeed.
- Defence must *prima facie* demonstrate triable issues.

9. Further in **Kenya Power & Co. -vs- Njumbi Residents Association and Another (2015) e KLR**, the court rendered that a court ought to act in a manner with a view of accomplishing a fair and proper administration of the law and in the interest of justice.

Madan J in Belina Murai & Others -vs- Amoi Wainaina (1978) e KLR rendered that a party should not be completely locked out of the seat of justice just because a mistake has occurred or made by a lawyer.

10. The celebrated Judge (Madan J) further held that the court should not condone a lawyer's mistake but it ought to do whatever is necessary to rectify the mistake in the interest of justice. Also in **Mbaki & Others –vs- Macharia & Another (2005) 2 EA 206**, the court stated that

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

11. Bearing in mind the above learned pronouncements, would it then be proper, or justified to lock the defendants from being heard, and from the seat of justice because their advocates failed to file the defence on time?

12. I like the holding by **Ringera J** (as he then was) in **Omwoyo –vs- African Highlights and Produce Co. Ltd (2002) e KLR** when he rendered that

“...time has come for the legal practitioners to shoulder the consequences of their negligent acts of omission like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of negligence of the Defendants advocates...”

There is no doubt that the defendants advocates are squarely to blame for their failure to file their clients defence on time and for no plausible reasons.

The defendants should not be held liable and made to suffer for their advocates negligence. That in my view would be unfair unjustified and against all tenets of justice as it would in effect offend the parties rights to be heard.

13. I have considered the draft defence proposed by the defendants. Allegations of collusion and fraud are stated against and by the defendants. The defendants admit part of the plaintiffs claim though not expressly.

In my opinion, the draft defence raises numerous triable issues and as stated in the case **Patel -vs- E.A Cargo Handling Services (Supra)** the triable issues are not necessarily upon which the defendants would ultimately succeed.

14. The main concern of the court is to do justice to all the parties. In this instance the only justice is to afford the defendants an opportunity to be heard on their defence. Doing so in my view will not prejudice the plaintiff's as eventually a judgment on merits will be delivered.

15. For the above reasons, I find it fair and just to allow the defendants to file their defence out of time but upon terms.

16. Accordingly the defendants application dated 20th September 2018 is allowed in terms of **prayer 1 and 2**. The *ex parte* judgment is set aside and all consequential orders arising therefrom.

The defendants advocates are condemned to pay throw away costs to the plaintiff assessed at Kshs.100,000/= within 30 days of this ruling.

Dated, signed and delivered this 25th Day of April 2019.

J.N. MULWA

JUDGE