



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 262 OF 2015

CAPTAIN SULEIMAN AMUR HAMUDPLAINTIFF

VERSUS

ONESMUS NGUNJIRI NJENGA.....1ST DEFENDANT

ROCK INVESTMENT COMPANY LIMITED2ND DEFENDANT

R U L I N G

1. Captain Suleiman Amur Hamud is the Plaintiff. He sued Onesmus Ngungiri Njenga, the 1st Defendant, and Rock Investment Company Limited, the 2nd Defendant for judgment, against them jointly and severally for USD115,311 and for Kshs.1,393,000 and for damages for breach of contract.
2. The back ground of the Plaintiff's claim is the agreement of 27th February, 2013 between the parties that the Defendants would import for the Plaintiff three aircrafts. It was agreed the importation fee together with the Defendants disbursements was total USD 131,200. The Plaintiff by his Plaintiff pleaded that he paid a down payment of USD 121,000 and the balance of USD 10,200 was payable in three months before the aircrafts were registered in Kenya.
3. It is further pleaded in the Plaintiff that, due to the Defendants' default, on 25th June, 2013 parties entered into a Memorandum of understanding. By that Memorandum of understanding the Defendants admitted having used the Plaintiff's USD 47,800 to buy other item and as a consequence of which the Plaintiff's container was detained at the Mombasa Port. This led to the Plaintiff to incur additional expenses of USD 66,650 and Kshs. 642,880 for clearance at the port.
4. There was yet another agreement on 23rd August, 2013 where the Defendants agreed to import another air craft.
5. The Defendants by an agreement of 2nd March, 2015 admitted owing the Plaintiff USD 68,511.
6. The Plaintiff's claim, therefore totalled USD 115,311 and Kshs. 1,393,000.
7. The Plaintiff served the 1st Defendant, on his behalf and on behalf of the 2nd Defendant, with the Plaintiff, filed in Court on 29th May, 2015, and summons to which the 1st Defendant acknowledged receipt by signing and noting "Received 8th June, 2015."

8. The Plaintiff amended its Plaintiff on 1st December, 2015. That Amended Plaintiff was served on the 1st Defendant, on his behalf and on behalf of the 2nd Defendant, on 3rd December, 2015.

9. The Defendants did not enter an appearance or file a defence within the prescribed period. Indeed to date the Defendants have not filed those documents.

10. Judgment in default of appearance was entered on 4th February, 2016 and the Deputy Registrar endorsed on that entry that – “set for formal proof hearing.”

11. The above endorsement led the Plaintiff’s Counsel to seek audience before the Deputy Registrar. Before the Deputy Registrar, on 31st March, 2016 the Plaintiff withdrew prayer No. (ii), that is the prayer for damages for breach of contract. The Deputy Registrar proceeded to enter interlocutory judgment against the Defendants jointly and severally in respect to prayers (i) and (iii) of the amended Plaintiff, that is for the liquidated claim.

12. It is in that background that Defendants have filed a Notice of Motion application dated 29th June, 2018. By that application the Defendants seek an order to set aside judgment entered against them and for the Court to grant them leave to defend this suit.

13. The 1st Defendant, in his affidavit in support of the application stated that the three aircrafts, as agreed, were delivered to the Plaintiff and are registered in his name. In respect to the claim, which the Plaintiff claimed he paid the 1st Defendant’s workers, the 1st Defendant stated that the Plaintiff only paid Kshs. 370,000, on his behalf, and not Kshs. 642,880 as claimed in the Plaintiff.

14. The 1st Defendant further stated that, in the presence of the Officer Commanding Station (OCS) at Wilson Airport, he and the Plaintiff verbally agreed that the 1st Defendant would carry out repairs on the Plaintiff’s aircrafts as settlement of the amount owed to the Plaintiff. The 1st Defendant admitted that he was in possession of Plaintiff’s one aircraft on which he was carrying out repairs.

15. The 1st Defendant further stated that he had paid the Plaintiff USD 110,500, and he supported this with payment remittance forms, and stated that he had also paid the Plaintiff, in cash, Kshs. 1.8 Million. He therefore deponed that the amount awarded in judgment herein was irregular. He pleaded that he had a good defence to the Plaintiff’s claim.

16. The 1st Defendant did not attach his draft defence to the application: it was however attached to his subsequent affidavit dated 13th November, 2018. By that draft defence the Defendants deny indebtedness to the Plaintiff and alleged over payment of the Plaintiff’s debt. The Defendants therefore counter claimed for USD 23,331.51 and Kshs. 144,589, and for damages for breach of contract and exemplary and punitive damages for malicious prosecution. I need to state that there is no evidence before me that the 1st Defendant was prosecuted at the instance of the Plaintiff.

17. The Plaintiff replied by his affidavits of 23rd July and 19th November 2018. In those affidavits the Plaintiff denied the deposition of the 1st Defendant and reiterated that the Defendants were indebted to him as claimed in the Plaintiff. To this end the Plaintiff annexed a Memorandum of Understanding signed by him and the 1st Defendant on 25th June 2013. By it the 1st Defendant acknowledged indebtedness to the Plaintiff and an agreement again signed by both of them, dated 2nd March 2015 where the 1st Defendant acknowledged the debts owed to the Plaintiff of USD68,511, which the 1st Defendant undertook to settle by instalments.

ANALYSIS AND DETERMINATION

18. The parties filed several affidavits in this matter. In my view most of the depositions in those affidavits are repeat of the same things. I confirm having read them and considered them.

19. The only issue for determination is whether the default judgment, entered against the Defendants should be set aside.

20. The 1st Defendant was served with the Plaint and summons on 8th June 2015. He acknowledged that service by signing on the summons. Those summons required him to file Memorandum of Appearance within 15 days of service. The Defendants do not deny that no appearance was filed within that prescribed period. It follows that judgement entered against the Defendants, on 31st March 2016, in default of appearance was a regular judgement.

21. The Defendants argued that the Plaintiff did not seek entry of default judgement as provided under order 10 Rule 4 (1) of the Civil Procedure Rules (hereinafter referred to as the Rules).

22. Order 10 Rule 4 (1) of the Rules provides that a party seeking the entry of judgment in default of an appearance shall make its request for judgement as provided under form 13 of Appendix A, of the Rules. The Defendants submitted the Plaintiff did not request for judgement as set out in that form.

23. I have perused the Plaintiff's Learned Counsel's letter dated 3rd August 2015 by which the Plaintiff requested for entry of default judgment and, in my view, it conforms to the form 13 of appendix A. Granted that the request did not set out whether the claim was for liquidated demand only or whether there was other claims outstanding determination by formal proof, which would have been evidence by a request for costs or no request for costs. See order 10 Rule (1) and (2) of the Rules.

24. The fact the Plaintiff did not indicate, by that request, whether the claim was only on liquidated claim or otherwise cannot nullify the default judgement entered. In my view the form used is intended to assist the Deputy Registrar to know whether the request was for judgment for liquidated amount or whether it was a request for entry of judgment for liquidated amount together some other claim.

25. In this case, as stated before the default to use the exact words of form 13, if at all, was cured by the mention before the deputy registrar when the Plaintiff withdrew the other claims and remained with the liquidated claim. Judgement was then entered by the deputy registrar for that liquidated claim.

26. As stated before the default judgement entered against the Defendants was a regular judgement and therefore the Defendants are obligated to set out reasons why this Court should move to exercise its discretion, donated under Order 10 Rule 11 of the Rules. This was what was stated in the case **SOUTHERN CREDIT BANKING CORPORATION LTD – V- JOHAN STEPHEN NGANGA (2006) eKLR**, thus:

“ Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is regular the Court is vested with unfettered discretion to set aside such judgment on such terms as are just. If judgement entered is found to be irregular it ought to be set aside ex debito justitiae.

27. There are guiding principles that should guide the Court when faced with an applicant seeking the exercise of the Courts' discretion to set aside default judgment.

28. The case **CMC HOLDINGS LTD V NZIOKI (2004) KLR 173** set out the guiding principle the Courts should bear in mind when faced by such an application. I quote from that case thus:

“In law the discretion that a Court of law has, in deciding whether or not to set aside exparte orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.

...The law is now well settled that in an application for setting aside ex-parte judgement, the Court must consider not only the reason why the defence was not filed or for the matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has

reasonable defence which raises triable issues.”

29. There are two broad reasons advanced by the Defendants why the default judgment should be set aside.

30. The first is that the Defendants have a defence which raises triable issues. The Defendants have denied the Plaintiff's claim and counter-claimed, as stated before.

31. The Defendants main defence to the Plaintiff's claim is that the said claim was excessive to what they owed the Plaintiff. In the affidavit of the 1st Defendant, in support of the application, dated 29th June 2018, there is no clear indication of how much if at all, the 1st Defendant over paid the Plaintiff's debt. The 1st Defendant attached two certificates of registration of aircrafts with the Kenya Civil Aviation Authority, both in the Plaintiff's name. He further attached an invoice addressed to "Skylink attention Suleiman Hamud". That invoice is dated 12th October 2017. It is difficult to read the figures on that invoice, but perhaps, more importantly is, what is its relation to a judgement entered in the year 2015. There are also remittance forms of funds, by the 1st Defendant, to the Plaintiff and again the 1st Defendant fails to explain the relationship of those remittance to the debt. This is so in the light of the 1st Defendant signing an MOU and an agreement acknowledging indebtedness to the Plaintiff. Those invoices and fund remittances therefore are negated by the 1st Defendant's deposition in his affidavit sworn on 1st August 2018. In paragraphs 13, 14, 22 and 24 of that affidavit the 1st Defendant makes it clear the Defendants did not dispute the amount owed to the Plaintiff. For example in paragraph 13 the 1st Defendant deponed:

“..... I hadn't the means to pay the Decretal sum up and until I obtained hangar space to work from in February 2018 wherein I immediately committed to pay the Decretal amount or part thereof in the best way I could.....”

Further in paragraph 22 the 1st Defendant deponed:

“That even prior to the agreement to refurbish the aircraft and my obtaining the hangar space within which to work, I had done my level best to attempt to pay off as much of whatever sums had been agreed to from the point of being indebted to the Plaintiff as I could.”

32. There are instances when the 1st Defendant, in that affidavit alleged the Plaintiff's claim was exaggerated and that the Plaintiff had not come to Court with clean hand.

33. Do the Defendants raise a defence with triable issue. It is good to consider what the Court of appeal is the case: **TENIC ENTERPRISES LIMITED V WATERFRONT OUTLETS LIMITED (2018) eKLR** stated, on issue of triable issue, thus:

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs.185,305,011.30. We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. (1974) E.A. 75 at P. 76 Duffus P. said:-6

“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.”

34. I have considered the parties affidavits. In my view it is not enough to state that the Plaintiff was over paid without bringing forth evidence of such over payments. The Plaintiff on its part has produced agreements where the Defendant admitted indebtedness. Some of those documents provided interest to be applied to the debt. The Defendant has not in my view raised a defence with triable issue, not even one. I believe that the Defendant well knew that he was indebted to the Plaintiff.

35. Why did the Plaintiff not file a defence to the claim? I find the explanation that his former Advocate let him down to be farfetched. Judgement was entered in 2015. In May 2016 the auctioneers descended on the 1st Defendant's family and proclaimed household goods. The 1st Defendant's wife successfully objected to that attachment. A ruling in her favour in that regard was delivered on 15th September 2016. It follows the 1st Defendant was aware of judgement against him as early as May 2016. What did he do about it? Absolutely nothing. Why, since he was aware there was judgment against him, he did not alert his Advocate, who he alleged he instructed from the date of service of summons and Plaintiff. And if his Advocate was negligent and so let him down has he reported him to the law society of Kenya. There was no evidence that he did. I find it lame for a party to allege he did not take certain action because he was let down by his Advocate and yet fail to report such negligence to a body that has disciplinary power over him. The excuse that his Advocate let him down was used for convenience to attempt to persuade the Court to set aside judgment.

36. Again the 1st Defendant was served with notice to show cause why he should not be arrested for failure to settle the judgment in this matter. The affidavit of service of Samson Lwika Shivisi, dated 3rd May 2018, shows the 1st Defendant was served with that notice to show cause on 2nd May 2018. When that notice to show cause came up for hearing on 10th May 2018 the 1st Defendant did not attend Court and the Court issued a warrant of arrest against him. On 25th of June 2018 when the 1st Defendant was arrested and taken before Court this is what he informed the Court:

“There is an area of agreement that I have not complied with. I have not refused to pay and I am still repairing his aircraft and business is low and I ask for time to clear the amount.”

37. Those statements could not have come from someone who knew he had over-paid the Plaintiff.

38. For the above reason I find that the Defendants do not deserve the exercise of this Court's discretion in their favour. There is no merit in their application.

39. Before concluding this ruling there are two issues I need to determine.

40. The first issue was raised by the Plaintiff. The Plaintiff submitted that the Defendant's Advocates, Triple A Law LLP, did not obtain leave of the Court to act for the Defendants as required. Under Order 9 Rule 9 of the Rules. That Rule provides:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-

a. Upon an application with notice to all the parties; or

b. Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate to party intending to act in person as the case may be.”

41. In this case the firm of Triple A Law LLP came on record for the Defendants after judgment had been entered. They took over the conduct of the case on behalf of the Defendants, by consent between them and the firm of Gitonga, Kinyanjui & Co. Advocates. They did not seek the leave of the Court to take over the conduct of that case. They were therefore in contravention of Order 9 Rule of the Rules. It was necessary for the Court to make an order permitting them to take over from Gitonga Kinyanjui & Co. Advocates.

42. My concern is that the Plaintiff's learned Advocate waited until when filing written submissions to raise that issue. It is an issue that ought to have been raised prior to hearing so that if their objection, to the firm Triple A Law was allowed and the firm was denied the right to represent the Defendants the Defendants would have had an opportunity to instruct another firm or the firm Triple A Law LLP could have sought leave as required.

43. That having been said, however, it is important to consider what mischief was addressed with the provision of Order 9 Rule 9 of the Rules. The mischief, as I know it, was to prevent clients, after judgment had been obtained to change Advocates without payment of fees of the Advocate who were with them when judgment was entered. In this case there is a consent, filed in Court, whereby the previous Advocate consented to Triple A Law LLP taking over the conduct of this case.

44. I reject the objection raised by the Plaintiff for the reasons set above. Leave is hereby granted for the firm Triple A Law LLP to act in this matter for the Defendants.

45. The second issue was raised by the Defendants. The Defendants argued that execution should not have proceeded because the Defendants were not served with a notice as required under Order 22 Rule 6 of the Rules. That Rule provides:

“Provided that, where judgment in default of appearance or defence has been entered against a Defendant, no execution by payment, attachment or eviction shall issue not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”

46. The Plaintiff, from the record of the Court file does not seem to have served the notice required under that Rule. The Plaintiff did not also address the issue raised, as that Rule, by the Plaintiff.

47. In my view the purpose of that Rule was to ensure that a party who did not enter an appearance, and perhaps had forgotten that he had been sued, he is made aware of eminent execution against him. It is to give such a party notice of entry of judgment against him.

48. In this case the Defendants were aware of the entry of judgement against them from May 2016. This is when the 1st Defendant's household goods were proclaimed by auctioneers. The wife of the 1st Defendant, by her affidavit dated 30th May 2016 stated:

“That I am the wife of the 1st Defendant and we have resided in several houses since our marriage and currently we reside in my father's house situated in Langata together with our children.”

49. If my proposition of the mischief addressed by Order 22 Rule 6 of the Rules is acceptable, then the Defendants got notice of entry of default judgement as at May 2016. It follows that by the time the 1st Defendant was served with the notice to show cause why warrant of arrest should not issue, he had notice of entry of judgement against him.

50. In the end I find and hold that the Notice of Motion dated 29th June 2018 is without merit and is dismissed. The costs of that application shall follow the event.

51. The following is the order of the Court. The Notice of Motion dated 26th June 2018 is dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT