



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CIVIL CASE NO. 43 OF 2018

ALTANA CORPORATION LIMITED.....PLAINTIFF/ RESPONDENT

VERSUS

CLARENCE MATHENY LEADERSHIP

TRAINING INSTITUTE.....DEFENDANT/APPLICANT

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

ETHICS AND ANTICORRUPTION COMMISSION....2ND INTERESTED PARTY

RULING

1. By a Notice of Motion dated 18th January 2019, brought under Orders 10 Rule 10 and 11, 50 Rule 4 and 51 Rule 1 of the Civil Procedure Rules, 2010, the Applicant sought an order of the court setting aside an interlocutory judgement entered herein on 11th January 2019 for default of entering Appearance or filing of defence.
2. The application is supported by grounds on the face of the motion and a supporting affidavit by **Willis W. Echesa, advocate** sworn on 18th January 2019. The grounds upon which the application is premised are that the interlocutory judgement is irregular because it was entered before time for entering appearance or filing of defence had lapsed since the period between 21st December and 13th January is excluded when computing time; that the time : that the interlocutory judgement is in any event irregular on grounds that the prayers sought in the amended plaint are not for a liquidated claim.
3. It is contended that the interest claimed and the basis upon which the judgment was entitled is not at court rates and that the Plaintiffs/Respondent will not suffer prejudice given that the decretal sum had been allocated and preserved by an order of the court. The Applicant further states that the Defence filed on 14th January 2019 was within time and, therefore, the Defendant/Applicant should be allowed to have his day in court.
4. Further to the above grounds, Mr. Echesa deposed that on 17th January 2019 he learnt that judgement had been entered against the Defendant and on perusing the court file, he noted that a request for judgment had been made on 10th January 2019 and that judgment had been entered on 11th January 2019 by the Deputy Registrar for **Kshs. 139,895,511/=**.
5. **Mr. Echesa** deposed that on 14th January 2019 he sent his law Clerk to file a defence but was informed that a request for judgment had been made; that he wrote a letter to the Deputy Registrar on the following day, 15th January 2019 raising the issue with the Deputy Registrar.
6. He stated that Summons to Enter Appearance was served on 10th December 2018 while the court proceeded on Christmas recess on 21st December 2018. According to Mr. Echesa, Appearance was to be entered within 15 days which would have lapsed on 25th December 2018. He deposed that by 21st December 2018 only 10 days had lapsed and therefore in terms of Order 50 Rule 4, time for entering appearance would not lapse until 18th January 2018.
7. He contended that the defence filed on 14th January 2019 was filed within time and was served on the plaintiff's advocates and the interested party on 16th January 2019. He further contended that entry of the interlocutory judgment on 11th January 2018 was irregular. It is also the Defendant/ Applicant's case that the amended plaint dated 3rd December 2018 is not for a liquidated claim and, therefore, an interlocutory judgment could not be entered.

8. **Ethics And Anti-Corruption Commission**, the 2nd Interested Party, which filed grounds dated 25th February 2019 in support of the motion. It also argued that the default judgment was entered prematurely before expiration of time; that it is a violation of procedural justice and the right to fair hearing espoused in Article 50(1); that the court has unfettered discretion to set aside a default judgement and that it is in the interest of justice that the default judgment be set aside.

9. **Altana Corporation Limited**, the Plaintiff/Respondent, filed a replying affidavit by **Zaheer Ihanda** sworn on 30th January 2019 and filed in court on 4th February 2019. It is deposed that the Defendant /Applicant and the Interested Party were served with the Amended Plaintiff and Summons to Enter Appearance on 10th December 2018; that an affidavit of service was filed to that effect on 10th; that the request for judgement was based on a signed and sworn affidavit of service; that the Defendant/Applicant has not entered appearance and served as required as the Civil Procedure Rules; that the Gazette Notice or Court Recess did not override the statute on filing of defence and that the defence filed after thirty four (34) days is not properly on record.

10. The Plaintiff/ Respondent stated that contrary to the Applicant's contention that the Plaintiff was not for a liquidated claim, the Amended Plaintiff was for **Ksh. 139,895,511/=**, outstanding consultancy fee which is a liquidated claim. The Plaintiff /Respondent relied on Order 10 Rule 4(1) (2) which allows entry of judgment on a liquidated claim. The Respondent contended that the judgment was properly entered as prayed for in the plaintiff.

11. During the hearing of the motion, Mr. Echesa, learned counsel for the Defendant/Applicant, submitted highlighting their written submissions dated 12th February 2019 that the judgment was irregular since it was entered before time had not lapsed. He also argued that the claim in the Amended Plaintiff is not liquidated and was not therefore a reliable for entry of a default judgment.

12. Regarding lapse of time, learned counsel relied on order 50 Rule 4 to argue that between 21st December and 13th January, time does not run for purposes of computing time. For that reason, he submitted, the default judgment was entered prematurely given that Summons were served on 10th December 2018 and Appearance was to be filed within 15 days. Counsel submitted that the request for judgment was made on 10th January 2019 and was entered on 11th January 2019 before time had lapsed. He relied on a number of decisions in support of their case.

13. Mr. Muraya, counsel for the Interested Party, associated himself with the submissions made on behalf of the Plaintiff/Applicant. He added highlighting their submissions dated 5th March 2019, that time for entering appearance had not lapsed; that the Defence raises triable issues and that this is a matter for the court's exercise of its discretion to set aside the judgment. He relied on a number of decisions to support their position.

14. Miss Akello, learned counsel for the Plaintiff/Respondent submitted also highlighting their written submissions dated 25th January 2019 and supplementary summons dated 25th April 2014 in opposition to the application. Counsel first contended that the interlocutory judgment is regular; that Summons were served on 10th December 2018 and that from that date, the Defendant/ Applicant had 15 days to enter appearance. According to counsel, time lapsed on 27th December 2018; that they applied for interlocutory judgment on 10th January 2019 which was entered on the following day, 11th January 2019.

15. Second, counsel submitted that their claim as contained in the Amended Plaintiff was a liquidated claim; that the Defendant/Applicant has not entered appearance to date and that the Defence was entered after entry of judgment and therefore it is not properly on record. Counsel further contended that Order 50 rule 4 does not apply in this case She relied on the definition of liquidated demand/claims in **Black's Law Dictionary**. She also relied on a number of decisions in support of their case.

16. I have considered the application, the responses and submissions by counsel for the parties. I have also considered the authorities relied on. The application before court is for setting aside a default judgment. It is premised on Orders 10 rules 10 and 11, 50 rule 4 and 51 rule 1 of the Civil Procedure Rules, 2010. The grounds for seeking to set aside the default judgment are primarily two. First is that argument that the default judgment is irregular for it was entered prematurely before time for entering appearance had lapsed.

17. The Applicant contends that Summons having been served on 10th December 2018, time did not run between 21st December 2018 and 13th January 2019 by virtue of Order 50 rule 4 of the Rules. The Applicant argues that it filed its defence on 14th January 2019 which was within time and therefore, the default judgment could not have been entered.

18. Second, the Applicant argues that the amended plaintiff does not seek a liquidated claim and therefore the court could not enter a default judgment. The Applicant's arguments are supported by the 1st Interested Party.

19. The Respondent disagrees with the Applicant and Interested Party contending that the judgment is regular; that it was entered after time had lapsed and that the Defendant failed to enter appearance on time. According to the Respondent, time lapsed on 27th December 2018; that the amended plaintiff is a liquidated demand or claim and therefore the default judgment was properly entered.

20. In my view, this motion raises two issues, that is; whether the default judgment is irregular and depending on the answer to that question, whether the amended plaintiff is for a liquidated demand or claim.

21. Order 10 Rule 11 gives this court wide discretionary power to set aside a default judgement. The rule provides that: **"Where judgment has been entered under this Order, the court may set aside such judgment and any consequential decree or Order upon such terms as are just."** In exercising its discretion under this rule, the court should be guarded by the demands of rendering justice. This is a judicial discretion which like all other discretion it should be exercised judiciously.

Whether the judgment is irregular

22. The main ground for seeking to set aside the judgment is that it was entered prematurely. The facts of the matter are not in dispute. The amended plaint and Summons to enter Appearance were served on 10th December 2018. Request for judgment was made on 10th January 2019 and judgment was entered on 11th January 2019.

23. Order 50 Rule 4 is generally headed “**Time**” while rule 4 is headed “**when time does not run.**” Rule 4 provides:

“Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the next following both days included, shall be omitted from any computation of time (Whether under these Rules or any order of the court for the amending, delivering or filing of any pleading or the doing of any other act. Provided that this rule shall not apply to any application in respect of a temporary injunction.”(Emphasis)

24. The plain reading of Order 50 Rule 4 which is couched in mandatory terms shows that the period between Twenty first December and Thirteenth January of the following year cannot be taken into account when computing time. The Applicant was served with Summons on 10th December 2018 by 20th there were five days remaining. Time did not run between Twenty-first December 2018 and Thirteenth January 2019. Time started running on 14th January 2019.

25. The impugned judgment was entered on 11th January after the request had been made on 10th January 2019. Clearly and without any equivocal the judgment was entered within the period when time did not run and before the Applicant’s time to enter appearance had lapsed. Entry of judgment was irregular and the irregularity is attributable to the court. I therefore agree with the Applicant and the 1st Interested Party that the default judgment was entered prematurely when it ought not to have been.

26. There is the second contention that the claim in the amended .Plaint was not liquidated one. Following my finding above that the default judgment was premature and therefore irregular should the court consider this ground of attack? I think not. This is because this issue is now moot. It will not matter whether the claim was or was not liquidated.

27. The applicant was deprived its right to enter appearance and file defence by the court’s irregular act of entering judgment in this matter. The issue would have been relevant had the court found that judgment was regular and that the time for filing defence had lapsed. It would then have found it relevant to determine whether the claim was a liquidated one or not and whether it was appropriate for the court to enter the impugned judgment.

28. Once the court arrives at the conclusion that the judgment was irregular, it must set it aside as a matter of course. In this regard, the Court of Appeal stated in James Kanyiita Nderitu & another v Marios Philotas Lilikas & another [2016] that;

“In an irregular default judgment...the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, 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 the default judgment on its own motion. In addition the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system”

29. The right to be heard was underscored by the Supreme Court of India in Sangram Singh v Election Tribunal Kotah 1955 AIR 425 thus;

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

30. The impugned default judgment though was not entered because the Applicant had not been served but because the default judgment was entered prematurely. That is before time allowed by the rules of procedure had lapsed. The action deprived the Applicant an opportunity to be heard and was therefore condemned unheard. For the above reasons I am satisfied that the motion has merit and must succeed.

31. Consequently, the application dated 18th January 2019 is hereby allowed. The default judgment entered on 11th January 2019 and all consequential orders set aside. The Defendant/Applicant is granted leave to enter appearance within 15 days from the date of this order and file Defence 15 days thereafter. As the fault was that of the court, each party will bear own costs of the application.

Dated, Signed and Delivered at Kajiado this 28th day of June 2019.

E C MWITA

JUDGE

