



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

E.L.C NO. 104 OF 2017

FREDRICK KORIR.....PLAINTIFF

VERSUS

SOIN UNITED WOMEN GROUP

(Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho).....DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 30.10 2018 the Defendant/Applicant seeks the following orders:

- a) *That there be a stay of execution of the judgment dated 30th August 2018 and all consequential orders thereof pending the hearing and determination of the application hereof.*
- b) *That this honourable court be pleased to set aside the ex-parte proceedings, judgment and all consequential orders of 30th August 2018.*
- c) *That the Defendant/applicant be granted leave to file a defence out of time.*
- d) *The costs of this application be provided for.*

2. The application is supported by the affidavit of Jane Mwolomet sworn on the 30th October 2018. The Applicants' contention is that they were not served with summons to enter appearance and they only learnt of this matter when they were served with a hearing notice dated 18th June 2018. She further deposes that they instructed an advocate who filed a notice of appointment on 24th July 2018 but he was not able to proceed with the matter as he did not have the pleadings. She deposes that they have a defence that raises triable issues.

3. In response to the application the Respondent swore a affidavit on 6th March 2019 in which he refutes the applicant's averments. He has annexed an affidavit of service dated 24th October which shows that the defendants were served with summons to enter appearance. He argues that since the Defendant's had an advocate on record by the time the matter was coming up for formal proof, there is no good reason why the defendants' advocate did not apply for an adjournment to enable him apply to set aside the ex-parte judgment. He further contends that the defence is a mere denial.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

Issue for determination

5. The singular issue for determination is whether the ex-parte judgment entered against the Defendant ought to be set aside and the Defendant granted leave to file a defence out of time.

Analysis and Determination

6. In considering whether or not to set aside the ex-parte judgment, I am guided by the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR** where Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116 at 123.**

c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.**

d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.**

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30**

7. Furthermore, in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P stated as follows:

“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 to 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”

8. In the instant case there is an affidavit of service on record indicating that the defendant's officials were served with summons to enter appearance and they are therefore not being candid. Furthermore, no good reason has been given why the defendant's officials failed to attend court on 26.6.2018 yet they had been served with a hearing notice and were aware of the hearing date. I have perused the draft defence attached to the Defendant's affidavit and I am of the view that it does not raise any triable issues.

9. In view of the foregoing, I decline to exercise my discretion in the Defendant's favour. I therefore find no merit in the application and I dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Kericho this 18th day of June 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. B. Langat for the Defendant/Applicant

2. Mr. C.Koech for the Plaintiff/Respondent

3. Court Assistant - Rotich