



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL CASE NO. 211 OF 2010

RONALD NDIRANGU NDEGWA.....1ST PLAINTIFF

EUNICE MURINGO MUTAHL.....2ND PLAINTIFF

VERSUS

WILFRED KASHINGA SARONI.....1ST DEFENDANT

LIBERTY GRAPHICS (K) LTD.....2ND DEFENDANT

RULING

The Advocate for the 2nd Defendant Ms Mengesa Advocates filed a certificate of urgency dated 13th November 2019 stating that this matter should be heard on priority for reasons;

- a) The Defendants have a reason to believe that there is no valid ex-parte final judgment that was entered against the Defendants capable of being executed and the entire proceedings herein leading to the said execution was premised on the wrong assumption that there is a valid judgment on court record;
- b) That a perusal of the entire court file reveals that there is no judgment that was entered against the Defendants on 28th MAY 2010 or any other date after that and the entire proceedings herein leading to the said execution is therefore *void ab initio* as the same is premised on the wrong assumption that there was a valid judgment on court record.
- c) The 1st Defendant/Applicant is justifiably apprehensive that unless this application is heard and disposed off, the Plaintiffs will execute the contested judgment in default to the 1st Defendant's utter prejudice and loss, as warrants for him to be committed to civil jail have been issued hence the urgency of this application.

The Application is supported by an affidavit dated 13th November 2019 sworn by Wilfred Kashonga Saroni, a Director of the 2nd Defendant herein. He avers that the Defendants entered appearance on 6th May 2010 and the statement of Defence was therefore due on 22nd May 2010.

That the Plaintiff then moved to court on 21st May 2010 with a request for judgment and another one was filed on 24th May 2019.

That the Plaintiff then served the Defendant's Advocates with a Notice of Entry of Judgment that was allegedly entered on 28th May 2019.

That as per the court records and particularly the decree issued by this honourable court, judgment was allegedly entered on 28th May 2010 and signed on the same day.

That he had perused the entire court file and the entire court record and there was no indication or any endorsement appearing on the entire court record that judgment was ever entered against the Defendants in this matter on 28th May 2010 as alleged or on any other date after that.

The application was further supported by an affidavit filed in court on 26th November 2019, sworn by Geoffrey Sore counsel of the 1st Defendant. He deponed that the Plaintiff filed a request for judgment on 21st May 2010 when the same was not ripe and according to his knowledge of court registry procedure he states that the file moved from the pigeon hole making it difficult for the 1st Defendant to file his defence.

That the 1st Defendants advocate on record at that time wrote to the court seeking assistance due to the predicament arising.

That the Plaintiff noting that the request for judgment filed on 21st May 2010 was irregular proceeded to file another request for judgment on 24th May 2010.

That the Plaintiff served the Defendants' advocates with a Notice of Entry of judgment that was allegedly entered on 28th May 2010.

FINDINGS

After perusal of the court file, my findings are;

The court proceedings commence from page 5 which means page 1 – 4 are missing.

On 16th February 2011 Justice Njagi recorded proceedings that Mr. Njenga was for Defendant/Applicant; Ms. Kalinga was for the Plaintiff/Respondent;

Page 14 -15 of the court proceedings/record;

“Issue at hand is setting aside an ex-parte judgment, issue is whether there is a defence on merit.

Judgment was applied for on 21st May 2010 – period for filing Defence had not elapsed.

Page 17 of the court proceedings;

Judgment was regularly entered as appearance was entered in May. Affidavit of service was filed: judgment was proper.

An earlier request alleged to have been made on 21st May 2010. They say they had been looking for the file but it could not be traced. An extract from Registry Register Movement shows file was the last to be retrieved on Friday; it was retrieved on 24th May 2010 which was following Monday. These clearly shows that the file was available.

Page 18 of the court proceedings;

The Defendants have not alleged that the plaintiffs had anything.”

Ruling delivered on 5th March 2011 by L. J. Njagi;

“page 1 - This is an application by the Defendants praying for orders to set aside the exparte judgment entered against them on 25th may 2010, in default of filing their defence. ...

The application is supported by the annexed affidavit of Edward Njenga Muchai, the Advocate having the conduct of this matter for the applicants; and two further affidavits sworn by Wilfred Kashonga Saroni, the 1st Applicant, on 29th July, 2010 and 13th September, 2010. It is based, inter alia, on the grounds that failure by the Defendants to file their defence within the stipulated time was not deliberate but was due to unavailability of the court file;

Page 2,....that the application for judgment on 21st May denied the Applicants an opportunity of filing their defence when the stipulated period had not elapsed; and that it is in the interest of justice that the applicants be given an opportunity of being heard and that they should not be condemned unheard.

Page 2, ...After considering the pleadings and the submissions by both parties, I find that the main issues for determination are whether the judgment on record is regular or irregular; and whether there is a defence which raises traible issues.

Page 3 - The record further shows that the Respondents applied for judgment on 21st May 2010, upon the Applicants' failure to file the defence on time. However, since there was no affidavit of service on record, judgment was not granted on account of that application. The Respondents thereafter applied for judgment on 24th May 2010, and judgment was duly entered on the strength of that application on 28th May 2010. It is erroneous for the Applicants' counsel to suggest that default judgment was entered prematurely on 21st May 2010.

Page 3 - ...The record shows that on 21st May 2010 the Respondents filed a request for judgment on account on the Defendants' failure to file a defence. That was the last day on which the Applicants were supposed to file their defence. If the file was there for the Respondents to file their request for judgment, it means that the file must have been there for the Applicants to file their defence. The reasons advanced for the Applicants' failure to file their defence on time do not bear any weight. I therefore find that the judgment on record was a regular judgment.

Page 6 - 7, The last issue is whether the Defendants are truly indebted to the plaintiffs. We get an answer from an undated letter addressed "To whom it may concern" by W. Saroni, the Managing Director and the CEO of Liberty Graphics (K) Limited, who is also the 2nd Defendant. In that letter he addressed himself thus:-

"Dear Sir/Madam

This is to confirm that the total sum of Five Million Kenya Shillings (Ksh 5,000,000) is owed to Mr. Ronald N. Ndegwa by Liberty Graphics (K) Limited. This amount was due to be paid in installments and the first installment of One Million Kenya Shillings (Ksh 1,000,000) fell due on 15th September 2009. However, we were unable to pay this sum owing to a delay of payments totaling Three Million Six Hundred Thousand Kenya Shillings (Ksh3,600,000) by our client "Kenya Today" (see attached letter dated 21st December 2009).

Following the receipt of a commitment to pay from "Kenya Today" (per attached letter dated 21st December 2009), we hereby undertake to make the above payment totaling Ksh 1,000,000.00 to Mr. Ronald N. Ndegwa no later than 20th January 2010. As such, we kindly request you to bear with him until then.

Yours faithfully

W. Saroni, HSC

MANAGING DIRECTOR & CEO

Page 8 - On account of the foregoing, I find that the Defendants' draft defence attached to Mr. Njenga's affidavit does not disclose any triable issues that can resist the Plaintiffs' claim. By reason thereof, the Defendants' application by Chamber Summons dated 14th June 2010 lacks merit and it is hereby dismissed with costs to the Respondents"

Page 3 of the Ruling- The record shows that the Respondents filed a request for judgment on account on the Defendants' failure to file a defence. That was the last day on which the Applicants were supposed to file their defence. If the file was there for the Respondents to file their request for judgment, it means that the file must have been there for the Applicants to file their defence. The reasons advanced for the Applicants' failure to file their defence on time do not bear any weight. I therefore find that the judgment on record was a regular judgment.

DETERMINATION

Therefore this Court finds in relation to the certificate of urgency filed on 15th November 2019, supplementary affidavit filed on 15th November 2019 and supporting affidavit by Geoffrey Sore filed on 26th November 2019 and annexures do not confirm that the court did not enter default/interlocutory judgment entered on 25th May 2010, from the above mentioned excerpts derived from the court record that confirm such judgment was entered on 25th May 2010, in spite of the same not being reflected in the court file as some proceedings of 2010 are missing/misplaced/destroyed/lost by either design or default by parties who dealt with the matter before..

There is a typed ruling by Justice Njagi of 5th March 2011, detailed on the pleadings filed by parties and proceedings to set aside the interlocutory judgment.

This is a ruling by a court of competent jurisdiction which has not been varied, set aside, reviewed or appealed against to date. It remains a valid/regular/legal order of this court.

From the above, the application by the Applicant is not borne out by the court record that there was no default/interlocutory judgment entered on 25th May 2010. The application is dismissed with costs and interim orders vacated forthwith.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS. KALINGA FOR PLAINTIFFS

MR. MANGESA FOR THE 2ND DEFENDANT

MS JASMINE – COURT ASSISTANT