



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 27 OF 2015

NSEJERE SPORTS, LLC.....PLAINTIFF/RESPONDENT

VERSUS

ALLAN KASAVULI1ST DEFENDANT/APPLICANT

PATRICK NGAIRA2ND DEFENDANT/APPLICANT

GEORGE ALADWA3RD DEFENDANT/APPLICANT

ESTHER LUVEMB.....4TH DEFENDANT/APPLICANT

TIMOTHY LILUMBI.....5TH DEFENDANT/APPLICANT

(Sued in their capacity as official of AFC leopards Football Club)

AFC LEOPARDS FOOTBALL CLUB.....6TH DEFENDANT/APPLICANT

RULING

1. The application dated 7th March 2017 seeks orders that:

“1. That if necessary, this Honourable court be pleased to grant leave to the firm of Simba and Simba Advocates to come on record for and on behalf of the Defendants/Applicants.

2. Spent.

3. That this Honourable court be pleased to set aside the default judgment entered herein and all the consequential costs

4. That this Honourable court be pleased to grant the Defendants/ Applicants unconditional leave to file the Defence and to defend the suit on the merits.

5. That this Honourable court be pleased to make such further orders as are necessary for the ends of justice. .

6. The costs of this Application be provided for.”

2. It is stated in the grounds and the affidavit in support that the Applicants were not served with summons to enter appearance. That the Applicants came to know of the impending execution when they saw a ten (10) days Notice of Entry of Judgment in the newspapers. That the Applicants moved expeditiously and filed the application at hand.

3. It is further stated that the Applicants have a defence on merit and will suffer substantial loss if condemned unheard. That no prejudice will be visited on the Respondent that cannot be compensated by way of costs. It is further averred that the Respondent is a foreign entity incorporated in the USA and has no known assets in Kenya. That the subject matter of the suit is a colossal amount of money and execution thereof will bankrupt the 6th Applicant and lead to it’s closure.

4. In the Notice of motion dated 15th March, 2017 filed by the 1st & 4th Applicant seeks orders that:

“1. Spent

2. That the firm of M/s S. M. Keyonzo Advocates be authorized to act for the 1st and 4th Defendants in this suit in the place of M.s Simba & Simba Advocates.

3. Spent.

4. That the interlocutory judgment entered herein on 28th May, 2015 and the final judgment entered herein on 20th December, 2016 against the 1st and 4th Defendants be set aside and the 1st and 4th Defendants be allowed to unconditionally defend this suit.”

5. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the 1st Applicant. It is stated that the Applicants were not served with summons to enter appearance and only came to know of the suit through the advertisement in the newspaper in connection with the entry of judgment. That the Applicants were not officials of the 6th Defendant at the material time and never dealt with the Plaintiff. It is further contended that there is a good defence as there is no binding contract between the Plaintiff and the 6th Defendant nor any order or delivery of the good claimed.

6. The Plaintiff filed a Preliminary Objection dated 5th April, 2017 which objects to the application dated 15th March, 2017 on the grounds that it is *sub judice* as the parties and the matter in issue are directly and substantially the same as in the application dated 7th March, 2017.

7. The applications are opposed. It is stated in the replying affidavit that service of summons was effected through substituted service pursuant to the orders of the court following several unsuccessful attempts to serve the Defendants personally. That the judgment herein was obtained in a regular manner. That the draft defences do not raise triable issues and consist of mere denials. The filing of the application dated 15th March, 2017 has been termed as an abuse of the court process as it seeks the same prayers as the application dated 7th March, 2017.

8. The court was urged to impose conditions if the application is allowed. That the decretal sum be deposit in a joint interest earning account in the joint names of the parties advocates and payment of thrown away costs.

9. The two applications and the Preliminary Objection were heard simultaneously. I have considered the applications, the response to the same, the Preliminary Objection and the submissions made by the counsels for the respective parties.

10. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...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 it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but 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 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter 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 that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93*.

11. A perusal of the court record reflects that the Plaintiff served the summons to enter appearance by way of substituted service pursuant to the orders of the court. The service was effected in accordance with the said orders.

12. On 12th June, 2015, a notice of appointment was filed on behalf of the 1-6th Defendants by the firm of Simba & Simba Advocates. Prior to the filing of the said notice, the request for interlocutory dated 13th April, 2015 had been filed by the Plaintiff’s counsel. Thus by the time interlocutory judgment was entered for the Plaintiff, the aforesaid notice of appointment was already on record. It was therefore erroneous to reflect in the said interlocutory judgment that the Defendants had failed to enter appearance. However, the 1st & 4th Defendants assertion that they did not instruct the firm of Simba & Simba Advocates remains unrebutted. Therefore, I hold that the Notice of appointment filed by Simba & Simba Advocates in respect of Defendant 1& 4 is of no consequence.

13. Subsequently, on the date fixed for formal proof, the court was informed by the Plaintiff’s counsel of their letter dated 8th February, 2016 dropping prayers a, b, c & e of the paint dated 20th January, 2015. Prayer d, f & g remained. The said remaining prayer (d) was in terms of paragraph No. 20 of the Plaintiff which is as follows:

“20. Particulars of loss of revenue and profits.

(a) The cost of opening a factory line USD 250,000

(b) The Club was obliged to make a minimum order quantity of at least 20,000 shirts annually or items of the same value. The value of 1 shirt as at the time of the contract was USD 10

USD 110 *20,000=200,000*7 years =USD1,400,000

(c) Costs of shipping the products in paragraph 11 above –USD 1,250

(d) Opportunity Costs – USD 20,736,000

Total USD22,387,250”

14. The Plaintiff's prayer entry of final judgment to be entered in terms of the remaining prayers was allowed. The said judgment was entered on 20th December, 2016. The question has arisen whether the claim was liquidated. The Blacks Law Dictionary 8th edition defines a Liquidated claim as follows:

“1. A claim for an amount previously agreed on by parties or that can be precisely determined by operation of law or by the terms of the parties agreement 2. A claim determined in a judicial proceeding.”

15. To my mind, the Plaintiff's remaining claim was capable of being established through a mathematical calculation. I hold that the claim was a liquidated one. With the foregoing, the conclusion of this court is that the final judgment herein was entered regularly.

16. The application dated 7th March, 2017 was filed by Simba & Simba Advocates on behalf of the 1-6 Defendant. It was not necessary for the firm of Simba & Simba Advocates to seek leave to come on record on behalf of the Defendants when the same firm of Simba & Simba Advocate had filed a Notice of appointment on 12th June, 2015, long before the entry of the interlocutory judgment and final judgment. The firm of S.M. Keyonzo applied to come on record on behalf of the 1& 4th Defendants following the entry of judgment.

17. Turning to the draft defences exhibited, I hold that the same do raise triable issues. The issues include the question whether the Defendant entered into an agreement with the Plaintiff, whether the goods were ordered and delivered and whether the 6th Defendant has the capacity to be sued.

18. Having held that the draft defences raise triable issues, this court is inclined to exercise discretion and allow the case to be heard on merits. The Plaintiff can reasonably be compensated by an award of costs. Consequently, I allow the applications dated 7th March 2017 and the application dated 15th March, 2017 with thrown away costs to the Plaintiff. The defences to be filed and served within 14 days from date hereof.

Date, signed and delivered at Nairobi this 31st day of July, 2018

B. THURANIRA JADEN

JUDGE