



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 15 OF 2018

DEJRENE ENTERPRISES LTD.....PLAINTIFF

VERSUS

P.N MASHRU CO. LTD.....1ST DEFENDANT

JOHN NJIRU.....2ND DEFENDANT

RULING

This suit was filed on 8th May, 2018. An affidavit sworn on 11th May, 2018 by one *Frank Nzuki Ngomo*, shows that on 11th May, 2018 he served copies of summons to *Mr. Mulili*, who is in charge of Claims Department, who accepted them on behalf of both defendants but declined to sign on the principal copy. On 29th May, 2018 the plaintiff/Respondent requested for interlocutory judgment against both defendants for a liquidated sum of 10,868,440/- since they had not entered appearance within the stipulated time. The Deputy Registrar entered interlocutory judgment on the same day.

Both defendants entered appearance on 30th May, 2018. On 7th June, 2018 they filed their statement of defence. However on 8th June, 2018 Notice of Execution was drawn. On 25th June 2018 the applicant filed a Notice of Motion seeking for orders that:-

The interlocutory judgment entered on the 29th May, 2018 be stayed and/or set aside pending the hearing and determination of the application interparties and the defendants be granted leave to enter appearance and file defence.

The said application is based on the grounds that the interlocutory judgment entered on the 29th May, 2018 was entered irregularly as the defendants were not aware of the existence of the suit and/or any orders issued therein.

The application is supported by the affidavit of *John Njiru*, the 2nd defendant/Applicant, who contends that the interlocutory judgment was entered unprocedurally. The affidavit of service sworn by *Frank Nzuki Ngomo* is said to be misleading, falsified and full of half truths, hence the same cannot be admitted in law as evidence of service. The reasons given for it is that the said affidavit is not accompanied by a current practicing certificate of the said process server as is the practice. The deponent alleges he was never served with any court process and had not authorized one *Mr. Mulili* to receive court processes on his behalf. At his work place he does not have a colleague known as *Mr. Mulili*. The affidavit shows the service was effected at a premises along Nairobi-Mombasa highway at Uwanja wa Ndege. The town, street and building in which it was served is not given. The applicants claim they only knew of the interlocutory judgment through their insurers. They were not even served with mandatory notice of entry of judgment. They aver that they have a good defence and the matter should be heard and determined on merit. They should not be condemned unheard of which is against the rules of natural justice.

The application is opposed by the Respondent through the Replying affidavit sworn by *Irene Jepkoech Kiplagat* on the 18th July, 2018. Her grounds are that the defendant and the insurance company were duly served with demand notice and statutory notice respectively before the commencement of these proceedings which they ignored. When the suit was filed they were served on 11th May, 2013 by a licensed court process server. The interlocutory judgment was obtained regularly as all the procedural steps were adhered to and setting it aside will be detrimental to the plaintiff business.

In determining this application, I have looked at the affidavit of service. The process server alleges that he served at offices which are situated along Nairobi-Mombasa highway at Uwanja Wa ndege. The town, building and time details are not given.

Mr. Mulili, the one who was allegedly served is said to had accepted that he had instructions to receive the said summons on behalf of *Mr. John* the second defendant herein. If that was the position it then comes as a surprise that he is alleged to have declined to sign on the principal copy. The applicant alleges he was not served, and there is a possibility he was not. The interlocutory judgment was therefore irregularly entered as service was not ascertained. Even if the interlocutory judgement was regular, the applicant entered appearance a day after it was entered and 7 days thereafter filed a defence. The proposed defence raises triable issues. The swiftness in their action shows they intend to defend the suit. Where a party has demonstrated intention to defend the suit, and the defence raises triable issues, has come to

court without inordinate delay, should not be denied the right to a fair hearing. In *Shailesh Patel t/a Energy Company of Africa –vs- Kestels Engineering Works Pvt Ltd and 2 others [2014] eKLR*, Ogola J despite finding the proposed defence not to appear to address the issues on the claim, did allow the application for setting aside interlocutory judgment in acknowledgment of the defendant’s right under *Article 50* of the *Constitution* to a fair hearing.

The Court of Appeal in Civil case No. 3399 of 1992, *Fredrick Chege Kamenwa –vs- Aron K. Kandie*, held that:-

“notwithstanding the regularity of an ex parte judgment, a court may set aside the same if there is reasonable defence on the merits”.

In Civil case No. 222 of 2010 of *Winnie Wambui Kibinge and 2 others –vs- Match Electricals Limited*, the court observed that, ***“.....it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.....”.***

Lastly, *Justice Adoyo* of the High Court of Uganda while examining the provisions relating to setting aside ex parte judgments expressed in the case of *Transafrica Assuracne Co. Ltd –vs- Lincoln Mujuni* that:-

“The rationale for this rule lies largely on the premise that an ex parte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing”.

In my view, where the defaulting party has offered a reasonable explanation for the default, has come to court without inordinate delay and the proposed defence raises triable issues, such a party should not be denied the right to a fair hearing. The applicant in this matter has met the said threshold. The application is merited and is granted as prayed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of October, 2018.

In the presence of:-

All parties absent

Mr. Mwelem- Court clerk