



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 8 OF 2018

TATA AFRICA HOLDINGS (KENYA) LTD.....PLAINTIFF

VERSUS

ACE MOTORS LTD.....DEFENDANT

RULING

The suit against the Applicant/Defendant was filed on 25th April, 2018. The Advocate for the Appellant/Defendant entered appearance on 4th May, 2018. On 21st May, 2018 the plaintiff/Respondent requested for judgment against the defendant for failure to enter appearance or file defence within the stipulated time. On 22nd May, 2018 the Deputy Registrar entered interlocutory judgment.

The Applicant/defendant herein filed the application dated 23rd May, 2018 seeking for orders that;

- (i) There be a stay of or further proceedings and/or execution herein pending the hearing of this application interparties.
- (ii) The exparte judgement entered on 22nd May, 2018 and all consequential orders be set aside and the defendant/Applicant be given unconditional leave to defend the suit.
- (iii) The proposed draft defence be deemed to have been properly filed and served subject to payment of requisite court fees.

The application is supported by an affidavit dated 23rd May, 2018 sworn by Deeper Bhatt who states that they were served with pleadings through their security guard and upon receiving them, they instructed their advocate to file a memorandum of appearance and defence on their behalf. A defence was consequently prepared but delayed in filing since the contact person in custody of all the documents was away from Eldoret, thus occasioning the delay.

The 14 days within which they were required to have filed the defence was to lapse on 21st May, 2018 and that is the date when the exparte judgment was requested for and subsequently entered on 22nd May, 2018. The plaintiff will not be prejudiced in anyway if exparte judgment is set aside unconditionally.

The annexed draft defence raises triable issues which the court ought to address.

The Respondent opposes the said application on grounds that service was effected upon applicant's manager one *Mr. Bhatt* and subsequently a memorandum of appearance was filed but never served upon the defendants thus prompting the request for judgment. The applicant is not candid in his averment and neither has he annexed any proof to support his averments. It is further averred by the respondent that the defence raises no triable issues which would warrant setting aside of the regular judgment.

Lastly, they contend that the outstanding claim has been due for more than four years and if the court is persuaded to set aside the regular judgment, then it is fair that the applicant deposits the entire sum to the court and/or the advocates as the court may deem fit.

In their submissions the applicants stated that service upon the defendant was not proper since it was effected upon the security guard and not the secretary or officer of the company. Secondly, they averred that the memorandum of appearance was duly filed on time and that the only delay was with filing the defence. The draft defence annexed raises triable issues. The exparte judgment granted was requested for before the expiry of the required time and the same was granted the following day.

They further contend that the filed affidavit of service describes the plaintiff's premises as situated on Kenyatta street while the applicant's premises is situated along Lumumba Avenue near Moi Girls High School. Also that *Mr. Bhatt* who is alleged to have accepted service on behalf of the defendant is neither an employee nor the manager of the defendant's company. He is a schizophrenic patient who is mentally unstable and only passes time at the establishment.

The Respondent on their part submitted that once the memorandum of appearance was filed, a defence ought to have been filed and served within 15 days. The plaintiff claim against the defendant is for a liquidated amount to the tune of 20 million arising after the party's contractual relationship to supply the defendant with farm machinery. The defence has raised no ground as to why the 20 million claim is not owing. Lastly they urged the court in case it finds the application merited, to find the applicant to have stayed with a substantial amount of money for over 4 years and order that the same be deposited to court.

The main issue for determination in this application is whether the interlocutory judgment entered against the defendant/applicant on 22nd May, 2018, was regular.

The applicable law for setting aside *ex parte* interlocutory judgment in default of entering appearance or filing of defence, is Order 10 rule 11 of the Civil Procedure Rules. The power to set aside an *ex parte* judgment is a discretionary power exercised with the aim of doing justice to the parties. Various court decisions on the issue are of the said position. In *Philip Kiptoo Chemwolo and Mumias sugar Company Ltd -vs- Augustine Lembede (1982-1988) KAR page 1036*, the Court of Appeal while dealing with an appeal against refusal to set aside an *ex parte* judgment in default, expressed that:-

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the height of all facts and circumstances both prior and subsequent and of the respective merits of the parties”.

In *Shah -vs- Mbogo and Another (1967) EA 116*, the court stated:-

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause justice, the court would set aside an *ex parte* judgment”.

Equally in *Patel -vs- EA Cargo Handling Service Ltd (1974) EA 75* the same position was buttressed by the court when it stated that:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions in 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 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 defense and which should go to trial for adjudication”.

Lastly in *Sebei District Administration -vs- Gasyali and other (1968) EA 300*, Sheridan J remarked:-

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”.

In this case the applicant entered appearance in time but just failed to serve. Interlocutory judgment was entered a day after expiry of allowed time to file a defence. The current application was filed a day after. There is a draft defence attached to it. The swiftness in which the proceedings herein have been undertaken by both parties demonstrates enthusiasm in defending or asserting their position in court. The draft defence raises triable issues and the delay can be compensated by way of costs. I for the reasons find the application merited and is granted as prayed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of October, 2018.

In the presence of:-

- (1) C.F Otieno for the defendant
- (2) Mr. Mwelem- Court clerk