REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2 OF 2018

CHRISTOPHER OGECHI OMBATI.....1ST APPLICANT

GRACE NYANGARA OGECHI.....2ND APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD.....DEFENDANT

RULING

1. In the chamber summons dated 24th April 2018, the defendant (hereinafter the applicant) approached the court seeking that:

i. This honourable court be pleased to set aside the default judgment and all consequential orders there from entered against the defendant on 17th April, 2018.

ii. This honourable court be pleased to stay formal proof hearing before the deputy registrar.

iii. This honourable court be pleased to allow the defendant to file its memorandum of appearance, defence and notice of preliminary objection out of the prescribed time.

iv.This honourable court be pleased to order that the defendant's preliminary objection be dispensed with first.

v. The cost of this application be in the cause.

2. The application is expressed to be made under *Order 10 rule 11* of the *Civil Procedure Rules, 2010; Section 3A* of the *Civil Procedure Act* and all other enabling provisions of the law. It is supported by grounds stated on its face and the depositions made in the supporting affidavit sworn by one *Aalia Hawa*, an advocate in the firm of *Omulele & Tollo Advocates*, the advocates on record for the applicant.

3. In the grounds anchoring the summons and in the supporting affidavit, the applicant did not clearly explain why it did not file the memorandum of appearance in good time resulting in the entry of interlocutory judgment against it on 17th April 2018. The only explanation offered by the applicant through its learned counsel only related to the period after the expiration of the time statutorily limited for filing of a memorandum of appearance.

4. The deponent to the supporting affidavit averred that his firm received instructions to act on behalf of the applicant when the period within which it ought to have entered appearance had lapsed; that he only learnt that interlocutory judgment had been entered against the defendant when he presented for filing in the court registry the defendant's memorandum to enter appearance which was rejected. The applicant contends that it has a good defence with triable issues and it should be given an opportunity to defend the plaintiff's claim which in its view is time barred; that if the application is not allowed, the applicant will suffer great prejudice as it would mean that it will be condemned unheard contrary to the provisions of *Article 50* of the *Constitution*.

5. The application is opposed through grounds of objection dated 30th May, 2018 and a replying affidavit of even date sworn by the plaintiff's counsel, *Ms Margaret Ameka*.

The plaintiffs in their response denied that their suit is time barred as alleged by the applicant and asserted that it was filed within the time prescribed by the law; that the interlocutory judgment was regularly entered and should not be set aside; that the application lacks merit as no explanation has been given for the delay between the time prescribed for entry of appearance and receipt of instructions from the defendant; that the draft defence annexed to the application shows that the applicant does not have a reasonable defence and that therefore the

application should be dismissed.

6. When the application came up for hearing, parties agreed to have it canvassed by way of written submissions. The applicant filed its submissions on 26th June 2018 while those of the plaintiffs were filed on 13th July 2018.

7. I have considered the application, the grounds of objection, the affidavits on record, the parties' rival submissions as well as the authorities cited. I have also perused the court record.

8. The court record shows that the plaintiffs' suit was instituted on 2nd January 2018. The summons to enter appearance was issued on 3rd January 2018. It required the applicant to enter appearance within 15 days of service of the summons.

The affidavit of service sworn by *Sytanslauce Weche* on 11th April 2018 proves that the defendant was served with the summons to enter appearance on 21st March 2018, a fact which is admitted by the applicant in its submissions. It is also not disputed that the interlocutory judgment entered on 17th April 2018 was regularly entered since the applicant had been duly served with summons but failed to enter appearance within the stipulated time.

9. Having established from the court record that the default judgment entered herein was regular, I find that the only issue which arises for my determination is whether the applicant has laid down sufficient basis to justify the exercise of the court's discretion in its favour by setting aside the default judgment and granting it leave to defend the suit. It may be important to point out at this juncture that the aforesaid discretion should only be exercised to meet the ends of justice but not to assist a party who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. The discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.

10. Under *Order 10 rule 11* of the *Civil Procedure Rules*, the court has unfettered discretion to set aside default judgment and any consequential decree or order on terms it considers just.

11. Some of the factors which should guide the court in the exercise of its aforesaid discretion is the explanation given for failure to file the memorandum of appearance or defence within time; the length of time that has passed since the default judgment was entered; whether the intended defence raises triable issues and the prejudice each party was likely to suffer if the application was allowed or dismissed: See: ***Patel V EA Cargo Handling Services Limited; Mbogo & Another V Shah, [1968] EA 93; James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another, [2016] eKLR***.

12. Guided by the above principles, I now turn to consider whether the applicant has met the threshold for grant of the orders sought.

In this case, the applicant's advocates have contended that they were unable to file the memorandum of appearance within time since they received the applicant's instructions to defend the suit when the time to enter appearance had expired; that failure to instruct them on time was due to inadvertence on the part of the applicant and was not deliberate.

13. Though the deponent did not disclose the date on which the firm of *Omulele & Tollo Advocates* received instructions to defend the plaintiff's claim, I have noted from the court record that the default judgment was entered on 17th April 2018 and the applicant sought to file its memorandum of appearance two days later on 19th April 2018 – see annexture to the supporting affidavit marked "**AH-1".** The instant application was filed on 24th April 2018 about 5 days later.

14. The time within which to file a memorandum of appearance expired 15 days after 21st March 2018 which was on or about 9th April 2018. If the court was to believe the deponent's word that instructions to defend the suit were received after time to enter appearance expired, it means that the instructions were received after 9th April 2018. Considering that interlocutory judgement was entered on 17th April 2018 about two weeks later and the application was filed five days later, I find that the applicant has demonstrated by conduct that it was genuinely seeking an opportunity to defend the suit and that the application was not meant to delay or obstruct the course of justice.

15. The above finding notwithstanding, I have examined the draft defence annexed to the supporting affidavit. I note that the defendant has claimed that the suit is time barred and has annexed a notice of preliminary objection to that effect. The defendant has also denied the allegations of negligence made against it in the plaint and has asserted that the applicant accorded the deceased prompt, adequate and competent care and that his death was occasioned by circumstances beyond its control.

16. Given that the plaintiffs have denied in the replying affidavit that their suit is statute barred and considering that their claim is predicated on medical negligence, it is my view that the applicant's intended defence is not frivolous but is one which raises triable issues which warrant further interrogation by the court.

17. On the issue of prejudice, considering that the default judgment was entered about seven months ago and the plaintiffs had not yet fixed a hearing date for formal proof by the time the application was filed, I find that if the application was allowed, the plaintiffs are not likely to suffer any prejudice that cannot be ameliorated by an award of costs. Conversely, if the application was dismissed, the applicant will suffer great prejudice since the dismissal of the application will have the effect of removing it from the seat of justice without giving it an opportunity to be heard on its dispute with the plaintiffs, which would be a smack on the face of the constitutional principle of access to justice and the right to be heard guaranteed under *Articles 48 and 50* of the *Constitution*.

18. In view of the foregoing, I am satisfied that the interests of justice require that the plaintiffs' suit be heard on its merits which can only be done if the default judgment is set aside and the defendant is granted leave to file its memorandum of appearance and defence.

I therefore find merit in the application and it is hereby allowed in terms of prayers 1 and 3. The memorandum of appearance, defence and notice of preliminary objection shall be filed and served within the next 14 days. I will not make any order with regard to prayer 2 since in my view, it has already been overtaken by events. I do not also find it appropriate to issue any order in respect of prayer 4 as in my opinion, the direction sought therein can only be given by the trial judge once the case has been certified ready for hearing.

19. On costs, the best order that commends itself to me given the circumstances of this case is that the applicant will pay the plaintiffs' thrown away costs in the sum of KShs.30,000.

It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** this 29th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the applicants

No appearance for the defendant

Mr. Fidel: Court Assistant