



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CIVIL CASE NO. 17 OF 2014**

**ANN NJERI KANGARA ..... APPLICANT**

**-VERSUS-**

**HARRISON KANG'ARA KARURI ..... RESPONDENT**

**RULING**

1. The matter pending before court is the application dated 22<sup>nd</sup> December, 2016 seeking for orders that the respondent's application dated 25<sup>th</sup> May, 2015 be dismissed for want of prosecution. The application dated 25<sup>th</sup> May, 2015 is seeking that the Court sets aside the interlocutory judgment.

2. The application is based on the fact that the Respondent never filed a reply to the originating summons and default judgment was entered against him on 6<sup>th</sup> May, 2015. He raised a Preliminary Objection to the Originating Summons which was dismissed on 20<sup>th</sup> April, 2014 and he proceeded to file the application dated 25<sup>th</sup> May, 2015 to set aside the default judgment. However, he has never fixed the same for hearing and the applicant's advocate took a date but service of the hearing notice was dismissed for want of regularity on 14<sup>th</sup> September, 2016. That it is more than three months since the application dated 25<sup>th</sup> May, 2015 was adjourned and it has not been prosecuted.

3. In response the Respondent states that the applicant's application is unfounded, premature and an abuse of the court process. That a statutory period of one year has not lapsed since his application was last actively in court. That summons was served upon him on 29<sup>th</sup> October, 2014 and memorandum of appearance was filed on 31<sup>st</sup> October, 2014 together with Preliminary Objection that after prosecuting the Preliminary Objection his advocates filed a replying affidavit to the Originating Summons. That the Deputy Registrar did not peruse the file before entering *ex parte* judgment since it was entered after he had filed all relevant documents. That his defence raises triable issues and it is only fair and just that the same be put to record to enable the court reach a finding based on merits of the matter.

4. I have considered the application. The first issue is:

**Dismissal of application for want of prosecution**

In the case of **Abdurrahman Abdi v Safi Petroleum Products Lt and 6 others [2011] eKLR**, the court stated:

***“The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”***

As per the records the Originating Summons was filed on 29<sup>th</sup> October, 2014 by the applicant. The Respondent filed memorandum of appearance and Preliminary Objection on 31<sup>st</sup> October, 2014. The Court gave its ruling on 24<sup>th</sup> May, 2015 whereby it dismissed the Preliminary Objection and the applicant proceeded to request for judgment on 27<sup>th</sup> April, 2015. The Respondent filed replying affidavit on 6<sup>th</sup> May, 2015 on the same date the default judgment was entered.

5. The Respondent is claiming that the deputy registrar entered default judgment whilst he had filed all relevant documents. This does not seem probable since it is expected that the deputy registrar would peruse the file to confirm the documents he filed before he entered judgment. The fact that the replying affidavit was filed on the same date, it seems more likely that the Respondent in view of the default judgment attempted to remedy the situation by filing his replying affidavit on the same date.

6. On the issue of fixing the application dated 25<sup>th</sup> May, 2015 for hearing, the records indicate that the applicant fixed the matter for 13<sup>th</sup> April, 2016, 18<sup>th</sup> May, 2016, 14<sup>th</sup> September, 2016 where the Respondent's was unavailable. Though the hearing for 14<sup>th</sup> September, 2016, the Court held that the Respondent had not been properly served.

7. The Respondent despite filing the application did not take a hearing date of the same and in all the five instances above where the matter was fixed, it was the applicant who took the initiative. The period between when the Respondent's application was filed and the applicant's application for dismissal is one and a half years. The Respondent has not offered any explanation for not fixing his application for hearing.

8. The act of dismissing an application is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, which delay occasions injustice to either party to the dispute and in this case, delay defeats equity. The Respondent has opposed the application for dismissal. I am minded of the overriding objectives of the **Civil Procedure Act** as provided under **Section 1A** and **1A** which provides:

*“The overriding objectives of this Act and the rules mad hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”*

The **Constitution at Article 159 (2) (d)** provides:

*“In exercising Judicial authority the Courts and tribunals shall be guided by the following principles – Justice shall be administered without undue regard to procedural technicalities.”*

9. These provisions call on the Court to strife to do substantial justice. The Respondent has opposed this application. I am of the view that he should get a chance to prosecute the application in the interest of justice. The Respondent will not suffer any prejudice. I will disallow the application. The Respondent to fix the application for hearing. The Respondent to pay thrown away costs of Kshs.5000/= within 14 days.

*Dated and delivered at Kerugoya this 20<sup>th</sup> day of December, 2017.*

**L. W. GITARI**

**JUDGE**

Ruling read out in open Court, M/S Kiragu holding brief for M/S Makuoro for Respondent. Applicant present, court assistant Naomi Murage this 20<sup>th</sup> day of December, 2017.

**L. W. GITARI**

**JUDGE**

**20.12.2017**