



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 8 OF 2014

IRENE NJOKA.....PLAINTIFF

VERSUS

KENYA RE-INSURANCE CORPORATION LTD.....DEFENDANT

R U L I N G

1. This is the application dated 23/1/15 seeking *inter alia* that that the court be pleased to set aside the judgment in default of appearance entered against the defendant and the defendants be granted an opportunity to defend the case.
2. The application is supported by the affidavit of Paul Wanga an advocate in the law firm representing the defendant. The corporation is sued in its capacity as the statutory manager of United Insurance Company. On 17/12/2014 the defendant instructed the firm to defend the suit against them. It is deponed that the law firm was instructed on 17/12/2014. However, it closed office on on 18/12/2014 for the Christmas vacation and resumed 12/1/2015.
3. It was stated that the memorandum of appeal was filed by the clerk from the firm on 20/1/2015 during which it was established that judgment in default of appearance had been entered against the defendant on 7/1/2015. Order 50 Rule 4 of the Civil Procedure Rules provides that the period between 21st December and 13th January both days included shall be omitted from any computation of time.
4. The applicant further states that the defendants term as the statutory manager for the said insurance company expired on 28/9/2014 with Mr. Evans Munene Waruhiu being instructed as the statutory manager effective 28/9/2014. The defendant was therefore wrongly sued at the time of filing suit on 28/11/2014. The defendant has a viable defence against the plaintiff's claim and should therefore be allowed to defend the claim. The plaintiff will not suffer any prejudice if the default judgment is set aside.
5. The respondent filed grounds of opposition and a replying affidavit. In the grounds for opposition, the defendant stated that the defendants were served with summons on time. It was deponed that the affidavit by the advocate should be struck out as it should have been sworn by the defendant and that the defendant did not disclose the source of documents attached in the supporting affidavit. In the replying affidavit, she stated that the defendant was served with summons on 5/12/2014.
6. This was a case where the respondent was found liable to pay damages in Embu HCCA 77/09 and Embu CMCC 233 OF 2004. She states that she was duly insured and covered against such liability by the United Insurance Company Limited who are mandated to pay the liability. She had admitted her claim for payment and paid for the excess before the insurance went under statutory management.

7. Both parties filed submissions in support of their arguments.

8. The applicant submitted that the defence raises triable issues which the court ought to consider. This suit was filed on 28/11/2014 while the term of the defendant as the statutory manager had already lapsed which issue has been raised in the defence. The defendant has explained the reason for the delay in filing its defence and argues that time had stopped running as provided by the law. It is argued that no prejudice will be suffered to the plaintiff if the orders sought are granted.

9. The applicant contends that the supporting affidavit is proper as it has been stated by the deponent in paragraph 8 that the law firm generally acts for the defendant. There was a public announcement that Evanson Munene Waruhiu was appointed as the statutory manager on 28/9/2013.

10. The applicant attached and relied on the following authorities;

(a) **JOMO KENYATTA OF AGRICULTURE AND TECHNOLOGY VS MUSSA EZEKIEL OBADIAH [2014] eKLR** where it was held that the objects of clothing court with discretion to set aside *ex parte* judgment is to avoid injustice resulting from an excusable mistake

(b) **MOHAMMED & ANOTHER VV SHOKA [1990] KLR 463** where the court stated that the test for setting aside *ex parte* judgment is firstly whether there is a defence with merit and secondly whether there would be any prejudice and thirdly whether there is explanation for delay

(c) **TREE SHADES MOTORS VS DT DOBIE & ANOTHER [1995-1998] 1 EA 324** where the court held that the court is obliged to consider whether the draft defence raises a reasonable defence to the plaintiff's claim. If it does the defendant should be granted leave to defend,

(d) **JOHN PETER KIRIA & ANOTHER V PAULINE KAGWIRA [2013] eKLR** where the court observed that no party should be condemned unheard especially where he demonstrates that there is a defence on merit, there is no prejudice to the other party and there has been no delay.

11. The respondents submitted that there was no explanation for delay as the defendant had sufficient time between 5/12/2014 and 20/12/2014 to file the defence. The deponent has not stated in his affidavit that his client was not available to swear the affidavit. This renders the affidavit a hearsay for the information is not within the deponent's knowledge.

12. It was further argued that the draft defence does not have merit as it does not deny any of the averments in the plaint and that the source of the documents mentioned in the replying affidavit has not been stated. The plaintiff seeks indemnity for liability which occurred before 30/9/2014 when the applicant was still a statutory manager. The respondent cited several authorities which were not attached to the submissions.

13. The law applicable in this application is Order 10 Rule 11 which provides:-

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

14. The principles for setting aside judgment were discussed in the following cases;

(i) In the case of **MAINA VS MUGIRIA [1983] KLR**. The court of appeal set the following principles:-

- *There is no limit or restriction of the judge's discretion except that it should be based on such terms that may be just because the main concern of the court is to do justice to the parties*
- *This discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake, but it is not meant to assist someone who has deliberately sought to obstruct justice.*

- *The power to set aside does not cease to apply because a decree has been extracted*
- *Some of the factors to consider in an application to set aside are facts and circumstances both prior and subsequent and all the respective merits of the parties together with any other material factor which would or might have not have been presented had the judgment not been exparte and whether or not it is reasonable to set aside the judgment.*

(ii) In the case of **MOHAMED & ANOTHER VS SHOKA [1990] KLR** the appellants applied to court to set aside exparte judgment claiming that service of summons was not properly done. The high court dismissed the application. On appeal, the court of appeal held that;

- *The test for the correct approach in an application to set aside default judgment are firstly whether the defence has merits and secondly whether there would be prejudice and thirdly what is the explanation for delay.*
- *It was for the appellants to establish on a balance of probabilities that even with the irregular return of service, they were never served with the summons.*
- *Considering the lapse of time and taking into account that the final judgment had been satisfied and in view of the absence of plausible explanation for the inordinate delay, the trial judge could not have exercised his discretion in favour of the appellants without prejudice to the respondent.*

15. Paragraph 5 of the draft defence the applicant states that it ceased to be the statutory manager of the insurance company on 30/9/2014 before the suit was filed. Further that time stopped running during the Christmas and new year holidays. These two things are triable issues contained in the draft defence.

16. The respondent has not demonstrated that she will suffer any prejudice if the application sought is allowed. On the issue of delay, the respondents have not demonstrated that the applicant is guilty of laches. In the affidavit in support of the affidavit, the deponent stated that they received instructions to act on behalf of the defendant on 18/12/2014 when the office was closing and only learnt that there was judgment in default when their clerk went to file a memorandum of appearance on 20/1/2015 just after their office had opened after Christmas and new year holiday. The present application was filed on 23/1/2015 three days after the defendant discovered that judgment in default had been entered. There was therefore no delay demonstrated by the applicants in filing the application.

17. The respondent urged the court to strike out the supporting affidavit on grounds that the advocate should not have sworn the affidavit on behalf of his client.

18. Order 19 Rule 3. (1) of the Civil Procedure Rules provides that;

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.

19. In the instant case the deponent has explained in the affidavit that they represent the defendant in their matters generally. This means that the advocate was conversant with the matters in the course of his instructions. The deponent further explained why the firm was not able to file the memorandum of appearance on time. The matters could only be explained by someone from the law firm. The explanation of the delay was within the knowledge of the advocate and he was therefore best placed to swear the affidavit in support of the application.

20. On the issue of the defendant ceasing to be the statutory manager for United Insurance Ltd on 30/9/2014 the applicant states that the same was a matter in the public domain as demonstrated by annexure SM3 (f) which is a public notice placed in a daily newspaper. These were matters within the knowledge of the advocate and he was in order to swear the said affidavit.

21. The applicant has satisfied this court that its defence raises triable issues which calls for the full hearing of the case.. The respondent has not shown that he is likely to suffer any prejudice in the event that the interlocutory judgment is set aside. It is in the interests of justice and in accordance with the rules of natural justice that both parties be heard.

22. I find the application merited and it is hereby allowed with costs to the applicant. The defence to be filed and served with 14 days.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF SEPTEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Areri for Defendant/Applicant

Mr. M. Njage for Plaintiff/Respondent