



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO. 24 OF 2014**

**SCOOPY ENTERPRISES LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KISII COUNTY ASSEMBLY SERVICE BOARD ....DEFENDANT/APPLICANT**

**RULING**

1. By an application dated 7<sup>th</sup> January 2016 expressed to be brought under **Order 10 Rule 11, Order 22 Rule 22, Order 49 Rule 5 of the Civil Procedure Rules and Section, 3A, and 63E of the Civil Procedure Act** the defendant/applicant herein seeks the following orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. Spent**

**5. THAT this court be pleased to set aside the ex parte judgment entered on the 5<sup>th</sup> March 2015, consequential proceedings and the warrants of proclamation.**

**6. THAT this court be pleased to grant leave to the applicant to file her statement of defence out of time.**

**7. THAT the draft attached statement of defence be deemed as properly filed and served upon payment of the requisite court filing fee.**

**8. THAT this court be pleased to issue any such orders as it may deem just and expedient.**

**9. THAT costs of this application be provided for.**

2. The application is supported by the affidavit of the secretary and accounting officer of the applicant County Assembly, one James O. Nyaoga, in which he states that the defendant was not served with the summons to enter appearance and plaint, but was only served with warrants of proclamation which he attached to the affidavit as annexure "JONI". He states that instead, the pleadings were served upon the speaker of the defendant who holds a ceremonial position and therefore, there was no proper service since under the law, only the accounting officer or clerk is authorized to receive documents upon service.

3. The applicant's deponent adds that absence of proper service meant that the subsequent proceedings that culminated in the entry of ex parte judgment against the applicant were null and void and ought to be set aside. It is the applicant's case that it is against public policy to proceed with execution proceedings against a public entity as the respondent has threatened to do because the lease document that is the subject of the suit did not comply with the mandatory Public Finance Management Act and the Procurement and Disposal Act.

4. The plaintiff/respondent opposed the said application through the replying affidavit of Jitendra Nagda sworn on 12<sup>th</sup> February 2016 in which he states that the said application is misconceived and abuse of the due process of court because the respondent was all along fully aware of existence of the case against it having been duly served with the summons to enter appearance and plead after which the applicant entered appearance and subsequently fully participated in other proceedings before the court including making submissions on the respondent's bill of costs. He further depones that it is hypocritical for the applicant to have entered appearance and fully participated in the court proceedings only to later on turn around and claim that they were not properly served with the pleadings. The respondent contends that applicant chose not to defend the suit after entering appearance in the case and is therefore precluded from seeking orders of the court to file a defence at time when execution proceedings are already underway.

5. When the application came up for hearing on 17<sup>th</sup> February 2016, parties agreed to canvass it by way of written submissions.

6. I have read and duly considered the submissions filed by the parties herein and I note that the only issue that presents itself for the determination by this court is whether the applicant is entitled to the orders for setting aside the ex-parte judgment entered on the 5<sup>th</sup> March, 2015 and all consequential proceedings and the warrants of proclamation. In other words, has the applicant made out a proper case for the granting of orders of settings aside the ex parte judgment?

7. Order 10 Rule 11, and Order 22 Rule 22 of the Civil Procedure Rules under which this application has been brought stipulate as follows:

**[Order 10, rule 11.] Setting aside judgment.**

**11. "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."**

**[Order 22 Rule 22**

**22. "(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has**

**been issued thereby, or if application for execution has been made thereto.**

**(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.**

**(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit."**

8. My observation is that the instant application ought to have been filed under **Order 10 Rule 1 and 2 of the Civil Procedure Rules** and not **Order 10 Rule 11 and Order 22 Rule 22** as stated by the applicant.

9. **Order 51 Rule 10 of the Civil Procedure Rules** however states:

**[Order 51, rule 10.] Provision under which application is made to be stated.**

**10. “(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

10. In view of the provisions of **Order 51 Rule 10 (1) (2)**, cited above, my finding is that even though the instant application was filed under the wrong rules, the same is not fatally defective and this court is still bound to deliver its ruling on the substance of the application, which is, the setting aside of the ex-parte judgment entered herein.

11. The well-established principles of setting aside interlocutory judgements were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P.** who detailed:

***“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect 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 defence and which should go to trial for adjudication.”***

12. In the instant case, the defendant/applicant stated that it did not defend the suit because the plaint and summons to enter appearance were served on the wrong officer, the County Assembly Speaker, instead of the clerk or the Accounting Officer. I find the argument and position taken by the defendant to be dishonest, mischievous, misleading and not befitting of the important place that it holds as a county government and therefore a public entity charged with the responsibility of managing the affairs of the entire county. A perusal of the court record clearly shows that the defendant duly entered appearance in this case through its current advocates as shown in the respondent’s annexure marked “S2”. The defendant subsequently participated in the proceedings that followed the entry of judgment against it when it on 27<sup>th</sup> July, 2015 filed written submissions to the respondent’s bill of costs. To my mind this conduct of the defendant was that of a litigant who had either given up its rights to defend the suit or had admitted the plaintiff's claim against it and it cannot therefore turn back and reclaim that right at this stage of the case. I agree with the arguments of the learned counsel for the respondent plaintiff that it is an act of dishonesty on the part of the applicant to turn around, at the eleventh hour after the case has reached the execution stage, and claim that it now needs to defend the suit in which it has all along participated without filing a defence. Furthermore, I have also perused the defendant’s intended draft statement of defence and I note that he same is made up of mere denial of the respondent's claim without raising any triable issues. It does not strike me to be a good defence even though a good defence does not necessarily mean a defence which must succeed but it needs to satisfy the concept of a *prima facie* defence.

13. In the case of **Mbogo v Shah (1968) EA 93** it was observed as follows:

***“when the respondent sought to enforce the judgment against the company it applied to the High Court under O.9 ru.10 of the Civil Procedure (Revised) Rules 1948 to set it aside and to grant it leave to defend in the name of the appellants. The learned judge who heard the application was the same judge who had entered judgment. He did not doubt the right of the company as an interested party to bring the application nor did he doubt***

*his power to grant it if he chose to do so. He refused it, however, on the ground, as I understand his judgment, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case. Order 9, r. 10 gives the High Court an unfettered discretion to set aside or vary an ex parte judgment (Evans v. Bartlam, [1937] 2 All E.R. 646) and it was in the exercise of his discretion that the learned judge refused the application”.*

14. It is now trite law and indeed a well hackneyed principle that the court’s wide discretion to set aside ex parte judgment should only be exercised in most deserving cases and upon the applicant demonstrating that it has genuine and compelling reasons for not filing its defence on time or at all. At no time did the lawyers of the Defendant complain that they lacked the Plaintiff and the Summons to enter appearance. To my mind, this application is an afterthought intended to obstruct or delay the respondent execution of the decree.

15. An application to set aside ex parte judgments stems from the fundamental principle of natural justice which states that no party should be condemned unheard. The right to be heard is however not an automatic right or a blank cheque available to all and sundry including complacent or indolent litigants who deliberately choose to ignore court processes. The discretion of the court to set aside interlocutory judgments, it has severally been held, must be exercised judiciously and upon the applicant providing sufficient reasons to convince the court to exercise the said discretion in his favour. The Defendant is not deserving of discretion because it has sought to obstruct or delay the court process. The main concern of the court is to do justice to the parties.

16. In the instant case, the defendant has not furnished this court with any plausible or sufficient reasons that can convince me to exercise my discretion and grant it the orders sought. As a result, I decline to exercise my discretion to set aside the default judgment entered on 5<sup>th</sup> March 2015.

17. In the end, I dismiss the notice of Motion dated 7<sup>th</sup> January, 2016 with costs to the plaintiff/respondent.

18. Consequently, the interim orders of stay of execution issued on 7<sup>th</sup> January 2016 are hereby vacated.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of November, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Wafula for Nyamuronge for the Plaintiff
- N/A for the Respondent
- Omwoyo: court clerk