REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 394 OF 2013

1. JOYCE WAIRIMU NG'ANG'A

2. SAMUEL MAINA MAKUNDI….……..……PLAINTIFFS

VERSUS

EXCELLENT LOGISTSICS LIMITED……..….DEFENDANT

R U L I N G

1. Before me is a Notice of Motion dated 16th October, 2014. The same is brought under Orders 10 (11) and 50 Rule (6) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Defendant seeks the setting aside of the interlocutory judgment entered against it on 4th November, 2013, and the consequent proceedings and orders thereto. It also seeks the enlargement of time and unconditional leave within which to file its statement of defence.

2. The motion is premised on the grounds on the body of the application, the Supporting and Supplementary Affidavits of Richard Musyoki Kioko, Advocate sworn on 16th October and 10th November, 2014 respectively. It was averred that, upon receiving instructions to defend the suit, one Moses Ngaywa an Associate with the firm of Muriithi and Ndonye, Advocates appearing for the Defendants, who has since left employment prepared a Memorandum of Appearance and Statement of Defence under HCCC No. 396 of 2013. The same were filed in that file instead of HCCC No. 394 of 2013 which is the file for the present suit. That upon instructing his clerk to peruse the court file, it was discovered that judgment in default had been entered on 4th November, 2013 and the matter was scheduled for formal proof on 24th October, 2014. He averred that the error was not deliberated on the part of the Defendant or the law firm. He urged, therefore, that the application be allowed.

3. The application is opposed on the basis of the grounds of objection dated 27th October, 2014 and a Replying Affidavit of Margaret Ameka sworn on 27th October, 2014. It was contended for the Plaintiff that; the application is intended to delay the fair hearing and finalization of this suit; that the delay to present the application is inexcusable; that no adequate and or sufficient explanation was given for the delay from when time expired for entry of appearance and receipt of instructions from the Defendant and that this application is therefore an abuse of the court process. It was contended that no explanation had been tendered for the delay between 15th October, 2013 when the legal officer of Kenya Orient Insurance Co. Ltd wrote a letter to Muriithi & Ndonye Advocates (***'the Advocates'***) and when it was received by the Advocates on 29th November, 2013 by which time, interlocutory judgment had already been entered. That in early December, 2013 a representative from the Advocates visited the office of the Plaintiffs/Advocates and attempted to effect service but the said service was not accepted due to the anomaly in the case number and the representative was so advised. Mrs Ameka stated that the said

representative was also informed that interlocutory judgment in default of appearance had already been entered against the Defendant but the Plaintiff's Advocates took no action to rectify the position.

4. It was further contended that the request for entry of judgment was entered in early November, 2013 long before the Plaintiff's Advocates were seized of the matter. She concluded that the Defendant having not advanced an explanation of its inability to file appearance within time has no bearing upon additional mistakes and oversight occasioned by its Advocates. She urged, therefore, that the application be dismissed.

5. The application was canvassed by way of oral submissions whereby counsels reiterated the depositions contained in the Affidavit of their clients. The Defendant relied on the cases of **Nairobi Court of Appeal Civil Appeal No. 210 of 2002., Kays Investments Limited v. Thrift Homes Limited** and **High Court Civil Case No. 95 of 2014., Shailesh Patel t/a Energy Company of Africa v. Kessel Engineering Works PVT Limited & 2 Others,** which this court has considered.

6. It is clear from the record that the Defendant filed the Memorandum of Appearance and defence after interlocutory judgment had been entered. The Defendant's reason for the entry of judgment, therefore, was that the defence was filed in court file under a wrong case number.

7. Under the provisions of Order 10 Rule 11 of Civil Procedure Rules, it is provided:-

> ***"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."***

8. In the case of **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v. Augustine Kubende (1982-1988)1 KAR 1036,** the Court of Appeal held at page 1039 that:

> ***"The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

9. At page 1040, the court continued thus:-

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits.***
>
> ***I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the respondent will not agree. I am unwilling to believe that in opposing the application for setting the judgment aside and allowing a hearing on the merits, the object of the respondent was to snap at the judgment in a case in which if the defendants were***

permitted a hearing, the quantum of the liability to pay damages may be much less."

10. In the case of **SHAH – V- MBOGO & ANO (1967) E.A 470** Court of Appeal for Eastern African held:-

"IV. applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought(whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

11. From the foregoing, the setting aside of a judgment in default is in the discretion of the court. That discretion is unfettered. However, like all other discretions, the same has to be exercised judiciously. It is to be exercised to avoid an injustice or hardship resulting from accident or inadvertence or excusable mistake or error. In this regard, the court has to look at the explanation or reason advanced for the failure to enter appearance or file a defence. Further, where such a judgment is regular, the court has to consider if there is any defence on merit as cases are filed to be determined on merit and not otherwise.

12. In the present case, there is no dispute that the interlocutory judgment entered on 4th November, 2013 was regular. The explanation given by the Defendant about the filing of the Appearance and Defence in the wrong court file (HCCC No. 396 of 2013) goes to explain the delay in bringing the present application and not the regularity or otherwise of the judgment. This is so because, whilst judgment was regularly requested for on 1st November, 2013 and entered on 4th November, 2013, the wrong Appearance and Defence by the Defendant was filed on 4th December, 2013 way after the judgment had been properly and regularly entered.

13. The judgment in default having been lawful, the only issue to consider is whether there is a defence on merit. I have seen the draft defence produced as exhibit "RMK 3". The defendant denies ownership of the motor vehicle registration No. KAE 307B/ZC 1984 which was one of the vehicles involved in the accident; occurrence of the accident is also denied and more importantly, the Defendant has pleaded contribution on the part of motor vehicle registration No. KAU 089Q in which the Plaintiffs were travelling. In my view, that defence is not trivial. If proved, the same would have the effect of reducing the quantum substantially.

14. In the premises, I am of the view that the application is meritorious. In the circumstances of this case, I will allow the application on the following terms:-

(a) the interlocutory judgment entered on 4th November, 2013 is hereby set aside with thrown away costs.

(b) thrown away costs are assessed at KShs.30,000/= payable within 30 days by the Defendant to the Plaintiff.

(c) the Defendant is to file and serve its appearance and defence within 14 days of the date of this ruling.

(d) In default of (b) or (c) above, the application shall be deemed dismissed and interlocutory judgment of 4th November, 2013 re-instated whereafter the matter shall proceed for assessment of damages.

It is so ordered.

DATED and DELIVERED at Nairobi this 27th day of February, 2015.

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A. MABEYA

JUDGE