



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 105 OF 2014**

**EZEKIEL KAMAU.....PLAINTIFF**

**VERSUS**

**MUCHOKI MWAI WILSON.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion dated and filed on 19<sup>th</sup> December 2014 was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules. Prayer No (1) was spent. It sought the following remaining orders:-
  1. **Spent.**
  2. **THAT the Honourable Court be pleased to set aside the default Judgment entered against the Defendant on the 30<sup>th</sup> of May 2014.**
  3. **THAT the Honourable Court do grant leave to the Defendant herein to file the following documents in terms of the drafts annexed hereto:-**
    - a. **The Statement of Defence**
    - b. **The List of Witnesses**
    - c. **The List of Documents**
    - d. **The Witness Statements**
  4. **THAT there be a stay of execution of Order dated 2<sup>nd</sup> December 2014 pending the hearing and determination of this Application.**
  5. **THAT the Honourable Court be pleased to set aside the Order dated 2<sup>nd</sup> December 2014.**

6. **THAT the Defendant be granted leave to file the requisite Replying Affidavit to the Notice of Motion application dated the 8<sup>th</sup> July 2014 and further direct that the same be heard inter parties.**
7. **THAT the Defendant herein be granted unconditional leave to defend his case.**
8. **THAT there be liberty to apply.**
9. **THAT costs herein be in the cause.**

#### **THE DEFENDANT'S CASE**

2. The application was supported by the Affidavit of Melanie P.E Kemunto, an Advocate of the High Court that was sworn on 19<sup>th</sup> December 2014. The Defendant's Written Submissions were dated 13<sup>th</sup> March 2015 filed on 17<sup>th</sup> March 2015.
3. The Advocate averred that her failure to attend court was an inadvertent mistake on her part. It was her position that she took full and personal responsibility for the lapse and contended that her mistake should not be visited upon the Defendant.
4. It was the Defendant's case that he had a good defence and that rules of natural justice dictated that parties to a dispute ought to be given an opportunity to be heard. He therefore prayed that the court grants him the prayers he had sought in his application.

#### **THE PLAINTIFF'S CASE**

5. In opposition to the said Application, the Plaintiff swore a Replying affidavit on 21<sup>st</sup> January 2015 that was filed on even date. His Written Submissions were dated 13<sup>th</sup> March 2015 and filed on 16<sup>th</sup> March 2015.
6. The Plaintiff's case was that the Defendant's intention was to delay the matter and that he was not keen on defending the suit. He stated that the Defendant and his counsel had not followed up the progress of the case and termed the current application an abuse of the court process meant to defeat the ends of justice. He thus urged this court to dismiss the Defendant's application with costs to him.

#### **LEGAL ANALYSIS**

7. The application herein sought various substantive orders that included setting aside the *ex parte* interlocutory judgment that was entered against the Defendant on 30<sup>th</sup> May 2014 and the Ruling that was delivered on 2<sup>nd</sup> December 2014 and filed on 9<sup>th</sup> July 2014. It also sought orders that the Defendant be allowed to defend his case and put in a Replying affidavit to the Notice of Motion dated 8<sup>th</sup> July 2014. The court will first deal with the question of whether or not the interlocutory judgment aforesaid was regular and if not, whether or not the Defendant ought to be granted leave to file his defence herein.
8. As regards the question of when interlocutory judgment can be entered against a Defendant, the court had due regard to the provisions of Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010 that stipulate as follows:-

**“4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**

9. It is clear that judgment can only be entered where the claim is liquidated. This was a position that was set out in the case of Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR, where the Court of Appeal held as follows:-

**“The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof.”**

10.A perusal of the Plaint reveals that the Plaintiff had sought the following reliefs against the Defendant:-

- a. **That the Defendant do account for the proceeds of the business from April 2012 to the Plaintiff.**
- b. **That the property of the business be valued for the purpose of sale of by-off.**
- c. **That the Defendant do allow the Plaintiff back into the business.**
- d. **That the due share of the proceeds be paid to the Plaintiff.**
- e. **Any other or further order as the Court may deem fit and proper to grant.**

11.Notably, in its ruling dated 2<sup>nd</sup> December 2014, this court noted that the interlocutory judgment that was entered against the Defendant was irregular as the prayers that had been sought in the Plaint were not of a liquidated nature as is envisaged in the provisions of Order 10 Rule 4 (1) of the Civil Procedure Rules. As the court cannot and should abet or propagate an illegality, the only option is for the court to set aside the said interlocutory judgment as it was irregular and had no legal basis. Such setting aside would not fall under the exercise of discretion as a court would be doing what it is mandated by law to do.

12.The court can, however, exercise its discretion to set aside the Ruling of 2<sup>nd</sup> December 2014 as it has wide and unfettered discretion to set aside *ex parte* orders if sufficient cause is shown as can be seen from the provisions of Order 51 Rule 15 of the Civil Procedure Rules. However, the discretion is not to be exercised in a vacuum or blindly. Appreciably, the law and principles to be applied on setting aside are well settled.

13.Ordinarily a mistake by an advocate would be excusable mistake when it is apparent that a litigant was not part of his counsel’s negligence or lack of diligence in attending to a matter as directed by the court. The discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice-**See Shah vs Mbogo & Another [1967] EA 116.**

14.In Paragraph 5 of its Ruling of 2<sup>nd</sup> December 2014, the court observed the Defendant’s failure to file its response and stated as follows:-

**“Turning to the substantive issue at hand, on 22<sup>nd</sup> September 2014, the court gave directions as regards the filing of affidavits and written submissions and directed that parties appear before it on 29<sup>th</sup> October 2014 with a view to highlighting the submissions and/or for further orders and/or directions by the court. The Plaintiff filed his written submissions dated 28<sup>th</sup> October 2014 on 29<sup>th</sup> October 2014. The Defendant neither filed his written submissions nor attended court on the said date which had been taken by consent. The court therefore reserved the ruling of the application**

**herein based on the Plaintiff's written submissions on the court file."**

15. Counsel for the Defendant averred that her failure to attend court to defend the Plaintiff's application dated 8<sup>th</sup> July 2014 was due to an inadvertent mistake on her part, an omission that this court can excuse. However, from the affidavit evidence, no plausible reason (s) was advanced to explain why the Defendant failed to file its response to the said application despite having been given an opportunity to do so.
16. Having due regard to the circumstances of the case herein, the omission to attend court may have been excusable but the omission by the Defendant's counsel to comply with the court's directions in respect of the filing of the documentation resulting in the court rendering its Ruling on 2<sup>nd</sup> December 2014 was inexcusable.
17. Turning to the question of setting aside the Ruling dated 2<sup>nd</sup> December 2014, the court found that it was necessary to preserve the subject matter of the suit pending the hearing and determination of the matter herein. Indeed, the Defendant did not demonstrate what prejudice or loss he was likely to suffer or had suffered as a result of the said interlocutory orders.
18. Accordingly, having considered the pleadings, affidavit evidence and written submissions in respect of the parties' case, the court was thus not satisfied that the Defendant had established a good case that would persuade it to set aside its said Ruling. Indeed, setting aside the Ruling of 2<sup>nd</sup> December 2014 would be nothing but a waste of the court's scarce resources of time.
19. The court found that although the Defendant's counsel's explanation that her firm could not file the defence herein on time as her file and all the documents were misplaced within her office was a classical case of lack of diligence, the court had no option but to find and hold that the Defendant was entitled to file his defence as, in any event, the entry of interlocutory judgment herein was a nullity *ab initio*.

## **DISPOSITION**

20. In the circumstances foregoing, the upshot of this court's ruling was that the Defendant's Notice of Motion dated and filed on 19<sup>th</sup> December 2014 was allowed in the following terms:-
  - a. **THAT default interlocutory judgment that was entered in favour of the Plaintiff against the Defendant on 30<sup>th</sup> May 2014 be and is hereby set aside.**
  - b. **THAT Defendant be and is hereby granted leave to file his Statement of Defence and the requisite documents within seven (7) days from the date of this Ruling.**
  - c. **THAT Plaintiff be and is hereby at liberty to file his Reply to Defence within fourteen (14) days of service of the Statement of Defence.**
  - d. **Costs shall be in the cause.**

21. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2015**

**J. KAMAU**

**JUDGE**