



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 109 OF 2014
MATEX HOSPITAL SUPPLIES LIMITED.....PLAINTIFF/RESPONDENT
VERSUS
KENYA PORTS AUTHORITY.....DEFENDANT/APPLICANT

R U L I N G

1. Matex Hospital Supplies Limited the plaintiff filed this claim against Kenya Ports Authority the defendant on 6th August 2014. Summons were issued on 26th August 2014 and according to the affidavit of service of Stanley K Kimani, those summons were served on the defendant's legal department on 27th August 2014. The defendants ought to have FILED their memorandum of appearance within 15 days of service, and according to my calculation the same should have been filed by 11th August 2014. The defendant however filed their memorandum of appearance on 18th September 2014.
2. The deputy registrar of this court on the application by counsel of the plaintiff entered judgment against defendant in default of appearance on 22nd September 2014. It is that entry of judgment that is the subject of the defendant'S Notice of Motion application dated 6th November 2014.
3. By that application defendant seeks the setting aside of that interlocutory judgment
4. There is a wealth of previous decision that I wish to refer to relating to applications to set aside interlocutory judgment.
5. The case **CMC HOLDINGS LTD V NZIOKI (2004) KLR 173** set out the guiding principle the courts should bear in mind when faced by such an application. I quote from that case thus:

***“In law the discretion that a court of law has, in deciding whether or not to set aside ex parte orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.*”**

...The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence whichraises triable issues.”

6. The holding in the case of **SOUTHERN CREDIT BANKING CORPORATION LTD –V- JOHAH STEPHEN NGANGA (2006) eKLR** was as follows:

“Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is regular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If judgment entered is found to be irregular it ought to be set aside ex debito justitiae.”

7. The court in the case of **ZILPHER ACHIENG KEPHER –V- MEGA WALTH INTERNATIONAL LTD & 2 OTHERS (2014) eKLR** declined to set aside an order to transfer a file from Milimani court to Mombasa law courts because the applicant delayed for two months before seeking to set aside that order. The court found the applicant guilty of laches.

8. The plaintiff’s claim in this case is for special damages of Ksh 11,308,000. That amount represents the value of goods the plaintiff alleges the defendant’s employee removed from the plaintiff’s premises. The plaintiff is or was a tenant on the defendant’s shop No.3 at KPA Belle –vue estate in Nairobi.

9. The plaintiff’s counsels applied for the entry of judgment by their letter dated 16th September 2014 filed in court on 19th September 2014. In the body of that letter the counsel wrote:

“Kindly enter judgment against the defendant who has failed to put its appearance/or defence within the prescribed time. The judgment is for a liquidated sum of Ksh 11,308,000 together with costs and interest thereon.”

10. The deputy registrar of this court on receiving that letter entered judgment on as follows:

“Ex-parte judgment is entered herein in favour of the defendant who has failed to enter an appearance within the prescribed period despite of having been served with plaint and summon. The ex-parte judgment is for Ksh 11,308,000 being the liquidated claim together with costs and interest from the date of filing suit till date of judgment”

11. I draw specific attention to that judgment recorded by the deputy registrar. The judgment was “in favour of the defendant.” Although the entry states it was in favour of the defendant it does not state against whom it was entered.

12. Secondly under Order 10 Rule 4 of the Civil Procedure Rules the plaintiff’s counsel application for entry of ex parte judgment should have been in the format seen in form No 13 of Appendix A of the Rules. As stated before learned counsel for the plaintiff applied for entry of judgment by letter and not in the format provided under the above Rule.

13. Order 10 Rule 4 (1) is the Rule under which entry of judgment for liquidated claim is entertained. It is in the following terms:

“4. (1) Where the plaint 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.”

14. As stated before the plaintiff by this claim alleged that the defendant removed items of its property from its rented premises whose value was Ksh 11,308,000. That in my view does not qualify as a liquidated claim. The Blacks Law Dictionary 8th edition defines liquidated claim as:

“ 1. A claim for an amount previously agreed on by parties or that can be precisely determined by operation of law or by the terms of the parties agreement. 2. A claim determined in a judicial proceeding.”

15. Considering that definition it becomes clear that the plaintiff's claim is far from being a liquidated claim. It is a claim that the plaintiff needed, after entry of judgment, to formally prove. The deputy registrar therefore erred to have entered final judgment on a claim that was not liquidated claim. The entry of judgment by the deputy registrar therefore was in excess of her jurisdiction and on that ground alone the defendant's application to set aside judgment will succeed.

16. However even if the deputy registrar had not erred as shown above this court would still have been inclined to set aside the ex parte judgment because of the serious issue raised in the statement of defence and counter claim. In that the defendant alluded to a previous suit on the same cause of action filed by different plaintiffs at Nairobi Milimani court being **No. HCCC No. 811 of 2006 DAVOD MBUVI AND CATHERINE KANINI MBEBA T/A GRAFITTI CREATIONS versus KENYA PORT AUTHORITY**. That suit was struck out by Ougo J. by her Ruling of 7th February 2014. That Ruling was supplied by the defendant and having read right through it is in-correct for defendant to allege that, that suit was struck out. What the learned judge did was to discharge an injunction that had been issued in favour of the plaintiff.

17. The plaintiff by its replying affidavit sworn in response to the defendant's application by Mary Syombua Ndetto on 12th January 2015 did not controvert the defendant's deposition on the existence of another suit relating to the same cause of action at Milimani court.

18. The allegation of the existence of another sufficient ground to set aside judgment entered herein in my view in setting aside the judgment will afford the defendant an opportunity to ventilate its defence which raises serious issues.

19. **In the end I grant the following orders:**

(a) The ex parte judgment entered on 22nd September 2014 is hereby set aside.

(b) The defendant's memorandum of appearance filed on 18th September 2014 and the defence and counter –claim filed on 6th October 2014 are deemed as though within the prescribed period.

(c) The costs of the Notice of Motion dated 6th November 2014 shall be in the cause

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE