



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 424 OF 2013**  
**FIDELITY INSURANCE COMPANY.....PLAINTIFF**  
**VERSUS**  
**HUSSEIN M. ALI**  
**T/A CRESCENT SERVICE STATION .....DEFENDANT**

**RULING**

This suit was instituted on 7<sup>th</sup> October, 2013 by Fidelity Shield Insurance Company Limited against its insured Hussein M. Ali T/A Crescent Service Station. The plaintiff's claim against the defendant insured is for a declaration that the plaintiff is entitled to avoid the policy of insurance No. MC 4011058214 for breach of conditions of the policy; a declaration that the plaintiff is not liable to make any payment under the aforesaid policy insurance in respect of any claim against the defendant arising out of injuries or loss sustained in an accident on 6<sup>th</sup> November 2011 involving motor vehicle registration No. KAV 485 K, a declaration that the plaintiff is not liable to pay any claim arising out of the said accident for reasons that the defendant did not report the accident and that the motor vehicle was at the material time of the said accident driven by an unauthorized driver which was contrary to the terms of the policy of insurance; and costs of the suit .

On 16<sup>th</sup> October 2013 the defendant was served with summons to enter appearance as evidenced by the affidavit of service sworn on 21<sup>st</sup> October 2013 by Wilson Wambua Nguta.

On 4<sup>th</sup> November 2013 the plaintiff requested for judgment for reasons that the defendant had not, at that material time, entered any appearance and or filed defence within the stipulated period. Interlocutory judgment was entered on 6<sup>th</sup> November 2013 by the Deputy Registrar.

On 11<sup>th</sup> November 2014 the defendant filed a defence through the law firm of Sagana, Biriq & Company advocates.

The plaintiff set down the suit for formal proof hearing and that is when the defendant, vide an application dated 23<sup>rd</sup> February 2015 and filed on the same day sought to stay proceedings and the setting aside of the interlocutory judgment; and leave to file a defence. The application is grounded on the premises that the prayers sought in the plaint do not entitle the plaintiff to an interlocutory judgment hence the interlocutory judgment entered was irregular, null and void; the defendant had demonstrated the interest to defend the suit by filing Memorandum of Appearance and defence; he has a strong

defence ; it is in the interest of justice that the suit be determined on merits; the application had been brought without inordinate delay; no prejudice will be suffered by the plaintiff if judgment is set aside; and that the court has unfettered discretion to set aside the interlocutory judgment.

The said application is further supported by the affidavit sworn by Hussein Ali on 23rd February 2015 echoing the above grounds. The plaintiff emphasized that Order 10 Rule 4-7 of the Civil Procedure Rules do not entitle a plaintiff to interlocutory judgment where there was no prayer for a liquidated sum and that what the plaintiff should have done, would be to set down the suit for hearing and not formal proof . The defendant also stated that he has a good defence to the claim by the plaintiff hence he should be allowed to defend the claim since there are various claims against him by injured persons as well as death following an accident involving his motor vehicle KAV 485K which was insured by the plaintiff hence he will be prejudiced if judgment is not set aside and he is allowed to defend the suit. Further, that he is willing to abide by any conditions that the court may impose on it for the issuance of the orders sought.

The plaintiff's application was brought under Order 10, Rule 11, Order 50 Rule 6, Order 21 Rule 1 of the Civil Procedure Rules; Sections 1A,1B,3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. He annexed copies of plaint, Memorandum of Appearance filed on 30<sup>th</sup> October 2014 dated 25th October 2014, and defence dated 11<sup>th</sup> November 2014. He also filed supplementary affidavit on 17<sup>th</sup> June 2015 reiterating the earlier supporting affidavit and stating that he only came to learn of interlocutory judgment on 4<sup>th</sup> December 2014 from his counsel and instructed him to file this application.

The plaintiff opposed the application by the defendant and filed replying affidavit sworn by Caren Jaguga on 31<sup>st</sup> March 2015 maintaining that the judgment entered was regular following service of summons to enter appearance upon the defendant and his failure to enter appearance or file defence within the prescribed period, which was inexcusable.

The deponent who is the plaintiff's legal officer contended that no leave was sought to file Memorandum of Appearance and defence out of time; there has been inordinate delay in filing the application; the application was intended to frustrate the plaintiff's bid to formally prove its case; that the defendant had no viable defence that raises triable issues. The plaintiff urged this court to dismiss the application with costs.

The parties argued the application through oral submissions.

In the supporting submissions, the defence counsel Miss Kigera submitted reiterating what is contained in her client's application, grounds and supporting affidavit, emphasizing that the judgment entered was irregular and no reason should be given for the delay or failure to file defence or enter appearance within the prescribed period. She relied on the case of **Andrew Washington Njenga V Co-Operative Merchant Bank Ltd(2004) e KLR** maintaining that the judgment entered is null and void hence the defence filed should be validated.

Mr Mutia advocate for the plaintiff submitted in opposition, relying on the replying affidavit that the judgment entered was regular and that the defendant was guilty of laches, having taken a period of over one year before filing this application to set aside a regular judgment and after entering an appearance and filing defence out of time without leave of court. Counsel also maintained that there was no viable defence that raises triable issues hence the application was only intended to frustrate formal proof hearing.

In a brief rejoinder, Miss Kigera submitted that the matter could only be set down for formal proof hearing if the prayers sought are pecuniary in nature. Further, that declaratory orders could not be quantified hence they fell under Order 10 Rule 9 of the Civil Procedure Rules and therefore the plaintiff should have set down the suit for hearing. She maintained that the defence was not frivolous as it raises triable issues following the accident involving an insured motor vehicle where people were

injured and the plaintiff was seeking to repudiate liability.

I have carefully considered the application as filed, the supporting affidavit and supplementary affidavit, the replying affidavit, oral submissions by both parties advocates and the authorities relied on, in line with the established law. The issue for determination, in my view, is whether the defendant is entitled to the orders sought. There are several ancillary questions attendant to this issue which will be determined alongside the main issue.

At the commencement of this ruling I did set out the history of the matter herein. The Deputy Registrar entered judgment against the defendant in favour of the plaintiff in default of appearance and defence following a formal request made on 4<sup>th</sup> November 2013 dated 1<sup>st</sup> November, 2013. The request for judgment did not set out the provisions under which it was made. Neither did the Deputy Registrar state under what provisions of the law the judgment had been entered. From the defendant's arguments, there was no jurisdiction to enter judgment as the claim was unliquidated and therefore the defendant had unconditional open ended leave to defend the suit anytime since, in any case, judgment was not available to the plaintiff in such a claim which should have been set down for hearing and not formal proof.

In the opposing papers and submissions, the plaintiff contends that where no appearance or defence is filed to a claim within the stipulated period, then the plaintiff is entitled to judgment hence the judgment entered was regular and since no reasons have been advanced for failure to file appearance and defence in time, the court should not exercise its discretion in favour of such a defendant whose application is intended to frustrate the hearing of the suit herein.

The applicable law on entry of judgment is found in Order 10 Rules 4, 5, 6 and 7 of the Civil Procedure Rules which provide:

***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 judgment, and costs.***

***2. Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail to appear as aforesaid, the court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon, as provided by Sub Rule (1) but the award of costs shall await judgment upon such other claim.***

***3. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in form No. 13 of the Appendix A enter judgment against any defendant failing to appear in accordance with Rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.***

***4. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear, the court shall on request on Form No. 13 of Appendix A, enter interlocutory judgment against such defendant and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.***

***5. Where the plaintiff is drawn as mentioned in Rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be***

***assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.***

From the above provisions, I gather that a default judgment can only be entered in respect of the liquidated demand whereas the other claims proceed to hearing. In addition, final judgment can only be entered where the suit is for a liquidated demand and some other claim. Where the claim is for pecuniary damages only or for retention of goods with or without pecuniary damages, the court is only entitled to enter interlocutory judgment and fix the matter for assessment of quantum of damages or value of goods.

In all other claims, such as the plaintiff's claim in the instant suit which seeks for declaratory orders without any pecuniary value, the plaintiff must proceed under Order 10 Rule 9 of the Civil Procedure Rules to set down the matter for hearing( See **Ruth Gathoni Ngotho-Kariuki v William Mwangi Wambugu (2012) e KLR**. This is so because the prayers sought in the plaint herein are neither liquidated nor pecuniary in nature.

In **Kenya Commercial Bank Ltd V Joshua Aggrey Oburi & Another CA 199,200,201 of 1999**, the Court of Appeal was clear that unless the matter falls within the provisions aforesated in Order 10 Rules 4,5,6 and 7 of the Civil Procedure Rules, the Deputy Registrar has no power to enter an interlocutory judgment and therefore judgment should be set aside *ex debito justitiae* since such a judgment is a nullity. A similar position was upheld in **Mint Holding Ltd & Another vs Trust Bank Ltd CA 249 (2011) e KLR**.

In **Andrew Washington Njenga V Co-operative Merchant Bank Ltd (2004)** Mohamed Ibrahim J (as he then was) held that where the plaintiff did not make claims for pecuniary damages but had 2 other claims, a permanent injunction and a declaratory order, the plaintiff had taken the plaint out of the possible purview of the limb in Order IXA Rule 5 (now Order 10 Rule 5) of the Civil Procedure Rules and therefore, the interlocutory judgment was improperly or irregularly entered. The learned judge proceeded to set it aside.

In the said **Andrew Washington Njenga** case, citing the Court of Appeal decision in **Magon V Ottoman Bank(1968) EA 156 page 158 JA Duffus**, the court was clear that whereas the power to set aside judgment was discretionary upon such terms as may be just, but in a case where obtaining of judgment was irregular and not in accordance with the law and practice as laid down under the relevant cited provisions of the Civil Procedure Rules, the respondent is entitled, as a matter of right, to have the judgment set aside without any conditions imposed. Further, the court was emphatic that there is no justification for the defendant to give any explanation or reasons for any supposed delay as the interlocutory judgment entered was in violation of the law and that the court's discretion would only come into play if the judgment was regular.

I fully agree with the above principles and do apply them here, and find that in the circumstances of this case, which are similar to the cases cited by the defendant's counsel, that in the plaintiff's claim against the defendant, there was indeed no liquidated claim or claim for pecuniary damages or for retention of goods. That being the case, the provisions of Order 10 Rules 4,5,6,7 of the Civil Procedure Rules were not available to the plaintiff who only had the option of setting down the suit for hearing and not to apply and or obtain any interlocutory judgment and purport to schedule the case for formal proof hearing.

It is for the above reasons that I find the application by the defendant herein merited and I proceed to allow it and set aside the interlocutory judgment entered by the Deputy Registrar on 6<sup>th</sup> November 2013 in default of appearance and defence for being an irregular judgment. The plaintiff shall therefore be entitled to set the suit down for hearing under Order 10 Rule 9 of the Civil Procedure Rules.

However, as the defendant has demonstrated the interest to defend the suit by filing and serving the defence upon the plaintiff, he is entitled to defend without conditions and the issue of the existence of a meritorious or arguable defence with triable issues does not arise for consideration by the court

since this court has in the circumstances of this case, no power to deny a party an opportunity to be heard thereby ousting him from the judgment seat, based on the court's view of the strength or weakness of his defence. Accordingly, the memorandum of appearance filed and defence filed on 11<sup>th</sup> November 2014 dated the same day is hereby deemed to be validly on record and duly served.

Each party shall bear their own costs of the application herein.

Dated, signed, and delivered in open court this 28th day of September 2015.

R.E. ABURILI

JUDGE

28/9/2015

28/9/2015

Coram R.E. Aburili J

C.A. Adline

No appearance for plaintiff.

No appearance for defendant

Court - Parties are absent

Date was given to them in court on 1<sup>st</sup> July 2015. Ruling delivered and pronounced in open court as scheduled.

Ruling to be typed.

Registry to inform parties' advocates.

R.E. ABURILI

JUDGE

28/9/2015