



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 75 OF 2014**

**LAWRENCE MUTHIGA**

**T/A KIMATHI BOOKSELLERS.....PLAINTIFF**

v

**ICEA LION GENERAL INSURANCE COMPANY LIMITED..DEFENDANT**

**RULING**

1. The application dated 16<sup>th</sup> June 2015 was brought by the defendant, **ICEA LION GENERAL INSURANCE COMPANY LIMITED**, seeking the setting aside of the ex-parte Judgement which was granted on 8<sup>th</sup> May 2015.
2. The said Judgement was granted following the defendant's failure to file a Defence to the suit.
3. It is the defendant's case that it filed its Memorandum of Appearance on 20<sup>th</sup> March 2014. Thereafter, the defendant appreciates that it ought to have filed its Defence within a period of 15 days. However, the defendant did not do so.
4. Instead, the defendant's advocate phoned the advocate for the plaintiff, requesting for an extension of time for the filing of the Defence. According to the defendant, its request for an extension of time was accepted by the plaintiff's lawyer.
5. The defendant's advocates then formalized the request for extension of time, by putting it in writing. And the plaintiff's advocates responded in writing, allowing the defendant up to 30<sup>th</sup> April 2014, to file its Defence.
6. It is the defendant's contention that on 28<sup>th</sup> April 2014, it filed its Defence in court. On the very same date, (28<sup>th</sup> April 2014), the defendant served the advocate for the plaintiff with the Defence.
7. If, as the defendant states, it had already filed a Defence on 28<sup>th</sup> April 2014, it would mean that the court made a serious error to enter judgement on 8<sup>th</sup> May 2014, on the grounds that there was no defence. In such circumstances, the resultant judgement would be irregular, and should be set aside immediately after the error is brought to the attention of the court.
8. But the plaintiff says that there was no Defence on the court file when the plaintiff applied for judgement.
9. If the Defence had been filed in court, why was it not in the court file?
10. The plaintiff's position is that the Defence was missing from the court file because it had never been filed in the first instance.
11. At this point in time, I deem it necessary to place on record some facts concerning this case.
12. The plaintiff is currently representing himself. He does not have an advocate.
13. However, at the time when he filed suit, the plaintiff was represented by the Law Firm of **ONDEGU & ASSOCIATES ADVOCATES**.
14. As the plaintiff's Notice to Act in person was not filed in court until 7<sup>th</sup> May 2014, that meant that

until that date, messrs **ONDEGU & ASSOCIATES, ADVOCATES** had the lawful mandate to act for and on behalf of the plaintiff.

15. Therefore, if Mr. Waweru Gatonye Advocate talked to the plaintiff's advocate prior to 7<sup>th</sup> May 2014, the representations made by the plaintiff's advocate would be binding on the plaintiff.

16. However, by dint of the provisions of Order 50 Rule 7 of the Civil Procedure Rules;

**“The time for delivering, amending, or filing any pleading answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court”.**

17. Whereas that Rule does not invalidate oral agreements between parties, it does address the mischief which could arise when one party asserts that there was consensual enlargement of time, whilst the other party denies that assertion. Instead of then leaving the issue for determination on the basis of which party the court found to be truthful, the Rule says that the consent for the enlargement of time should be in writing.

18. When the plaintiff pointed out that the alleged consent, to enlarge time, was not in writing, the defendant's advocate responded by saying that there was a letter from the plaintiff's advocates, confirming their concurrence to the enlargement of time.

19. However, the letter from the plaintiff's advocates seems to bear a date which preceded the letter that it was supposedly responding to. The letter from the plaintiff's advocates was dated 7<sup>th</sup> March 2014, whilst it was supposedly responding to a letter dated 7<sup>th</sup> April 2014.

20. If the 2 letters are looked at from the perspective of their respective dates, then it would follow that something was amiss.

21. But then again, the contents of the letter dated 7<sup>th</sup> March 2014 indicate that that letter was responding to a letter dated 7<sup>th</sup> April 2014.

22. In the circumstances, was the letter dated 7<sup>th</sup> March 2014 simply a creation of the advocates for the defendant, as the plaintiff has asserted?

23. Logically, it is possible. However, it is equally possible that there was a typographical error by the plaintiff's advocates, about the date.

24. In other words, on the basis of the material which the parties have provided to the court, I cannot make any conclusive finding about the authenticity of the letter dated 24<sup>th</sup> March 2014.

25. I therefore take the letters at their face value. In other words, there is a letter from **ONDEGU & ASSOCIATES, ADVOCATES**, agreeing to the extension of time for the filing of a Defence.

26. By the said letter, the plaintiff's advocates allowed the Defendants upto 30<sup>th</sup> April 2014, to file their Defence.

27. As the Defence was then filed on 28<sup>th</sup> April 2014, it follows that the Judgement granted on 8<sup>th</sup> May 2014 was irregular.

28. But, how is it possible that the Deputy Registrar could enter judgement, on the grounds that there was no Defence, if indeed the Defendants had filed a Defence?

29. The plaintiff emphasizes that the Deputy Registrars do not act as automatons, who do not verify the factual position on a court file.

30. Obviously, if a Deputy Registrar took action without first perusing the Court file to ascertain the factual position, he or she would be guilty of a serious abdication of responsibility.

31. So, did the Deputy Registrar fail in his or her duty, to peruse the court file before granting judgement?

32. There is no basis upon which the court can answer that question currently. However, there is on record, now, a copy of the Defence, which bears the court stamp dated 28<sup>th</sup> April 2014. On a *prima facie* basis, that implies that the Defence had been filed on that date.

33. Secondly, there is on record, a copy of the said Defence which was endorsed by the Law Firm of **ONDEGU & ASSOCIATES ADVOCATES** on 28<sup>th</sup> April 2014.

34. If any person is asserting that those 2 documents had been falsified by the defendant, it was the responsibility of that person to prove that assertion.

35. In this case, the plaintiff has made assertions and allegations, but he did not provide proof.

36. That does not, however, help us appreciate what could have happened to the Defence which had been filed in court. Was it mis-filed, or was it deliberately removed from the court file?

37. I do not have the answer to those questions. But it is also very clear, from the perspective of both parties, that the Court file in this case has been very elusive. Both the plaintiff and the defendants have had occasion to complain that they could not trace the court file at the Registry.
38. Both parties have had to take steps to reconstitute the court file, at different times. In the circumstances, I find that it was more probable than not that the Defence was filed on 28<sup>th</sup> April 2014, but that it then got displaced from the Court file by the time the Deputy Registrar entered judgement. That finding is largely influenced by the fact that on 28<sup>th</sup> April 2014, a copy of the Defence was duly served upon the plaintiff's advocates.
39. Had the firm of **ONDEGU & ASSOCIATES ADVOCATES** not have been served, they would definitely have said so: But they did not.
40. Having made that finding, it follows that the judgement entered on 8<sup>th</sup> May 2014 was irregular. It must therefore be set aside.
41. However, even if the judgement had been regular, this court would still have had the discretion to determine whether or not to set it aside.
42. I have given careful consideration to the issues raised in the Defence. To my mind, the said issues are not frivolous.
43. The plaintiff is accused of failing to co-operate with the defendant's investigators. He is said to have abandoned the vehicle on a river bed, which led to more damages to the vehicle.
44. The defendant also denied the contention that the plaintiff spent Kshs. 210,000/- to tow the vehicle to the Volvo Dealer in Nairobi.
45. Any payment made by the defendant was deemed to be Ex-gratia, as opposed to a contractual obligation.
46. And the defendant asserts that the Insurance Cover was cancelled after the plaintiff executed a Discharge Voucher. Indeed, the defendant's position was that the plaintiff was paid Kshs. 1,882,100/- in cash, and that the salvage value of the vehicle was Kshs. 1,537,900; bringing the total value of the settlement to Kshs. 3,420,000/-.
47. Clearly, it will need to be determined by the Court whether or not there was a settlement of the plaintiff's claim.
48. The defendant also asserted that the bulk of the plaintiff's claims, which relate to the loss of business, were excluded from the policy of insurance. If the defendant was able to provide evidence to show that the bulk of the plaintiff's claim was not covered by the policy of insurance, that would have a significant impact on the claim.
49. Therefore, I hold the considered view that it is in the interests of justice to provide an opportunity to the defendant to put forward its defence.
50. Of course, I am alive to the plaintiff's challenges to the various lines of the defence. If the plaintiff did succeed in persuading the court that there was no merit in the defence, the court would still grant him judgement.
51. In other words, the setting aside of the judgement would not be prejudicial to the plaintiff, because the plaintiff would still have the opportunity to shoot down the defence, if the plaintiff's case is as unassailable as the plaintiff believes it to be.
52. In the final result, the judgement which was granted on 8<sup>th</sup> May 2014 is hereby set aside, forthwith.
53. I also set aside all orders and proceedings which were founded upon the judgement which has now been set aside. In particular, but without limitation to the same, I set aside the Warrants of Attachment which were issued against the defendant on 9<sup>th</sup> June 2014.
54. The costs of the application dated 16<sup>th</sup> June 2014 are awarded to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> day of September 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Plaintiff in person for the Plaintiff

Wanjohi for Rono for the Defendant

Collins Odhiambo – Court clerk.