



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO 24 OF 2009

ALBERT BUNDI M'IKIUGU.....PLAINTIFF

VERSUS

AUGUSTINE MURITHI M'NGARUTHI.....DEFENDANT

R U L I N G

The defendant/applicant in his application dated 14th December, 2012 seeks orders that:

1. ***This application be certified urgent for hearing ex-parte in the first instance.***
2. ***There be an order for stay of execution of the decree issued herein pursuant to the judgment dated 17th July, 2009 and all consequential orders pending the hearing of this application inter-partes.***
3. ***Execution of the decree passed herein and all consequential orders be stayed pending the hearing and determination of this application.***
4. ***The Interlocutory Judgment entered against the defendant herein on 28th April, 2009 together with the judgment dated and delivered on 17th July, 2009 and the decree thereby issued and all the consequential orders made be set aside.***
5. ***The defendant be granted leave to file his defence to the plaintiff's claim***
6. ***Costs be provided for.***

The application is supported by the affidavit of the defendant and is predicated upon the following grounds:

1. ***The defendant was never served with summons to enter appearance.***
2. ***The defendant has a good defence to the Plaintiff's claim.***

In his written submissions, the defendant cast aspersions regarding the method that was used to serve summons to enter appearance. In a nutshell, he has claimed that he was never served with the summons and was not aware of the case. He claimed that he only came to learn about this case when the District Surveyor served him with a letter. He does not say what the contents of the letter were and when it was written. He goes on to explain that he was unable to seek legal services due to his financial position. He claims that he was further frustrated by a traffic road accident which had occasioned him body injuries.

It is submitted that he has proffered a reasonable explanation to merit the orders sought. He concludes that the plaintiff stands to suffer no prejudice if he is allowed to defend his case.

The plaintiff has vehemently opposed the application. He has pointed out that the defendant did not file a defence and counterclaim till after the Interlocutory Judgment had been entered even though he had been

served with summons to enter appearance and other apposite pleadings. The plaintiff submits that the draft defence and counter-claim the defendant has annexed contains mere denials and does not raise a good defence.

The plaintiff submits that the defendant has not proffered any reasonable explanation to merit the setting aside of the Interlocutory Judgment. He further submits that the defendant has not given any cogent reason to explain the inordinate delay of about 4 years before he filed this explanation.

The plaintiff has cited the Case of **Shah Versus Mbogo & Another (1967) E. A. 470** where the Court of Appeal for Eastern Africa opined as follows:-

“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 effort, 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 be refused.”

He has submitted that the apposite Court orders were delivered by the Honourable court on 17th July, 2009 and had already been implemented.

The case of **Kenya Commercial Bank Versus Nyantange & Another (1990) KLR 443** was cited where Bosire, J, opined that;

“Order 1XA rule 10 of the Civil Procedure Rules donates a discretionary power to the Court to set aside or vary an ex-parte Judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.

The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.”

The defendant submits that he will be prejudiced in that he will be denied enjoyment of his judgment. He prays that this application be dismissed with costs.

I have carefully considered the averments of the parties and their submissions. I have also considered the authorities proffered by the parties.

I agree that the 2 authorities proffered by the plaintiff are relevant to the circumstances of this case. Although the defendant claims that he was not served with summons to enter appearance and with the pleadings, he does not deny that he became aware of the suit after he received a letter from the District surveyor. He does not say when he received the letter. He has even failed to indicate the date the letter was written. Nevertheless, he says that he could not seek legal services as his financial position was poor. He has also said that he was frustrated by a road accident which occasioned him serious bodily injuries.

I find that the delay for a period of 4 years has not been satisfactorily explained. This court is, therefore, not inclined to exercise its discretionary power to grant the orders sought by the defendant.

I need to say one other thing.

In his judgment delivered on 17th July, 2009, the Hon. Justice Anyara Emukule, J, accepted that the defendant had been served with the apposite summons to enter appearance. This being the case, my court, which is a Court seized with similar horizontal jurisdiction to that of the Honourable Judge, I can not purport to overturn his finding. My decision in this matter is, however, based on my finding that the defendant, who waited for 4 years or so before filing this application does not merit the orders he has sought.

In the circumstances, this application is dismissed.

Costs are awarded to the plaintiff.

It is so ordered.

Delivered in Open Court at Meru this 20th day of November, 2014 in the presence of:

Cc. Daniel

Parties not in Court

P. M. NJOROGE

JUDGE