



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2544 of 1997

HEYWOOD OCHIENG ASESU.....PLAINTIFF

VERSUS

JACKSON KIMEU MULINGE & 2 OTHERS.....DEFENDANTS

R U L I N G

1. The main orders sought by the 1st Defendant in his application by **notice of motion dated 30th April 2012** are that the judgment entered for the Plaintiff on 27th May 2011 (and consequential decree and orders) be set aside; and that the 1st Defendant be granted leave to defend the suit. The application is brought under **Order 12, rule 7** of the **Civil Procedure Rules** (the **Rules**). **Sections 1A and 3A** of the **Civil Procedure Act, Cap 21** (the **Act**) are also cited.
2. The grounds for the application appearing on the face thereof that are germane to the main prayers are -
 - i. That the 1st Defendant has a good defence which raises triable issues, particularly paragraph 8 of the statement of defence.
 - ii. That failure on the part of the 1st Defendant to be represented on 5th April 2011 when the case came up for hearing was not deliberate or intentional.
3. The application is supported by an affidavit sworn by one **JOSEPH WAMBUA NZIOKA** (Nzioka) who describes himself as “...the **Finance Manager of Machakos Ranching Company Limited** which company is associated with the (1st) Defendant.”
4. Nzioka has sworn further that he “...generally manage(s) the affairs of the (1st) Defendant and (he is) personally aware that the (1st) Defendant has been sick for quite some time and is normally in and out of hospital.” He has also sworn that “...in view of the (1st) Defendant’s health which has greatly deteriorated, (he is) the one who generally manages his affairs and (he is) conversant with the facts of this case (and) hence competent to duly authorized to swear this affidavit on behalf of the (1st) Defendant.” He has not exhibited any such authority.
5. The Plaintiff has opposed the application by **notice of preliminary objection dated 8th May 2012** and by **replying affidavit filed on 9th May 2012**.
6. The main legal points raised in the preliminary objection are -

i. That the application is incompetent and irreparably defective.

ii. That the supporting affidavit sworn by Joseph Wambua Nzioka is incompetent and inadmissible, and ought to be struck out for being sworn by an incompetent person, and for being based on hearsay.

7. The replying affidavit (sworn by the Plaintiff) gives a history of the litigation. He pointed out that a default interlocutory judgment entered against the 1st Defendant remained in place by consent of the parties and that hearing proceeded only in respect of quantum of damages.

8. The Plaintiff also deponed that hearing notice was duly served upon the 1st Defendant by way of registered post at his last known address upon his advocate's ceasing to act for him, and upon such substituted service being sanctioned by the Court.

9. The application was canvassed by way of written submissions. Those of the 1st Defendant were filed on 4th December 2012 while the Plaintiff's submissions were filed on 10th December 2012. I have considered the submissions (including the authorities cited). I have also perused the court record.

10. The record of the court discloses that all three Defendants were duly served with summons to enter appearance and copy of the plaint. They did not enter appearance nor file defence within the stipulated time, and interlocutory judgment was entered against them.

11. The Defendants subsequently applied by chamber summons dated 28th July 1998 for orders to set aside the default judgment and for the Defendants to be allowed to file memorandum of appearance and defence. The application was compromised upon the terms that the Plaintiff withdraws his suit as against the 2nd and 3rd Defendants; that the interlocutory judgment against the 1st Defendant do remain in place; and that the matter do proceed by way of "formal proof" for purposes of assessing damages. An order was accordingly entered on 26th January 2001.

12. Thus, the hearing that proceeded *ex parte* upon the failure of the 1st Defendant or his advocate to attend court after being duly served with hearing notice (and which resulted in the judgment delivered on 27th May 2011) was for purposes only of assessment of damages as there was already judgment on liability.

13. There is thus no issue of the 1st Defendant's defence raising any triable issue, liability having in effect been settled by consent.

14. In the present application, there is no complaint at all that the damages awarded to the Plaintiff are unlawful or otherwise inappropriate in law. So, what purpose would be served by allowing the application? The application is clearly misconceived. At any rate it has no merit and must be refused.

15. There is also the issue of the supporting affidavit sworn by Nzioka. He does not claim to be the 1st Defendant's duly recognized agent under **Order 9** of the Rules, or his duly appointed *guardian ad litem* under **rule 15 of Order 32** of the Rules. So, upon what basis could he swear the affidavit in support of the application?

16. The supporting affidavit is incompetent for having been sworn by an incompetent person. It is hereby struck out. An application of this nature must be supported by an affidavit. Having struck out the supporting affidavit, the application cannot stand alone. It would be liable to be struck out.

17. As it is, I have already held that the application has not merit. It is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2013