



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 440 of 2011

**EDWARDS KINGS ONYANCHA MAINA
T/A MATRA INTERNATIONAL ASSOCIATES.....PLAINTIFF**

VERSUS

CHNA JIANGSU IETC CORPORATION & 8 OTHERSDEFENDANTS

RULING

By a Chamber Summons dated 26th January 2010 and filed in this Court on 27th January 2010, the 2nd defendant in this suit, **James Ochieng Oduol T/A Ochieng Oduol & Co. Advocates** seeks the following orders:

- 1. That for reasons to be recorded service of this application be dispensed with and the same be certified urgent and be heard ex parte in the first instance for purposes of prayers 2 and 3 herein.**
- 2. That there be a stay of execution of the Interlocutory Judgement and Decree issued against the second defendant by the Hon. King'ori (Deputy Registrar) on or about the 24th December 2009 pending the hearing and determination of this Application.**
- 3. That an urgent date be set for the hearing of this application inter-partes.**
- 4. That the Interlocutory Judgement and the resultant Decree entered against the second defendant by the Hon. King'ori (Deputy Registrar) on or about the 24th of December 2009 be and is hereby set aside *ex debito justitiae* and all orders or proceedings subsequent thereto be vacated.**
- 5. That this Honourable court do issue leave to the Second Defendant to file his Defence.**
- 6. That this Honourable Court make further Orders and issue other directions as it may deem just and expedient.**
- 7. That the costs of this Application be provided for.**

The said application is supported by an affidavit sworn by **James Ochieng' Oduol**, the applicant, on 26th January, 2010. According to the applicant, the summons to enter appearance were served on his firm on 26th November 2009 and appearance was entered on his behalf on 8th December 2009. Under Order 49 rule 3A of the Civil Procedure Rules, time, according to him stopped running for the purposes of filing the defence from 21st December 2009 till 6th January 2010. However the Deputy Registrar on or about 24th December 2009 purportedly entered interlocutory judgement against him in default of defence an action which in his view was both premature and contrary to law. Further the said purported interlocutory

judgement is a nullity, irregular and unknown to law due to the fact that the orders sought in the plaint are not envisaged under Order IXA of the Civil Procedure Rules, Cap 21 Laws of Kenya. Moreover, the draft defence raises various triable issues and fundamental matters regarding the functioning and administration of justice hence it is in the interest of justice preservation of the due process of law that the purported default interlocutory judgement be set aside. It is further contended that the claims sought cannot stand the test of judicial scrutiny and that the plaint does not disclose any reasonable cause of action, is an abuse of the process of the court and is contrary to public policy, scandalous, frivolous and vexatious.

In opposition to the application, the plaintiff on 18th February 2010 filed a notice of Preliminary Objection on Points of Law in which he raised a total of 32 issues.

In **Remco Limited vs. Ministry Jadv Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

It is clear that the 2nd defendant entered appearance on 8th December 2009. He had fifteen days within which to file his defence. Ordinarily the last day for the filing of the defence ought to have been 23rd December 2009. However by virtue of order 49 Rule 3A (now order 50 Rule 4) of the Civil Procedure Rules the period between 21st of December 2009 and 13th January 2010 was excluded from computation of time. Consequently he had until 16th January 2010 to file his defence. However on 24th December 2009, the plaintiff applied for interlocutory judgement against the 2nd defendant while the judgement against the 1st defendant was requested for on 14th December 2009. Interlocutory judgement was accordingly entered against the 1st and 2nd defendants on 16th December 2009 and 24th December 2009 respectively.

From the foregoing provisions of the Civil Procedure Rules it is clear that the entry of interlocutory judgement against the 2nd defendant on 24th December 2009 was premature and the same must be and is hereby set aside *ex debito justitiae*.

As if that was not enough the prayers sought in the plaint are as follows:

- 1. That this matter be referred to his Lordship The Chief Justice for directions that the suit be heard and disposed-of by a three Judges Bench for purposes of Constitutional Jurisdiction lacking in and/or against the ruling on 10.4.2002; 10.03.2003; 1.10.2004; 6.2.2009 and/or 15.6.2009 further for directions the hearing hereof be conducted in a day to day basis until finalized.**
- 2. That the defendants jointly and severally do compensate the plaintiff for the fruits contained in dismissed Nairobi HCCC 1227/96 which be restituted forthwith to reside in Nakuru High Court Civil Registry.**
- 3. That the 1st and 2nd defendants be punished for their contempt with impunity and contumacy of court orders in Nakuru HCCC 125/93 and Nakuru HCCC 132/93 plus in Nairobi HCCC 1227/96 and in Court of Appeal Civil Appeal CA70/95 and/or CA71/95 plus in Civil Application NAI 259/95**

pursuant to section 5(2) of Judicature Act chapter 8 laws of Republic of Kenya.

4. That the Defendants especially the 1st and 2nd defendants jointly and severally compensate this plaintiff with Accrued interest at rate of 26.5% pa then ruling on 1.04.1994 at National bank of Kenya Ltd pursuant to the conditional stay orders on 1.03.1994 re-issued 19.01.1996 in Nakuru HCCC 125/93 consolidated with Nakuru HCCC 132/93 plus accrued interests at 20% pa vide orders on and wef 26.2.1997 in Nairobi HCCC 1227/96.

5. That the restored suit Nairobi HCCC 1227/93 reside in Nakuru High Court Civil Registry as Nakuru HCCC 125/93 and Nakuru HCCC 132/93 for any further court orders in executions of the restituted suit and the certificate of taxation in Court of Appeal CA 70/95 and/or CA 71/95.

6. Cost of this instant suit plus interest at court rates from date of filing this suit.

Entry of default judgement were provided for under Order 9A rules 3, 4, 5, and 6 which are now Order 10 rules 4, 5, 6 and 7 of the Civil Procedure Rules and the said rules provide as follows:

“4. (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 the 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.

5. 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 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.

6. 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 in 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.

7. 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 foregoing it is clear that a final judgement can only be entered where the suit is for a liquidated demand only. Where, however, the claim is for a liquidated demand and some other claim, a default judgement can only be entered in respect of the liquidated demand while the other claims proceed to hearing. Where, on the other hand, the claim is for pecuniary damages only or for detention of goods with or without pecuniary damages, the court is only entitled to enter interlocutory judgement and fix the matter for assessment of the quantum of damages or value of goods (a procedure that is popularly known, erroneously though, as formal proof). It is only in respect of the foregoing claims that a default judgement whether final or interlocutory can be entered. In all other claims the plaintiff must proceed under rule 9 of Order 10 and set the matter for hearing.

It is clear that the prayers sought in the plaint herein are not the type of claims contemplated under Order 10 rules 4 to 7 aforesaid.

I therefore find that the Deputy Registrar was not entitled and had no jurisdiction to enter interlocutory judgement in default of defence. In all claims which fall outside the provisions of Order 10 rule 4, 5 6 and 7 the plaintiff, if he intends to proceed, is required to set down the suit for hearing.

A similar situation came before the Court of Appeal for deliberation in the case of **Kenya Commercial Bank Ltd. vs. Joshua Aggrey Oburi & Another Civil Appeals Nos. 199, 200 & 201 of 1999.** In that case one of the reliefs sought was for an injunction. The Court of Appeal held:

“It can be seen straight away that there is no provision for entry of interlocutory judgement in regard to the reliefs sought by the plaintiff...So what is to be done? In this case the plaintiff ought to have set the suit down for hearing (formal proof) without giving notice to the defendants who had both not appeared. Instead of doing that the plaintiff applied for interlocutory judgement, obtained the same, and proceeded to draw the decree which purportedly finally adjudicated the suit...The learned judge erred in two ways. He ought to first have appreciated that the Deputy Registrar had no power to enter an interlocutory judgement in the case. He ought to have set aside that judgement *ex debito justitiae*”.

The same position was taken by the same Court in **Mint Holdings Ltd & Another vs. Trust Bank Ltd eKLR** in which the Court held:

“The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgement in any event. As pointed out there was no liquidated demand. Judgement could only have been entered upon formal proof. The entry of such interlocutory judgement was irregular as order IXA of the Civil Procedure Rules does not cater for entering of an interlocutory judgement when the nature of reliefs sought requires formal proof”.

It is therefore clear that the interlocutory judgements that were entered herein against the 1st and 2nd defendants were not only irregular but were without jurisdiction hence null and void. The same are accordingly set aside.

In my view, the interlocutory judgements having been entered without jurisdiction and the same being null and void the issue of the existence of a meritorious defence does not fall for consideration since the Court cannot deny a party of the opportunity of being heard based on the Court’s view on the strength or weakness of a party’s case.

The defendants are hereby granted leave to file their defences within 10 days from the date hereof.

As the entry of the said irregular judgements was triggered by the plaintiff’s application, the costs of this application are awarded to the 1st and 2nd defendants.

Dated at Nairobi this 17th day of January 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of

Miss Midar for Mr Kuyo for the Applicants

Respondent present in person