



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 94 of 2012

WILLY SONGY MASAI 1ST PLAINTIFF

JOHN WESONGA 2ND PLAINTIFF

V E R S U S

THE SECRETARY GENERAL – KNUT 1ST DEFENDANT

THE CHAIRMAN – KNUT 2ND DEFENDANT

R U L I N G

In the Notice of Motion dated 8th November 2012, the defendants are seeking to set aside the judgment entered herein in default of entering appearance and filing defence. The defendant would also like to have their draft defence to be allowed and deemed to have been duly filed. The application of **XAVIER MYAMU**, counsels for both parties agreed to argue the application by way of written submissions. The plaintiff/respondent filed their submissions on 19.12.2012 but no sub-missions were filed for the applicant.

The applicants' position is that they were indeed served with the summons to enter appearance and file defence. According to the supporting affidavit, the summons were served upon a legal officer but were not brought to the attention of any Executive Officer of the Union. This led to the no-entering of appearance with the stipulated period. The applicants contend that the defendants have a valid defence. The plaintiffs have proclaimed against the defendants yet the dispute involves the Union and not individual members. The error in failing to file the appearance and defence was inadvertent and not deliberate.

In the replying, it is stated that the summons were duly served. The defendants have not been sued in their personal capacity but as officers of the Kenya National Union of Teachers. The plaintiff's position is that the purported defence is a slow and a mere denial that raises no triable issues. In the written submissions by the plaintiffs, it is submitted that the application lacks merit. The name of the legal officer serve is not mentioned and if that is the case, then a legal officer is better placed to know the meaning of court summons. It is further contended that the purported defence does not raise any triable issues. The application is being brought after execution had started. The delay is inordinate as a period of six (6) months had lapsed from the time judgment was entered. Counsel relied on the case of **DAIMA BANK LTD. –VS- PATRICK MWAU MUSEMBA, Nairobi HCCC 835 of 2003 (Milimani) and that of SHAH –VS- MBOGO [1967] E.A. 116.**

Order 10 rule 11 empowers the court to set aside a judgment entered in default of appearance and defence upon such terms as a are just. The court record shows that the plaint was filed on 19th April

2012. Summons were issued on 18th April 2012. On 7th June 2012, **ZABLON OCHIENG SENGE** filed an affidavit of service stating that he had served the summons upon **MR. WILLISON SOSION** on 17th April 2012 who took the other summons on behalf of the Union Secretary General. A request for judgment was made on 31st May 2012 and filed on 7.6.2012.

The plaintiffs resorted to amending their plaint was filed on 3rd September 2012. The fresh plaint sought a liquidated amount while the prayers in the original plaint simply sought payment of allowances for 27 months of service. Fresh summons were issued on the same day 3.9.2012. The second affidavit of service by **ZABLON OCHIENG SENGE** indicates that the summons were served upon the General Secretary, **MS. MARGARET** as the 1st defendant was on sick leave and the 2nd defendant was on an official trip to Mombasa. The General Secretary accepted service on behalf of the two defendants. The service was done on 28.9.2012.

A second request for judgment was made on 16th October 2012 for **KShs. 3,017,200/=**. The Deputy Registrar entered judgment on the same date 16.10.2012 as prayed. Subsequently, a certificate of costs was issued on 22.20.2012 for **KShs.191,108/=**. Warrants of attachment were issued by the court for **KShs.3,421,962/=** to **M/S ESHIKHONI AGENCY AUCTIONEERS** and on 6th November 2002 the defendants were served with the proclamation.

The service of the proclamation seems to have jolted the defendants from their slumber. It led to the filing of the application on 9th November 20 12. It is clear from the record that the defendants were served. It is also clear that the plaintiffs made great effort to send a process twice to Nairobi and serve the defendants. All what is required is for the court to exercise its discretion and deal with the issue. In the case of **MAINA V MUGIRIA, Civil Appeal No.27 of 1982 (unreported)** the Court of Appeal set the following conditions for setting aside ex-parte judgment.

“The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance of defence by the defendant or upon the failure of either party to attend the hearing are:

- a) **Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Service Ltd. [1974] EA 75 at 76 C and E.**
- b) **Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistakes or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbugo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.**
- c) **Thirdly, the Court of Appeal should not interfere with the exercise of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbugo v Shah [1968] EA 93.”**

In the case of **TABAKI FREIGHT SERVICES INTERNATIONAL LTD –VS- MARGARET KIARIE, Nairobi HCCC 2027** the court stated as follows:-

“The court’s power to set aside ex parte judgment is wide and is exercised without limits or restriction except that if the judgment is set aside or varied it must be done on terms that are just. The power is exercised to avoid injustices or hardship resulting from accident, inadvertence, or excusable mistake or error but it will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice (see Shah v

Mbogo (1969) EA 116). The matters to be considered in deciding the application was discussed in Jammades v Gordandas Hemraj (1952) URL 7. In that case, Ainley, J. said as follows:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregular should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.”

The court therefore has wide discretionary powers in dealing with the issue at hand. Counsel for the respondent submit that that such discretion should be exercised judiciously and upon the applicant tendering reasonable and acceptable explanation for failing to enter appearance or file defence on time. From the court record, the court record, the judgment was entered on 16.10.2012. The application was filed on 9.11.2012. This is a period of about one month. I do find that the delay is not inordinate as contended by the plaintiffs. The first request for judgment made on 31st May 2012 was rendered inoperative by the filing of the amended plaint. Time therefore started running from the date of service of the summons on 28th September 2012. The request for judgment indicate that the second service was done on 3.9.2012 and summons issued on the same date. The second affidavit of service confirms the date of service as 28.9.2012. This application having been filed on 9.11.2012, I do find that the delay is not inordinate.

The court is expected to consider the defence to be relied upon. The defendants contend that the workings on the amount due to the plaintiffs is erroneous and exorbitant (par. 6 of proposed defence). I have seen the amended plaint and paragraph 8(a) thereof state as follows:-

8(a) the plaintiff's claim against the defendant is for the payment of KShs.3,017,200/= being their dues for the full term of 27 months of their service.

Since the above claim is being disputed as exorbitant, I do find that the defence raises triable issues. The plaintiffs contend that the defence is evasive and does not indicate how much is admissible. That being the case, I do find that such issues shall be determined during a full hearing.

It is not the intention of the court to shut out a litigant from presenting his case. It is also not the intention of the court to shut out a litigant from enjoying the fruits of his judgment. Under Order 10 rule 11, the court is encouraged to grant conditions while setting aside ex-parte judgments. The proceedings herein show that the dispute between the parties has been on-going since 2009. The plaintiffs have been pursuing their allowances for long and their efforts always met resistance. They thought that they have reached the end of the long journey when the auctioneers proclaimed upon the defendants only for the current application to be filed. The end, though visible, is still too far.

To ensure that the plaintiff gather the energy and go the extra mile, I do grant the application and set aside the ex-parte judgment on condition that the defendants do deposit in court the amount of KShs.3,421,962/= as indicated in the warrants of attachment within thirty (30) days hereof. Parties are at liberty to have the amount deposited in the joint account of both counsels. I find this to be fair as the plaintiffs will be pursuing their claim knowing that the money is available and on the other hand, the defendants will be able to come up with the amount they deem proper and payable to the plaintiffs.

In the end, the application herein succeeds in the above terms. Should the defendants fail to pay the decretal amount as ordered, then these orders shall be deemed to have lapsed and execution shall proceed. For their delay in approaching the court, the defendants shall meet the costs of this application. I do further order that the defendants shall meet the auctioneer's fees.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

SAID J. CHITEMBWE

JUDGE