REPUBLIC OF KENYA

High Court at Bungoma

Civil Case 109 of 2010

JANE NASIMIYU WASIKE *alias* JANE MAUKA.....PLAINTIFF

versus

DR. SAMUEL KAMAU.....1ST DEFENDANT

DR. CLEOPHAS KUBASU.....2ND DEFENDANT

THE SECRETARY BOARD OF GOVERNMENT BUNGOMA DISTRICT HOSPITAL...3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The issue

[1] What I am called upon to determine is:

a) Whether or not an interlocutory judgment is necessary before a case is proved.

[2] The learned counsel for the Plaintiff informed the court that the Plaintiff was ready to proceed with the hearing of the case that had been scheduled for 31/1/2013. That notwithstanding, from the record, three issues emerged, to wit:

a) Whether the 1st and 2nd defendants had been served in person;

b) The grounding of the A.G entering appearance for all the defendants; and

c) The effect of non-entry of interlocutory judgment against the defendants for default of defence.

[3] Madam Mumalasi, counsel for the Plaintiff, addressed herself on the three matters. She was of the view that:

a) Interlocutory judgment is not necessary until the case is proved.

b) Order 10 rule 8 on government is clear and it was not mandatory that they should apply for

interlocutory judgment in default of defence. According to her there is no provisions under which a party can seek for judgment in default of defence.

c) Under section 1A and 1B of the Civil Procedure Act, the most important thing is justice on procedural and substantive basis. Even if the parties who are represented are served and they fail to appear, it is not a guarantee that the court will set aside any judgment entered after the case has proceeded to hearing.

d) That the plaintiff has followed the law and has served the A.G who appeared for all the defendants. Counsel believes that the 1st and 2nd defendants are aware of the suit.

COURT RENDERS ITSELF

Defendants sued jointly and severally

[4] The issues which have arisen are quite complex and have been a common source of error on how a party should proceed where there has been a default to file either of the primary pleadings, to wit, memo of appearance or defence. Fundamentally, this suit is based on vicarious liability, but the defendants have been sued both jointly and severally. In such suits, it is not a remote possibility for judgment being entered jointly and severally against the defendants. If that happens, individual liability also attaches and execution could as well be directed to all or either of the defendants depending on the judgment of the court. This is the scope within which this ruling is made.

Consequences for failure to file defence

[5] The issue that first comes to mind is a straight forward one, that is; whether there is a provision in the Civil Procedure Rules under which a request for judgment in default of defence can be made. Order 10 substantially deals with consequences for failure to file appearance or defence. But more specifically, I do not hesitate to reproduce Rule 10 of Order 10 of the CPR that:

10. The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.

Rules 4 to 9 of Order 10 of the CPR deal with request for, and entry of interlocutory judgment where a defendant or defendants, as the case may be, have failed to enter appearance. The same procedure, with necessary modifications, applies, pursuant to rule 10, to a situation where a defendant has failed to file defence. With all due respect, the argument by madam Mumalasi that there is a no provision for entry of judgment in default of defence cannot be correct and is totally indefensible. That issue rests there.

Necessity to apply for interlocutory judgment

[6] The next issue that is inextricable with the one I have just concluded, is whether or not it is necessary to apply for an interlocutory judgment before the matter can proceed to hearing. The Plaint makes a liquidated demand of Ksh.140,000/= together with some other claims for general damages, exemplary and aggregated damages. Rule 4 (2) of Order 10 of the CPR will therefore apply. Rule 4 (2) is couched in mandatory terms with regard to request for, and entry of judgment for a liquidated demand and interest thereon. It provides:

(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails or all the defendants fail, to appear [read: to file defence] 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.

This case squarely falls under rule 4 (2) above and the Plaintiff cannot fall back on Rule 9 of Order 10 of the CPR which deals with cases that are not specifically provided for by the rules.

[7] By dint of rule 10 of Order 10, the plaintiff should have applied for interlocutory judgment before setting the case for formal proof. Unless a case falls under Rule 9 of Order 10 of CPR, a request for, and entry of interlocutory judgment is necessary before the case is heard.

The essence of applying for interlocutory judgment

[8] That requirement is essential as; 1) It pronounces judgment on, and removes the need of further prove of liquidated demand; and 2) The judgment is entered after the court is satisfied that service had been effected and all mandatory preliminary matters have been complied with. It is not therefore a mere technicality as Madam Mumalasi wants the court to believe. It is a major aspect of natural law and should be observed. If this procedure was followed, the issue of service on all the defendants, and the appearance by the AG could have been settled by the court, and certainly, we would not be having this debate. Article 159 (2) should not be taken as a panacea for all procedural lapses on the part of parties. I have said this many times and I will repeat that, whereas parties and their counsels should develop new and real consciousness about the elegant provisions of Article 159 (2) (d) of the Constitution, they must stop to think what I said in **BGM HC PET NO 107 OF 2009 Re Ex Parte ELECTINA WANG'ONA** thus:

[39] But the utter misconception that must be avoided is to think that all procedural requirements have been rendered obsolete. In spite of the constitutional admonitions against placing undue regard to technicalities, there is nothing pernicious in observing procedural rectitude provided it is kept under proper constitutional control, and relates to a technicality of a nature that is the Centre piece of administration of justice. For example, service of court process and pleadings is an integral part of due process and natural law; its role can never be dwindled an iota. I admit that in a great many cases, and I have said this earlier, procedural law facilitates substantive law.

So, the requirement under Order 10 on request for, and entry of judgment is an essential aspect in adjudication of cases and should be observed.

[9] The court needed to be satisfied on service upon the 1st and 2nd defendants before the matter could proceed to trial. Summons were issued to each defendant and as 1st and 2nd defendants are individuals, summons should be served on each in person or upon recognized agents of the defendants in accordance with Order 5 rules 6,7 and 8 of the CPR. As regards the 1st and 2nd defendants, the initial service of summons is crucial and must be shown such service had been done in accordance with the law. From the record, no affidavit of service on the 1st and 2nd defendants was ever filed. A return on every summons issued by the court, whether served or not, must be made by the serving officer. Entry of appearance by the AG for all the defendants does not remove the requirement under Order 5 rule 15 of the CPR that the serving officer, in all cases where summons have been served in accordance with the rules, shall swear an affidavit of service stating the time, identifying the person served and the manner in which the summons was served. The requirement is a tool for accountability of court process as well as a reference point by the court when service must be confirmed before any proceeding could be taken in a case.

[10] I take the view that the A.G represents public interest either as friend of the court or as a substantive party in a civil proceeding where the Government is a party as per Article 156 of the Constitution. In the present case, the 1st and 2nd defendants are also sued severally and individual defence is not prohibited or a remote possibility in law. Service of court process is so central in administration of justice and the court should always take judicial notice that has been effected according to the law. The right of the individual doctors sued herein to be invited for the hearing of the case does not abate just because the A-G has entered appearance for all defendants. In most instances, the issue emerges at the execution stage or when an application to set aside ex parte judgment is made. I proceed on the premises that the individual defendants could apply to set aside the judgment and the defining aspect would be that of service of summons. The legal safeguard for justice is found in the requirement that the Plaintiff applies for judgment on the liquidated demand, and the court enters judgment thereof against the 1st and 2nd defendants. The fact that they were employees of the 3rd defendant does not remove the necessity of personal serve, or obviate the risk of liability befalling the 1st and 2nd defendants severally. In that context the appearance by the A-G may not be sufficient in law.

The decision

[11] All these issues are resolved at the point when judgment in default of defence is made. Therefore the affidavit of service herein only shows that the A-G was served with the hearing notice for 31/1/2013. There is nothing to show the 1st and 2nd defendants had been served personally with summons as to legally claim they were aware of the case.

[12] In the circumstances, I direct that the serving officer to file an affidavit of service in respect of the 1st and 2nd defendants, and the Plaintiff to take the appropriate legal step: apply for judgment on the liquidated claim, and fix the case for formal proof of the other un-liquidated claims and costs in accordance with Order 10 rule 4(2) and 8 of the CPR. No evidence that would be led on the liquidated claim in the absence of a judgment on it if at all the Plaintiff is proceeding on default of filing a pleading. The procedure being adopted by the Plaintiff is foreign to the law as a liquidated claim is involved, and the proper procedure is to apply for judgment in default of filing a pleading, whether an appearance or defence, as the case may be, on the liquidated claim herein. This procedure applies where the government is a party except the leave of the court should be sought first under Order 10 rule 8 of the CPR.

Dated, signed and delivered in open court at Bungoma this 13th day of March, 2013

F. GIKONYO
JUDGE