REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 16 OF 2012

ALBERT KIBUGU……....PLAINTIFF

VERSUS

LAW SOCIETY OF KENYA…….DEFENDANT

RULING

The defendant/ applicant has filed a Notice of Motion dated 24th April 2012 under order 10 Rule 11 of the Civil Procedure rules and section 3A of the Civil procedure Act and all other enabling provisions of the law, seeking the following orders;-

1. That the ex-parte judgment entered against the defendant on 14th March 2012 and all consequential orders be set aside.
2. That the defendant be granted leave to file its defence out of time as per the draft defence annexed herein and to defend the suit.
3. That the costs of this application be in the cause.

The application is based on the following grounds:.

1. That the defendant has a strong and arguable defence to the plaintiff's claim which ought to be heard on merits.
2. That the defendant's defence raises serious triable issues and should therefore be allowed so that the same can be ventilated on merits.
3. That the plaintiff's claim raises serious legal issues of negligence on the part of the defendant and it will be in the interest of justice that the defendant is allowed to defend itself.
4. That the claims made in the plaint are neither for a liquidated demand, pecuniary damages nor for detention of goods as envisaged under order 10 of the Civil Procedure rules.
5. That in the circumstances, the said judgment is a nullity and should be set aside as a matter of right.
6. That the application ought to be granted in the interest of justice.
7. That the defendant will not in any way be prejudicial by granting the orders sought herein and if he does, he can be adequately compensated in costs for any loss, damage or prejudice he may suffer if the ex-parte judgment is set aside.

The application is supported by the affidavit of James Nyiha dated the 24th of April 2012. He depones as follows; That the defendant herein was served with the summons and plaint pertaining to this suit by the plaintiff's advocates on 6th February 2012.That the defendant thereafter instructed their firm to enter

appearance on its behalf and they promptly did so on 21st March 2012.That according to the Civil Procedure rules, they were supposed to filed the defendant's defence within 14 days after entering appearance, being 4th April 2012.That after they entered appearance on behalf of the defendant, and as they were drafting the defendant's defence so as to ensure that the same is filed on or before the said 4th April 2012, the plaintiff served the defendant with a Notice of Entry of Judgment on 30th March 2012, which notice showed that interlocutory judgment had already been entered in the matter on 14th March 2012.That the delay to filed the memorandum of appearance after receipt of the summons and plaint by the defendant was caused by the fact that the defendant being a public office, it takes time for the received documents to be analysed and forwarded to the external lawyers. That accordingly, the delay by the defendant to enter appearance and file a defence within the stipulated time and was inadvertent, excusable and was not done in bad faith. That further, in the circumstances of the present suit the delay is not only excusable but it also justifiable due to the fact that the delay is not in any way inordinate. That the draft defence annexed herein is a clear indication that the defendant has an arguable defence, which raises serious triable issues and which ought to be availed an opportunity to be canvassed in court so that a decision on merits can be reached. That in addition, and without prejudice to the foregoing, the claims made in the plaint dated 28th December 2011 are neither for liquidated demands, pecuniary damages nor for detention of goods as envisage by Order 10 of the Civil procedure Rules. Accordingly, the court ought not to have entered the interlocutory judgment and the same should be set aside as a matter of right. That it is the interest of justice that this honourable court should sets aside the interlocutory judgment and allow the defendant to file the draft defence and defend the suit and proceeds to hear the matter on merits. That this is a suitable case for the exercise of the Court's unfettered discretion to set aside the ex-parte judgment.

The plaintiff/ respondent filed a replying affidavit dated 9th July 2012. He depones as follows: That it is true that they served the defendant with summons to enter appearance on 6th February 2012.That the summons were clear that the defendant was required to enter appearance within 15 days of which the last date was falling on 21st February 2012.That when by 21st February 2012 the defendant had not filed an appearance they perused the court file at the registry and confirmed that the defendant had failed or neglected to file a memorandum of appearance thereafter he requested for default judgment as provided under the Civil Procedure Rules. That the court acceded to their request and entered judgment in their favour. That it has now transpired that the defendant filed its memorandum of appearance on the 21st March 2012 which was way after judgment had been entered. That the defendant being the professional body for advocates in this country must surely be managed by legal professionals who should know the consequences of failure to comply with the provisions of the law and in particular, the Civil Procedure Rules. That they even communicated with officials of the defendant before judgment was entered and they informed them that they would be entering appearance before the due date. That the defendant's application would not only demean the law but is arrogant and aimed at waste of judicial time and resources which amount is to subversion of the process. That the claim sought by the plaintiff is for pecuniary damages and hence proper before this court. That the draft defence attached to the application lacks merit and it only intended to waste the plaintiff's and the court precious time and failure by the plaintiff to file court papers on time is not justifiable nor is it excusable. That no tangible reason has been tendered by the defendant as to why the judgment should be set aside. That the court can only set aside judgment where it convinced that the judgment was entered erroneously or other factors which were beyond the defendant's control, which is not the case in this instance.

Parties filed written submissions. I have read and considered the said submissions. The applicant's submissions reiterate the facts as deposed in Mr. Nyiha's affidavit. Counsel argues that they have a draft defence that shows that their defence raises triable issues that warrant being heard on merit. That the plaintiff's suit is based on a tort of negligence against the defendant on the claim that the defendant acted unprofessionally and that the said action led to a loss for the plaintiff. That the defendants defence has raised issues with the claim and further pleads negligence on the part of the plaintiff and the plaintiff's ignorance to pay back fees as required, hence the lack of a practising certificate. That the defendant is ready and willing to canvass the case and have the issues determined on merit. The applicant relied on the following cases; **Remco Ltd Vs. Mistry Jadva Parbat and Co. Ltd and Others (2002) 1EA** 233, the court noted that a defence on merits does not mean a defence which must succeed, but one which

discloses bona fide triable issues for adjudication at the trial and in the case of **Tree Shade Motors Limited Vs. D. T. Dobie and Co. Kenya Ltd & Joseph Rading Wasambo (1998) e KLR** where the court ruled that even if service was validly done, judgment will be set aside if the defence raises triable issues. Counsel urged the Court to exercise its unfettered discretion and set aside the judgment and any consequential decree or order upon such terms as are just as guided by the tried and tested cases of **Shah V. Mbogo (1967) EA. 75** and **Chemwolo and Anor Vs. Augustive Kabende (1986) KLR 429.**

The plaintiff respondent reiterated what is deponed in his affidavit and submitted that the draft defence has mere denials and does not raise triable issues. That it is just a ploy to buy time as the applicant has admitted most of the issues which has been raised by the plaintiff. That the claim made in the plaint is for pecuniary damages and going through the plaint it is clear what the plaintiff has prayed for; and the defendant/applicant contention that it does not come under order 10 of Civil Procedure Code is misguided. He sought to throw away costs of 175,000.00.

I have considered contents of the affidavit filed by the parties together with their submissions and cited authorities. The applicant does not deny that the defendant was served with the summons and plaint. This was done on the 6th of February 2012. They state that they entered appearance on the 21st March 2012 and they had 14 days to file a defence. However the plaintiff served them with a notice of entry of judgment on the 20th March 2012. The applicant upon being served with the summons on the 6th February 2012 had 15 days to file to enter appearance. This would have taken them up to 21st February 2012. The plaintiff filed a request for judgment on 29th of February 2012 and interlocutory judgment was entered on the 14th of March 2012. This was a regular judgment. The applicant argues that they have a good defence to the plaintiff's claim and states that their failure to file appearance was because the defendant being a public office takes time for the received documents to be analysed and forwarded to the external lawyers. In the plaint filed the plaintiff accuses the defendant for being negligent and claims punitive damages, damages for negligence, stress anxiety, refund of money paid to the defendant from 1998 to 2009 amongst other prayers. In the draft defence attached to the application at paragraph 4 the defendant raises the issue that the plaintiff was required first to settle the back fees owing in respect of the years 1999 and 2000, during which period he had failed to take out practising certificates. At paragraph 5 the applicant alleges that the plaintiff failed and/or neglected to pay the back fees for the years 1999 and 2000 as per the directions of the defendant. There are other issues that the defence raises at paragraph 7, 10, 11, 12 and 13. In the case of **Shah V. Mbogo (1967) EA. 75** the Court of Appeal held that ***where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to entered and defend*** and further that ***notwithstanding regularity of it (judgment)a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits.***

In my view though a regular judgment is on record the draft defence attached to the application raises issues that I cannot ignore and I find that the application has merit as there is negligence alleged on the part of the plaintiff and also the role of the Registrar of the High Court in issuing practising certificates. Guided by the Court of Appeal authorities I find it is necessary to give the applicant a chance to be heard on the defence raised. I therefore grant prayer 2 of the application dated 24th of April 2012. The defendant shall file its defence within 14 days from the date of this ruling and serve on the plaintiff/ respondent. The plaintiff/respondent is at liberty to file a reply to the defence within 14 days from date of service. The respondent has failed to justify throw away costs of 175,000.00. Costs of the application are however awarded to the plaintiff/respondent.

Orders accordingly.

Dated, signed and delivered this 31st day of May 2013

R. E. OUGO

JUDGE

In the presence of:-

.....…..... Plaintiff/Respondent

…….....…… Defendant/Applicant

….....Court Clerk