

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

ENVIRONMENT & LAND CASE NO. 9 OF 2013

SHAPHAN LUNANI WALELA..... PLAINTIFF

VERSUS

PATRICK KINYANJUI NJAMA DEFENDANT

RULING

The Applicant brought a Notice of Motion dated 25/03/2013 seeking to set aside an interlocutory judgment entered against him. The Plaintiff/Respondent herein filed a claim against the Applicant on 28/01/2013. Summons to enter appearance were duly served upon the Applicant who entered appearance on 18/02/2013. The Applicant did not however file defence. The Respondent requested that the matter be listed for formal proof as the Applicant had failed to file defence within the required time. The Deputy Registrar of the High Court directed that the hearing do proceed under Order 10 Rule 10 of the Civil Procedure Rules. It is after this that the Applicant moved to Court and filed the present application.

The Affidavit in support of the application was sworn by Peter Kiarie Ndarwa Counsel for the Applicant. Mr. Kiarie depones that the Applicant instructed him and he duly filed memorandum of appearance on 18/02/2013. The Applicant's file remained on his desk for him to prepare a defence but the same escaped his attention until the time for filing defence was over. He contends that failure to file defence was not deliberate and that the Applicant has a defence which raises triable issues. He annexed a draft defence.

The application is opposed by the Respondent who contends that the interlocutory judgment was regularly entered and that the Applicant has no defence to his claim as the agreement between him and the Applicant had been determined by effluxion of time and therefore the provisions of Cap 301 do not apply.

There is no doubt that the Applicant failed to file defence within the required time. The Applicant entered appearance on 18/02/2013. He was expected to file defence latest by 4th March, 2013. The Applicant filed this application 20 days after the time of the defence had expired. Mr. Kiarie says that the file was on his desk for purposes of him drawing a defence but that it escaped his attention. He does not state the reason why it escaped his attention i.e. whether he was away from office for that period or he had too much on his desk. The delay is not for a few days and is not properly explained.

I am aware that I have a wide discretion when it comes to setting aside an interlocutory judgment. This discretion however must be exercised judiciously. In exercising this discretion, the intended defence has also to be considered. In the present case, the Applicant contends that the tenancy between him and the Respondent was a controlled one and as such, the provisions of Cap 301 had to be followed. The Applicant also contests the jurisdiction of the Court. The basis of the claim herein was a tenancy agreement entered between the Applicant and the Respondent. The Applicant was granted an open space to operate as a garage for a period of one year with effect from 1st June 2011 to 31st May, 2012. Clause 6 of the tenancy agreement provided that if any party either desired to renew the lease or terminate the same, a three months notice had to be given in advance. When the tenancy expired on 31/05/2013, the Applicant had not given any notice for extension of the tenancy as required. The tenancy therefore came to an end in accordance with the agreement. The Applicant cannot therefore seek to invoke provisions of Cap 301. There was no landlord/tenant relationship between the two parties. The Applicant had no basis of continuing to remain in the premises and the Respondent was at liberty to have him removed from the premises through a suit. I find that the Applicant has no defence with triable issues and as such there will

be no point of setting aside the interlocutory judgment. The Applicant's motion fails and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered in Open Court on this 19th day of June, 2013.

E. OBAGA

JUDGE

COURT

At 10.19 am. No appearance. Parties to read contents of the ruling at the registry.

Court Clerk: Joan.

E. OBAGA

JUDGE

19/06/2013