



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 75 OF 2012

THAYU KAMAU MUKUGI.....PLAINTIFF

VERSUS

FRANCIS KIBARU KARANJA.....DEFENDANT

RULING:

The applicant herein **Francis Kibaru Karanja** has brought this application dated 17th October, 2012 for orders that, the Interlocutory Judgement entered herein against the Defendant be set aside; that the Defendant be granted leave to file his Defence and counterclaim and for costs of the application.

The application was premised on these grounds:- That the Defendant was never served with the Plaintiff to the suit, the process server having posted the Court documents at the Defendant's premises, that there is an existing suit touching on the suit premises in which the Defendant intended to enjoin the Plaintiff herein as a party and that the Defendant has a good Defence to the suit herein .

The application was also supported by the Affidavit of Francis Kibaru Karanja the applicant herein. He contended that he had a good defence as per the annexed copy of the draft defence. The said application was opposed by the Plaintiff herein Thayu Kamau Mukugi who filed his Replying Affidavit on 18/12/2012 . He averred that on 13/3/2012, the Defendant Entered Appearance through the firm of Maina Makome & Co.Advocates by filing a Memorandum of Appearance dated 13th March, 2012 and also filed a Replying Affidavit sworn by the Defendant in reply to the Notice of Motion and that the application is an excuse used to delay the case. That the Defendant failed to file his Defence .

The parties herein canvassed the application by way of written submissions. The court has carefully read and considered the pleadings, the written submissions and the relevant law and the court makes the following findings:- It is not in doubt that the Plaintiff herein filed this suit on 16/2/2012 . It is also evident that the Defendant was served with the suit documents by one process server Eric Otieno Jaoko on 6/3/2012. The service was done by affixing documents on the door to the Defendant's residence at Thome Estate. The process server deponed that he served the Notice of Motion application, Summons to Enter Appearance and Hearing Notice.The Defendant did admit receipt of the Court documents but denied ever receiving the Plaintiff. He alleged that was the reason why his counsel did not file Defence.

The Defendant did file his Replying Affidavit on 11/3/2012 and even participated in the hearing of interlocutory Application on 14/3/2012. The Defendant did not raise the issue of not having been served with the Plaintiff. Ruling was delivered on 20/4/2012 and the Defendant herein did not raise the issue of missing Plaintiff. When the matter was set down for formal proof on 21/11/2012, the applicant filed the

instant application on 12/11/2012. That is not demonstration of good faith. The Court do believe that the applicant was served with all the Court documents on 6/3/2012 and even the Plaintiff. However the Defendant went into deep slumber until when he realized the matter was for Formal Proof and then he brought this application for setting aside the Interlocutory Judgement.

Order 7 Rule 1 of the Civil Procedure Rules provides that:-

“ where a defendant has been served with a summon to appear he shall unless some other further order be made by the Court, file his defence within fourteen days after he has an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence”.

The Defendant herein breached the above provision of the Civil Procedure Rules which is couched in mandatory terms. However, applicant is seeking for setting aside of the Interlocutory Judgement was entered. He did not state the date of the Interlocutory Judgement. I have perused the Court proceedings and I have not seen entry of the interlocutory Judgement. Order 10 Rule 6 of the Civil Procedure Rules provides that:

“Where the Plaintiff is drawn with a claim for pecuniary damage....and any defendant fails to appear, the Court shall, on request enter interlocutory judgement against such Defendant”.

It seems the Plaintiff herein failed to make a request for entry of interlocutory Judgement but only set the matter down for Formal Proof. Therefore, there is no Interlocutory Judgement to set aside as it was never requested for by the Plaintiff as required by Order 10 Rule 6 of the Civil Procedure Rules.

On the second prayer of the Defendant that he be granted leave to file his Defence and counter claim, I will be guided by the principles elucidated in the case of **Tree Shade Motors Ltd Vs DT Dobie & Co. Ltd ; Civil Appeal No. 38 of 1998**, where the Court held that even if the Exparte Judgement was lawfully entered, the Court should look at the Draft Defence to see if it contains a valid or reasonable Defence.

I have considered the copy of the Draft Defence and counter claim by the Defendant herein. It raises some triable issues and the Court finds that this is a matter that should be heard and decided on merit. For the above reasons, *only do I allow the Defendant Prayer's No.2.*

The Court consequently grants the Defendant leave to file his Defence and Counter Claim out of time. The Defendant to file the same within a period of 14 days after the date of this Ruling. The Plaintiff/Respondent herein is entitled to costs. So costs to the Plaintiff herein.

It is so ordered.

Dated, Signed and delivered this 12TH day of July, 2013.

L .N. GACHERU

JUDGE

In the presence of

Maina for the Defendant/ Applicant

No appearance for the Plaintiff

Court Clerk : Anne

L .N. GACHERU

JUDGE.

12/7/2013