



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 801 of 2009

CITY HOPPER..... PLAINTIFF/APPLICANT

VERSUS

BENJAMIN KAMOYE

T/A IN YOUR FACE ADVERTISING..... DEFENDANT/RESPONDENT

RULING

Before me is the Plaintiff's application amended on 25th May, 2011 seeking the setting aside of the interlocutory judgment entered herein on 10th June, 2010.

The background to the application is that on 29th October, 2009, the Plaintiff filed a suit against the Defendant for allegedly passing off his services as being endorsed, recommended or approved by the Plaintiff. Upon being served with the summons and the statement of claim, the Defendant entered appearance on 11th November, 2009 and filed a Defence and Counterclaim on 31st December, 2009. In the counterclaim, the Defendant claimed that he had been defamed by the Plaintiff in a Notice the Plaintiff had put on the daily newspapers of 28th October, 2009, and 30th October, 2009, respectively. Accordingly, he claimed damages under various heads for libel. The Defence and Counterclaim was served upon the Plaintiff's Advocates on 11th January, 2010. On 3rd June, 2010, the Defendant's Advocates requested for interlocutory judgment against the Plaintiff for failure to file a Defence to the counterclaim which was duly entered on 10th June, 2010. That is the interlocutory judgment that is sought to be set aside vide the Notice of Motion of 25th May, 2011.

The application was supported by the Affidavit of Julius M. Kitheka sworn on 25th May, 2011 and the written submissions dated 8th March, 2011. The Plaintiff contended that the delay in replying to the statement of defence and counterclaim was due to the fact that the parties were discussing an out of court settlement, that the negotiations between the parties broke and therefore the Plaintiff was desirous of pursuing the suit and finally, that the Defendant will suffer no prejudice if the interlocutory judgment is set aside.

The Plaintiff relied on the case of **Morris & Company –vs- Victoria Minerals & Chemicals Ltd & Anor NBI HCCC No. 288 of 2006 (UR)** on the proposition that the main concern of the court, in an application such as the one before me, is to do justice to the parties before it.

The Defendant filed a Replying Affidavit by Stephen Kibungei sworn on 11th March, 2011 but did not file any submissions. In the said Affidavit, Mr. Kibungei denied that there were any negotiations whatsoever between the Plaintiff and the Defendant and that the Defendant/Applicant had requested for interlocutory judgment on 3rd June, 2010 because the Plaintiff had not filed any Reply to Defence and Defence to the counterclaim yet there were no negotiations. The Defendant urged the court to dismiss the application.

I have considered the Affidavits and the submissions on record. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & others –vs- David Njeru Karingi CA No. 181 of 1994 (UR)** the Court of Appeal held:-

“In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court’s discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

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However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.” (emphasis mine)

From the foregoing, it is clear that in considering the present application the court has a wide discretion which however has to be exercised on the basis of the evidence and sound legal principles. That this court has to exercise its discretion in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.

The evidence before me on which I am called upon to exercise the said discretion is scanty. What is not disputed is that the judgment being challenged is a lawful judgment. The Reply to Defence and Counterclaim was properly served upon the Plaintiff’s Advocates on 11th January, 2010. Under Order 9 Rule 3, service on a recognized agent of a party to a suit is effectual as service upon a party. On being served with the Reply to Defence and Counterclaim as aforesaid, no Defence to the counterclaim was filed. Judgment was requested for over five (5) months later. Accordingly, I hold that the judgment was properly and regularly entered.

As I have stated, the evidence tendered by the Plaintiff surrounding the entry of the subject judgment is very scanty. The Affidavit in Support of the Motion was sworn by the Advocate for the Plaintiff. The only reason given for failure to file a Defence to Counterclaim is set out in paragraphs 2,3, 4 and 5 of the Affidavit in Support of the Motion which state:-

“2. THAT after this matter was filed the defendant intimated that he was not going to act as an agent of the Plaintiff hence the parties entered into negotiations.

3. THAT pursuant to the negations the Plaintiff’s application dated 12th November, 2009 was withdrawn.

4. THAT ON 4TH May, 2010, I communicated to the Plaintiff that the application for an injunction

was withdrawn and that the main suit would proceed for hearing if the parties did not resolve their issues amicably.

5. THAT as a result of the above there was imminent possibility of settling out of court, hence the failure by the Plaintiff to file a reply to the statement of defence and counter-claim.”

The deponent who is an Advocate and not the party, does not state when and who commenced the negotiations, the nature of the negotiations or how he knew there were negotiations. I state so because, the Replying Affidavit has denied the existence of any negotiations yet the penultimate paragraph of the Affidavit in Support of the motion states:

“9. THAT what is deponed to hereinabove is correct to the best of my knowledge, information and belief.”

The court is left to speculate what parts of the said Affidavit are sworn on knowledge or information or belief. By choosing to rely on an Affidavit by its Advocates, the Plaintiff did not want the Court to hear what the Plaintiff itself has to state on the failure to file the Defence to counterclaim. Since the issue of whether there were negotiations or not was a contested matter, my view is that neither the Plaintiff’s nor the Defendant’s Advocate should have sworn any of the Affidavits in this matter as they did in this case. The deponent of the Affidavit in support of the Motion has not even exhibited a single letter as evidence of the existence of the alleged negotiations. Since the law is quite clear that he who alleges must prove (See Section 107 of the Evidence Act), the Plaintiff having alleged through its Advocate that there were negotiations, which are denied by the Defendant, it was upon the Plaintiff to prove their existence. I am afraid I have not seen any evidence on record to make me find that there were any such negotiations.

Even if there were such negotiations, when were they commenced, when did they cease, what was their nature? In my view, such evidence although vital was not produced by the Plaintiff to enable the court rule in its favour.

The other issue is in paragraph 4 of the Affidavit in support of the motion. The deponent had sworn that on 4th May, 2010, he communicated to the Plaintiff that an application for an injunction was withdrawn and that the main suit would proceed for hearing if the parties did not resolve the matter amicably. No copy of that letter was produced. Judgment was entered on 10th June, 2010. The Plaintiff did not apply to set it aside until 25th February, 2011. In my view, the circumstances before and after the entry of the judgment militate against setting aside the judgment.

Finally, it has not been argued that the judgment was entered as a result of any accident, or through inadvertence or any excusable mistake or error. The reason advanced for failure to file the Defence to counterclaim is not plausible, is not backed by any evidence and is not convincing.

Accordingly I find that the Plaintiff’s Amended Notice of Motion amended on 25th May, 2011 to be unmeritorious and is dismissed with costs.

DATED and delivered at Nairobi this 27th day of March, 2012.

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A MABEYA
JUDGE