



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO.222 OF 2011

NYUMBU CAMP LIMITED.....1ST APPLICANT/DEFEDANT

ADAM JILLO.....2ND APPLICANT/DEFENDANT

VERSUS

DOMINIC NCHOE.....RESPONDENT/PLAINTIFF

RULING

This is an application for setting aside the default judgment entered on 27th September, 2011, to enlarge time within which the applicants should file their defence and counter-claim and for an order to stay execution of the default judgment.

The application is premised on the grounds that:

- i) counsel for the applicants filed and served Memorandum of appearance on 6th September, 2011;
- ii) due to ill-health of counsel for the applicants, the defence and counter-claim were not filed within the prescribed time;
- iii) when counsel became well and resumed duty, he was overwhelmed by work and was only able to finalise the defence, counter-claim, verifying affidavit, witness' statement and list of documents on 28th September, 2011;
- iv) the above pleadings could not be filed as the court file was either missing or in the custody of the Deputy Registrar;
- v) the file was subsequently availed but the pleadings could not be filed as default judgment had been entered on 27th September, 2011, a day before the attempt by counsel for the applicant to file a defence and counter-claim;
- vi) this application has been brought without delay;

vii) the applicants will suffer prejudice if the default judgment is not set aside.

In response, the respondent has averred that it is improper for counsel for the applicants to swear the affidavits in support of this application; that whereas there is an explanation for counsel's indisposition on 15th September, 2011, he has not explained his condition after 6th September, 2011 when the Memorandum of appearance was filed; that even if the defence and the counter-claim was ready on 28th September, 2010, the same was still out of time; that counsel for the respondent has incurred expense in securing the judgment; that should the court be inclined to allow the application, the applicant should be ordered to deposit Kshs.750,000/= into court.

Following the decision in **Shah V. Mbogo** (1967) EA 116, it is now settled that an *ex parte*/default judgment will be set aside in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice.

In this case, it is observed that the delay was not inordinate. The applicant filed Memorandum of appearance on 6th September, 2011. Three weeks later, on 27th September, 2011, the default judgment was entered. One week after that, the present application was brought. The applicants have offered a plausible and an honest explanation why the defence and counter-claim were not filed within time.

No prejudice or injustice will be occasioned to the respondent. The affidavits sworn by the applicants' counsel cannot be struck off because they do not deal with contentious matter but matters affecting them personally and within their knowledge.

In the result, the application is allowed. The default judgment is set aside and time enlarged for the applicant to file and serve the defence and counter-claim within 14 days, thereafter the respondent can file and serve a reply to defence and defence to counter-claim as provided under the procedures.

The applicants to pay costs to the respondent.

Dated, Signed and Delivered at Nakuru this 21st March, 2012.

W. OUKO

JUDGE