REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 214 OF 2010

UNIVERSAL EDUCATION TRUST FUND……..…..PLAINTIFF/RESPONDENT

-VERSUS-

ABBAS AMINALLAH…….……DEFENDANT/APPLICANT

RULING

The plaintiff, being a registered trust under the Trustees (Perpetual Succession) Act (Cap.164, Laws of Kenya), filed suit by plaint on ***29th June, 2010***, in respect of tenancy on L.R. No. MN/11269/1271 and 1272; the claim was for delivery-up of possession of a house situate on the said land, as well as rental arrears and *mesne profits*. The defendant filed defence and counterclaim on ***13th August, 2010***, and thereafter, on ***15th September, 2010*** moved the Court for interlocutory Orders, by Chamber Summons.

The defendant's gravamen relates to a default Judgment which had been entered by the Deputy Registrar on ***10th August, 2010*** in the following terms:

*"Upon reading the request for Judgment dated **2nd August, 2010** by the firm of M/s. Balala & Abed, Advocates for the plaintiff, interlocutory Judgment against the defendant herein who has failed to file a defence within the prescribed time is entered as prayed."*

The defendant's prayers are as follows:

(i) "THAT the Honourable Court be pleased to set aside the Interlocutory

*Judgment herein entered on **10th August, 2010** and all other consequential Orders flowing therefrom";*

*(ii) "THAT leave be granted to the defendant to file his defence dated **29th July, 2010** out of time";*

*(iii) "THAT the defence dated **29th July, 2010** and filed on **13th August, 2010**…..be deemed as filed within time and that this matter proceeds on merit."*

The application rests on grounds which may be set out in summary as follows:

(a)the defendant inadvertently omitted to file and serve his defence and counterclaim in time;

(b)the delay in filing the defence was not inordinate and should not defeat the purpose of the overriding objective and the fair hearing and determination of the issues raised in the suit;

(c) the defendant has a strong defence against the plaintiff's claim, and it is only fair and just that he be given an opportunity to be heard on merits;

*(d)the plaintiff filed a reply to the defence and counterclaim on **26th August, 2010,** which raises issues that can only be properly adjudicated in a full hearing on merit;*

(e) the defendant's application will be rendered nugatory, should the matter proceed for formal proof before the application is heard and determined;

(f) setting aside the Interlocutory Judgment, and granting the defendant an opportunity to be heard on merit, will not prejudice the plaintiff and will, indeed, aid the Court in ensuring that both parties have a fair hearing, and that justice is attained;

(g)the application is apt to be rendered purely academic, if the plaintiff proceeds with formal proof, to the detriment of the defendant;

(h)it is in the interest of justice that the Interlocutory Judgment entered, and all consequential Orders, are set aside and the suit proceeds on merit.

Abbas Aminallah, the applicant, swore an affidavit on ***15th September, 2010*** providing evidential support to the application and its prayers.

The plaintiff responded by filing grounds of opposition on ***28th September, 2010,*** in the following terms:

(i) the application is "fatally defective as it is brought under the wrong provisions of the law";

(ii) the prayers sought by the defendant are misconceived and an abuse of Court process;

(iii) the defendant's proposed defence is a sham defence, as it raises no triable issues and is mere denial of the plaintiff's claim;

*(iv) the application is brought after inordinate delay, as the Interlocutory Judgment sought to be set aside was granted way back on **10th August, 2010** and the defendant's application was filed in Court one month later, on **15th September, 2010**.*

Learned counsel for the applicant, after summing up the straightforward evidence in the matter, urged that the delay in filing defence was not inordinately long, and that it was the party's prayer that "*inadvertence on the part of his Advocates [be] not visited [upon] him.*"

Counsel urged that the defendant has a credible defence and counterclaim; that it is "*a just and fit case for the Court to exercise its discretion to set aside the Interlocutory Judgment*"; and that "*it is in the interest of justice, equity and [the] overall attainment of the overriding objective, that [the defendant] be allowed to file his defence and counterclaim out of time.*"

Responding to the contention that the defence and counterclaim is a sham, learned counsel urged: "*whether or not the…defence and counterclaim is a sham, [and] whether or not the defence raises triable issues…, [or should be struck out] is a discretion that can only be exercised by the Court……*"

Counsel invoked case-authority as a guide to the exercise of the Court's discretion. In ***D.T. Dobie & Company (Kenya) Limited v. Joseph Mbaria Muchina & Another,*** Civ. Appeal No.37 of 1978 [1980] eKLR, ***Madan, JA*** stated the position as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way'."

Learned counsel submitted that the application is filed under Order IX, Rule 10 of the Civil Procedure Rules, though, on account of inadvertent mistake it was shown as having been filed under Order XLI, Rule 4(1),(2), (3) and (5). He urged that the application be not held to be defective and then struck out; especially as Order VI, Rule 12 of the [earlier edition] Civil Procedure Rules [now Order 2, Rule 14] provided that:

"No technical objection may be raised to any pleadings on the ground of want of form."

Counsel submitted that the error in question may be overlooked on the basis of still other provisions of the law: Order 51, Rule 10 of the Civil Procedure Rules, 2010 provides:

"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

"(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

Such provisions of the ordinary law are to be seen, besides, in the context of the important provision of Article 159(2)(d) of the **Constitution of Kenya, 2010**:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

……

(d) justice shall be administered without undue regard to procedural technicalities….."

Counsel urged the Court to apply the foregoing imperative provisions of the law, just as has been done in many cases (he gave the example of ***Erastus Gitonga v. David Kimathi,*** Meru H.C. Succ. Case No. 326 of 2001 [2004] eKLR [***Sitati, J***]).

As to whether the interlocutory Judgment may be set aside, counsel relied on Order IX, Rule 10 (now Order 10, Rule 11 of the Civil Procedure Rules, 2010), which provides that:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and consequential decree or order upon such terms as are just."

The application of this provision has a trodden path in judicial practice. In ***Patel v. E.A. Cargo Handling Services Ltd*** [1974] E.A. 75 the Court of Appeal thus held (*per* ***Sir William Duffus, P***):

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that

must succeed, it means…..'a triable issue' that is an issue which raises a *prima facie* ***defence and which should go to trial for adjudication."***

Counsel submitted that the defendant has shown that his defence and counterclaim of ***29th July, 2011*** raises triable issues which might defeat the plaintiff's claim in the suit; that the counterclaim raises issues meriting consideration before Judgment is entered; that he had made a *bona fide* attempt to file the defence and counterclaim out of time.

Learned counsel, ***Mr. Abed*** for the respondent advanced the procedural point on non-compliance with the governing law for this kind of application, and invoked a High Court decision, Nairobi HCCC No. 332 of 2006 [2006] eKLR (***Mugo, J***), in which an application for enlargement of time to file a defence had been refused. Counsel, further, submitted that the defendant "*has not demonstrated a good defence with chances of success for the Court to exercise its discretion in his favour."* He submitted that the defence and counterclaim "*are a sham and bare denial of facts with a view to [merely creating] artificial triable issues."*

Counsel for the applicant has been more focused on the content of the pleadings, the evidence, and the directions of judicial practice. Specific as the plaintiff's claim in the pleadings is, a contest to the same in the form of a *counterclaim*, by itself, indicates that a proper *lis* exists for resolution by evidence; and justice is unlikely to be attained, in such a case, by Judgment arrived at as a technicality. The existence of a cause to be pleaded in contest of the original suit is, in a situation in which the *plaintiff* would not seek summary Judgment, *prima facie*, a signal that a *triable case* exists.

The evidence shows the circumstances in which the defendant had not complied with the deadlines for filing pleadings, and, taking into account the limited lapse in time-compliance, I do not see that a strong case has been made for declining the applicant's prayer. My appraisal of the consistent judicial practice is that the defendant's case in this application falls within the category of those normally allowed.

Consequently, I hereby allow the application by Chamber Summons dated ***15th September, 2010*** and specifically make Orders as follows:

(1)The Interlocutory Judgment of 10th August, 2010 is set aside.

(2)The defendant shall duly file his defence and counterclaim dated 29th July, 2010.

(3)The defence and counterclaim dated 29th July, 2010 and annexed to the application shall be deemed as duly filed, subject to payment of the prescribed Registry charges.

(4)The costs of this application shall be in the cause.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 19th day of March, 2012

MAUREEN ODERO
JUDGE