REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 196 of 2012

1. JAMES MOENGA NYAKWEBA

2. ROBERT KIPROTICH BETT

3. STELLA KWAMBOKA NYAKWEBA.....PLAINTIFFS

VERSUS

JAIRO ATENYA ASITIBA ……....……DEFENDANT

R U L I N G

By a Notice of Motion expressed to be brought under the provisions of Article 50 and 159(d) (sic) of the Constitution, Section 1A, 1B, 3A and 63E of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules, 2010, the Defendant seeks the following orders:

a. This Application be certified urgent and be heard ex parte in the first instance.

b. The execution of the judgement entered herein in default of appearance and all the consequential orders and processes be stayed, suspended and/or lifted pending inter partes hearing of this application.

c. This Honourable Court be pleased to discharge and/or set aside the judgement entered herein in default of appearance and all the consequential orders and processes attendant thereto.

d. This Honourable Court be pleased to allow this matter to prceed for full trial on merits and.

e. This Honourable Court be pleased to grant the Defendant/Applicant an opportunity to be heard on the Plaintiffs claims herein and deem the Defendant's statement of Defence filed herein to be properly on record.

f. Costs.

The application is based on the ground that although the defendant entered appearance, he was unable to file his defence due to unavailability of the Court file and yet he has a good defence to the claim.

The application is supported by an affidavit sworn by the defendant **Jairo Atenya Asitiba**, on 26th July 2012. According to him, on being served with summons to enter appearance on 16th May 2012, he entered appearance on 24th May 2012. He then prepared his statement of defence but was unable to file

the same due to the fact that the file could not be traced in the registry since the system in the registry is that a document cannot be filed unless the relevant court file is available. According to the deponent the search for the file went on for over one month until sometimes in July 2012 when the plaintiffs served him with a notice to execute the judgement entered against him. On finding the file on 20th July 2012, the defendant contends even the memorandum of appearance which he had filed was not on record hence he proceeded to file a fresh memorandum as well as a defence. In the defendant's view, the judgement was irregularly entered and the same ought to be set aside. It is further contended that the plaintiff's claim is untenable in law and lacks merits as the same is unsubstantiated with the main component being interest at the rate of 200% per annum which rate is wishful and inapplicable. Further the moneys alleged to have been paid were never paid to the defendant's benefit and/or at all hence he has a good defence. It is the defendant's view that his Constitutional right to be heard as enshrined in the Constitution justifies the setting aside of the judgement entered herein.

In opposition to the application the plaintiff relied on a replying affidavit sworn by **G M Nyaanga**, the plaintiff's advocate on 10th August 2012. According to him, the defendant was served with summons on 12th May 2012 and not 16th May 2012 as alleged. The request for judgement dated 30th May 2012 was filed on 30th May 2012 by which time a memorandum of appearance ought to have been filed, served and duly minuted. Default judgement was entered on 21st June 2012 over 40 days after service of the pleadings and summons by which time the defendant had not filed any pleadings and hence the entry of the judgement was regular. The plaintiffs proceeded to extract a decree and certificate of costs and issued a Notice to execute. According to the deponent, it appears the defendant rushed to the advocate who entered appearance and filed a defence on 20th July 2012 without seeking extension of time. As no explanation has been proffered why the defendant filed two memoranda of appearance the only valid memorandum is the one dated 20th July 2012 since there is no record of the earlier memorandum which was not served. No correspondences have been exhibited either to prove the allegation that the Court file could not be traced a clear indication of indolence and bad faith. According to the deponent the Court file has always been available and since the source of the information of unavailability of the Court file is the advocate who has not sworn an affidavit, the allegation is untrue. The defendant's conduct in filing a defence after being served with Notice to Execute instead of applying to set aside the judgement, according to the deponent is grossly wanting as the filing of a defence out of time can only be allowed with leave of the Court. Accordingly, the present application is brought after inordinate delay. As the plaintiffs have been vigilant in prosecuting their suit, it is contended that they stand to be prejudiced if the application is allowed. According to the said affidavit the alleged interest of 200% was agreed by the parties and ought to be respect under the doctrine of privity of contract. In his view justice requires that the application be disallowed with costs.

In his submissions, **Mr Agwara**, learned counsel for the defendant reiterated the contents of the supporting affidavit and contended that the fact that the defendant filed a further memorandum of appearance with the defence is an indication that he has been keen to defend the matter. As there was an appearance entered on 24th May 2012, the interlocutory judgement could not be entered and is therefore necessary for the same to be set aside. The sum involve is Kshs. 3.4 million, it is submitted, to which the defendant has a defence and since the circumstances leading to the entry of judgement are unclear, it is submitted that the Court, in the exercise of its powers under section 1A and 1B of the Civil Procedure Act ought to set aside the same. In support of the said submissions, learned counsel relied on **Trust Bank Ltd vs. Amalo [2003] 1 EA 350** and **Gateway Insurance Co. Ltd vs. Mjahid [2003] 1 EA 74**. In the counsel's view, the replying affidavit filed herein is sworn by the advocate without authority rather than the plaintiffs.

On his part **Mr Nyaanga**, learned counsel for the plaintiffs submitted that service of the plaint and summons is not denied and there is no memorandum of appearance on record and that the authenticity of the memorandum whose copy is exhibited is in doubt since it has never been served. Therefore it cannot be claimed to have been filed. If it was filed then there was no reason to file the second memorandum of appearance unconditionally. Although the receipt appears genuine it is submitted that there is none in the Court file. Neither is the entry of appearance minuted. An application seeking to set aside judgement calls for an exercise of discretion and hence the conduct of the parties is important. With respect to the

defence, it is submitted that the position taken by the defendant is not correct since the dispute was not in respect of a share certificate. Further the receipt of the money is not denied. Similarly that the transfer was not done is not in dispute. Accordingly the application ought to be dismissed. If on the other hand the Court is minded to set aside the judgement, it is submitted that it ought to impose conditions. It is important to note that the plaintiffs relied on **Mbogo and Another vs. Shah [1968] 1 EA 93** and **Bank of India vs. Abdul Karim Wabuti & 3 Others Nairobi High Court (Commercial Division) Civil Case No. 141 of 2001** for the principles for setting aside *ex parte* judgement and **Nancy Njoki Kinyanjui vs. Equity Bank Limited Nairobi High Court (Commercial Division) Civil Case No. 269 of 2011**.

In a rejoinder, **Mr Agwara** reiterated that the defendant has a defence and that the delay has been explained. The omission to minute the entry of appearance by the Court, it is submitted ought not to be visited on the client.

I have considered the application, the affidavits both in support of and in opposition to the application, as well as the rivalling submissions and the authorities cited. The plaintiffs have raised a pertinent issue on the lack of the minutes in the Court file indicating the filing of the memorandum of appearance and have relied on my decision in **Nancy Njoki Kinyanjui vs. Equity Bank Limited** (supra). In that case I expressed myself as follows:

"On 27th June 2011 the firm of Mwaniki Gachoka & Co. Advocates filed a notice of withdrawal of suit together with a notice of change of advocates both dated 23rd June 2011. By a minute made on the file on 28th June 2011 only the notice of change of advocates was endorsed by the Deputy Registrar. Therefore as far as the said matter stands there is no endorsement to the effect that the said suit has been withdrawn".

The withdrawal of a suit by way of notice under Order 25 of the Civil Procedure Rules leads to certain consequences. On such withdrawal, the whole suit is terminated and the Court is expected to make an order relating to costs. Rules 3 and 4 of the said Order provide:

3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

4. If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.

Withdrawal of a suit is therefore an important stage in the proceedings since its effect is to bring proceedings to an end. To do so requires a Court order so as to pave way for the next cause of action which is the making of the order relating to costs. Appearance on the other hand does not require a Court Order. It is dealt with under Order 6 rule 2 as follows:

2. (1) Appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in Form No. 12 Appendix A with such variation as the circumstances require, signed by the advocate by whom the defendant appears or, if the defendant appears in person, by the defendant or his recognised agent.

(2) On receipt of the memorandum of appearance as required under subrule (1) the proper officer shall stamp and file the original and stamp the copies thereof with the court stamp showing the date on which they were received and—

(a) if they were delivered to the proper officer, he shall return the stamped copies to the person appearing, or

(b) if they were sent by post, he shall send one copy by post to the plaintiff 's address for service and one copy by post to the defendant's address for service.

(3) Where the defendant appears by delivering the memorandum of appearance as required under subrule (1) he shall within seven days from the date on which he appears serve a copy of the memorandum of appearance upon the plaintiff and file an affidavit of service.

(4) Where a defence contains the information required by rule 3 it shall where necessary be treated as an appearance.

It is clear from the foregoing provision that there is no express requirement that the date of the entry of appearance be minuted on the Court file although in my view it would be good practice for the registry to do so. Accordingly I find that nothing turns on the failure by the registry to minute the entry of appearance on the Court file.

The principles guiding the setting aside of ex parte judgements were comprehensively dealt with by the Court of Appeal in **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** where it was held as follows:

"**In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously….. In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed".**

In **Margaret Apiyo vs. Jotham Chemwa Matayo Civil Application No. Nai. 257 of 1996 Tunoi, JA**

(as he then was) in granting extension of time said:

"True, ignorance of the law is no excuse but the particular circumstances of this case do militate the court's grant of discretion in favour of the applicant. She is old and illiterate. She is aggrieved. The respondent is smart and educated. Fraud is alleged. *Blame for tardiness is placed squarely at the door of the court*. Where will the scale of justice tilt towards?" (Emphasis and underlining mine).

In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".

The defendant states that on being served with summons he did enter appearance. He has exhibited a copy of the Court filing receipt dated 24th May 2012 which receipt, the plaintiffs' counsel admits appear genuine. Assuming that the appearance was entered on 24th May 2012, the defendant had until 8th June 2012 within which to file his defence. However, by a letter dated 30th May 2012, the plaintiffs requested for entry of judgement in default of appearance and or defence which was duly entered on 22nd June 2012. It would therefore be clear that the entry of judgement was prematurely requested.

That the Court failed to minute the fact that an appearance had been filed would be a mistake that would be laid squarely on the doorsteps of the judiciary. To the extent therefore that default judgement was purportedly entered for non-appearance, the same would amount to an irregular judgement liable to be set aside *ex debito justitie*.

Even if I were to find that the judgement was regular, the next issue that I would have to determine is whether or not there is a defence on merits. One of the issues raised is the issue of the levying of interest at the rate of 200%. Prima facie such rate of interest would raise eyebrows in commercial world and raise the issue whether or not such rate of interest amount to penalty. Based on that fact I would have been amenable to the favourable exercise of discretion in the defendant's favour in order that the dispute herein be resolved on merits.

However, pursuant to my finding on the regularity of the judgement, I hereby set aside the judgement entered herein on 22nd June 2012. The defence filed herein will be deemed duly filed. In cases where the judgement is irregular, it is my view that it would be unjust to impose conditions as sought by the plaintiff herein.

In the premises there will be no order as to costs since there is no evidence that the plaintiffs were aware of the entry of appearance by the defendant.

Dated at Nairobi this 22nd day of October 2012

G.V. ODUNGA

JUDGE

Delivered in the presence of

Mr Mutembei for Mr Nyaanga for Plaintiff

Mr Agwara for the Defendant