



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 118 of 2006

CAROLINE KIBIWOTT.....1st PLAINTIFF

BRENDA A ODOUR.....2nd PLAINTIFF

AGNES AWOUR.....3rd PLAINTIFF

TOM MARK OLANDO.....4th PLAINTIFF

GEORGE CHENGASIA MURUNGA.....5th PLAINTIFF

VERSUS

MOI UNIVERSITY..... 1st DEFENDANT

VICE CHANCELLOR MOI UNIVERSITY.....2nd DEFENDANT

DEAN SCHOOL OF LAW, MOI UNIVERSITY.....3rd DEFENDANT

RULING

The Defendants have through an Application dated 11th October 2007 sought *inter alia* to set aside the Interlocutory Judgement entered against them, stay execution and have their Statement of Defence admitted out of time.

The Plaintiffs served the Defendants with the Complaint and summons to enter appearance. The Defendants, all three, entered appearance on the 6th day of December 2006, through the firm of M/s Ochieng, Onyango, Kibet & Ohaga Advocates. The Defendants did not file any Defence subsequent to this.

Even before entering appearance, the Plaintiff's injunction application came up for hearing *inter parte* on the 8th November, 2006 and was heard in the absence of the Defendants, though served. This Court confirmed the *ex-parte* orders previously given.

On 30th April 2007 at the instance of the Plaintiffs, the Deputy Registrar entered interlocutory judgment against the Defendants having failed to file a defence within the prescribed period or at all.

The matter was set down for formal proof on the 25th July 2007. On that day, neither the Defendants nor their advocate appeared. Mr. Magare, counsel for the Plaintiff, informed the Court that the Defendants

failed to file a defence after entering appearance and that he served them with a hearing notice for that day only out of abundant caution.

I perused the affidavit of service sworn by the process server on the 25th July 2007 and was satisfied that the hearing notice had been served and receipt acknowledged by the Defendants' advocates on the 4th July 2007. I directed that the formal proof proceeds.

The 1st Plaintiff was sworn and barely after introducing herself, the Court adjourned the matter and being a part heard a further hearing date for 27th July 2007 was given. The Court ordered that the Plaintiff did not need to serve the Defendants.

On the 27th July 2006, the matter proceeded and all Plaintiffs testified and closed their case. This Court ordered the Plaintiffs to file written submissions on or before the 30th July 2007 and reserved its judgment for the 3rd August 2007. The Plaintiffs complied and filed their written submissions on the 30th July 2007.

On the 3rd of August 2007, the court entered judgment for the Plaintiffs against the Defendants jointly and severally in terms of prayer (a) and (c) of the Plaint. For reasons recorded therein (urgency being the primary reason) this Court reserved the reasons for the judgment to be given on 16th November 2007.

On the 12th October 2007, the Defendants filed this application now under consideration. Other than the prayers already listed herein, the Defendants sought to arrest the delivery of the reasons for judgment.

The Court delivered the reasons for judgment on the 9th May 2008 in presence of both parties. Subsequently the court ordered that the Defendants application be set for hearing on priority basis.

Mr. Jinaro Kibet, learned counsel for the Defendants, argued the application before me. He produced several authorities which I have considered. He narrated the background and submitted that the parties were negotiating and he was instructed not to file a defence as the parties believed the matter would be settled.

I have seen the Plaintiff's response to this particular ground. I am persuaded by the averments of the 3rd Plaintiff in his Replying Affidavit of 27th May 2008, that the attempt to settle this matter was only initiated about 5 months after the Defendants filed an appearance. The Defendants have not sufficiently explained the intervening period. In any case I have not known negotiations by parties to be a reason not to file a statement of defence. Time continues to tick against a Defendant who seeks to negotiate with a Plaintiff knowing that such negotiations may fail.

Mr. Kibet submitted that the interlocutory judgment had serious ramifications on the finances of the Defendants. It had a ripple effect that could run in excess of Kshs. 1.5 billion. That is if all the students were to seek a refund of fees in effect of the said interlocutory judgment.

On the merits of the Defendants case, Mr. Kibet submitted that the draft statement of defence raised a very credible defence including;

- a) The suit by way of plaint was misconceived.
- b) The decisions of the council are statutory (see the Moi University Act)
- c) Whether the prayers sought can be by way of Plaint as against Judicial Review.
- d) The Plaintiffs challenged administrative decisions of a statutory body on grounds of breach of natural justice among others?

e) Whether the 3rd Defendant is an entity that can be sued?

He further submitted that no prejudice would be caused on the Plaintiffs. And if any, they would be compensated by way of costs.

Mr. Kibet admitted having been served with a hearing notice for the 25th July 2007 and owned up for the failure to appear. He urged the Court not to greatly prejudice the Defendants for a mistake on his part. However the learned counsel took great issue with the failure to be served with a hearing notice for the subsequent hearing, 27th July 2007.

Mr. Magare appeared for the Plaintiffs and opposed the application. The learned counsel dismissed the arguments made by Defendants on the strength of their case. At this stage I am not called upon to critically analyze these rival arguments as I might prejudice the Judge who might be called to adjudicate upon them. On the face of the statement of defence, I am prepared to find that it raises issues worth considering.

The Plaintiffs counsel also raised the efficacy of the orders sought especially after the reasons for judgement had been delivered. This made Mr. Kibet orally apply to amend his application, to include order 9 (b) Rule 8 and that such amendment would not change his submissions. This was opposed and I shall render myself in that regard herein.

The Plaintiffs challenged the conduct of the Defendants. The prayers sought are discretionary and the conduct of the applying party needs to be considered.

I have anxiously considered the application before me. It is a cardinal principle of law that a party must have its day in court. The powers to set aside interlocutory judgement are discretionally and every case calls for its merits and special circumstances.

I find that the Defendant's counsel is to blame for the interlocutory judgement having been entered. The failure to file a defence in time and appear at the hearing despite being served is squarely on his shoulder. However, the Defendants have been diligent and keen to defend this suit. Mrs. Manani, Legal Officer of the 1st Defendant, followed this up and upon perusal of the court file, discovered the failure on the part of their counsel. This is not the ordinary conduct of a party who has an able counsel, the caliber of Mr. Jinaro Kibet and his firm. This court would not wish to prejudice such a party.

In my reasons for judgment, I observed that the Defendants were entitled to cross-examine the Plaintiffs and any witnesses having entered an appearance. They were served with a hearing notice for the 25th July 2007 and I ordered that they need not be served on the subsequent hearing of 27th July 2007. This order was ex-parte and I am entitled to review my own order on that basis. I am persuaded by the submissions of the Plaintiffs on the need to have been served with a new hearing date in accordance with Order 16 Rule 1 of the Civil Procedure Rules.

In the interest of the justice, I exercise my discretion in favour of the Defendants and allow prayers 3, 6 and 7 except that they file their statement of defence within 14 days. By setting aside the judgment, the corollary of that is reasons for judgment delivered subsequently is automatically set aside. Cost of this application shall be borne by the Defendants.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012.

F. AZANGALALA

JUDGE

In the presence of: Mr. Kathiti h/b for Mr. Nyachiro for Plaintiff