



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 391 of 2012

JOHN MBUGUA NJUGUNA T/A JASMINE BASE.....PLAINTIFF

VS

MOTORZILLA LIMITED.....DEFENDANT

RULING

1. Before me is a Notice of Motion dated **3<sup>rd</sup> August 2012** and expressed to be brought under **Order 12 Rule 7** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The application seeks for orders that the honourable court be pleased to set aside the interlocutory judgment entered herein on **24<sup>th</sup> July 2012** and grant leave to the defendant to defend the suit.
2. The application is based on the grounds set out on the application thereof and is supported by the affidavit of **George Miano Gitonga** sworn on **6<sup>th</sup> August 2012**.
3. The application is opposed vide the Replying affidavit of **John Mbugua Njuguna** and sworn on **14<sup>th</sup> September 2012**.
4. The defendant's case is that the inadvertent delay on its part to file the statement of defence and witness statement was due to the illness of the defendant's director and at such time he could not be reached to sign his witness statement. It is their case that in view of the circumstances, it is utterly unjust, unlawful and unconstitutional for the plaintiff to execute the said judgment against the defendant, without according the defendant an opportunity to be heard.
5. In opposing the application, the plaintiff contends that the judgment on record is proper, sound and regular since the defendant was expected to file a defence on or before **18<sup>th</sup> July 2012** and its attempt to file a defence 13 days later was outside the mandatory period. It is the plaintiff's case that the defendant has not advanced any proper reasons for the orders sought, given that the judgment was properly entered. It is also the plaintiff's case that the defendant's defence consists of bare denials and does not raise any triable issue worth being ventilated.
6. I have carefully considered the application, the replying affidavit in opposition and the oral submissions by learned counsel for the parties.
7. The application before me essentially requires the exercise of the court's discretion in favour of the setting aside of the interlocutory judgment, as it is not disputed that the said judgment was regularly entered. In my view, the delay in filing the defence in this matter of 13 days cannot be said to be inordinate. It is also pleaded that the delay was due to the illness of the defendant's director which impeded him from signing his witness statement. Although no proof of the illness was placed before me, and although I do not think that it was mandatory that the witness statement be filed together with the defence, I will give the defendant the benefit of doubt and accept that as an excusable reason for the delay.
8. In **Kenya Ports Authority –vs- Kustron (K) Limited C.A. No.142 of 1995** the Court of Appeal cited with approval the case of **Jamnadas Sodhia – vs – Gordandas Hemraj [1952] 7 ULR** – where it was held as follows:-

***“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that, to deny a subject a hearing should be the last resort of a court.”***

9. Applying the above principles to the present application, it is my considered view that the interlocutory judgment entered against the defendant should be set aside and that it be allowed to put forward its defence. The decretal sum involved is substantial and it would only be fair for the parties to be heard in order to prove the claim. The plaintiff has also not demonstrated that he will suffer injury which cannot be compensated by an award of costs.

10. In the upshot, the defendant’s Notice of Motion dated **3<sup>rd</sup> August 2012** is hereby allowed. The plaintiff’s costs of this application and all costs thrown away will be paid by the defendant.

**IT IS SO ORDERED.**

**DATED, DELIVERED AND SIGNED THIS 15<sup>TH</sup> DAY OF NOVEMBER 2012**

**J.M MUTAVA**  
**JUDGE**