REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 107 of 2005

BEENA K KHAMBAITA.....….....PLAINTIFF

VERSUS

TALVINDER SALGOO.....…….....……..DEFENDANT

RULING

By a Notice of Motion dated 23rd May 2012 expressed to be brought under the provisions of Order 10 rule 11, Order 50 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A of the Civil Procedure Act, Chapter 21, Laws of Kenya and all other enabling provisions of the law the Defendant seeks orders:

1. **That this application be certified as urgent.**

2. **That service of this Application be dispensed with in the first instance.**

3. **That this Honourable Court be pleased to stay the proceedings herein pending hearing and determination of this Application.**

4. **That this Honourable Court be pleased to set aside the interlocutory judgement entered against the Defendant herein.**

5. **That Honourable Court be pleased to grant the Defendant/Applicant leave to file and serve his Defence out of time.**

6. **That the annexed Defence be deemed as properly filed and served.**

7. **That the costs of the Application be in the cause.**

The application is based on the following grounds:

a) That initially there were two Defendants in this suit and we entered appearance for both the 1st and 2nd defendants.

b) That an interlocutory judgement was entered against both the 1st and 2nd defendants but later, the interlocutory judgement against the 2nd defendant was set aside.

c) That we filed a statement of defence for the 2nd defendant and the plaintiff filed a reply to the 2nd defendant's statement of defence meaning that there are arguable and triable issues in this suit.

d) That thereafter, the plaintiff withdrew her suit against the second defendant and leaving the 21st defendant as the only defendant in this suit and without a statement of defence on record.

e) That the defendant should be given a chance to defend himself as the issues raised in the plaint are weighty and should be considered in full trial.

f) That it is in the interest of justice that the interlocutory judgement herein is set aside and the defendant be granted leave to file and serve his defence out of time.

The application is supported by an affidavit sworn by **Patrick Kibuchi**, the applicant's advocate on 23rd May 2012. According the deponent, **Kenindia Assurance Company**, the insurers of the 2nd defendant instructed **Messrs Kibuchi & Company Advocates** to appear and defend the suit on behalf of the defendants. However when the said advocates filed a Notice of Appointment it realised that there was already an interlocutory judgement against both defendants although he judgement against the 2nd defendant had been set aside. Consequently, the defence was filed on behalf of the 2nd defendant to which the plaintiff filed a reply. In the deponent's view the filing of the reply means there are triable issues to be tried at the full trial. It is deposed that the Defendant (sic) was the driver of motor vehicle reg. No. KAE 099S that was involved in the accident, the subject matter of the suit while the 2nd defendant (**Balwaat Sagoo**) was the registered owner thereof. According to information availed to the deponent, by the defendant, the defendant is the son of the said **Balwant Sagoo** who is now deceased (hereinafter referred to as the deceased). By an amended plaint dated 16th May 2007, the plaintiff added one **James K Mbugua** as the 2nd defendant but withdrew the suit against him vide a notice dated 13th July 2011 leaving **Talvinder Sagoo** as the only defendant without a statement of defence on record. Although the matter was listed for formal proof on 14th May 2012 the same did not take off although the defendant did not turn up in court. Thereafter the defendant visited the advocates and informed the advocates that he is one of the beneficiaries of the estate of the deceased and having read the amended defence, the deponent believes that the judgement is likely to attract an extremely high award and that the advocates in the same law firm who were previously handling the matter failed to apply for the setting aside the judgement which mistake ought not to be visited upon the defendant. In his view, it is only just and fair that the Court sets aside the interlocutory judgement and grants the defendant a chance to defend himself in light of the fact that the amount claimed by the plaintiff in damages is Kshs. 4,306,645.15 and above. In the deponent's view the application has been brought without undue delay hence sufficient reason has been shown to enable the Court set aside the interlocutory judgement and grant the defendant leave to file the defence out of time in the exercise of the Court's unfettered discretion.

The plaintiff has in opposition to the application filed an affidavit sworn on 11th June 2012 in which it is deposed that the entire application is an abuse of the court process meant to delay the trial of the action as it contains no ground known in law or fact for setting aside an interlocutory judgement. According to him, the Defendant though duly served wilfully and intentionally refused and or neglected to enter appearance to the suit herein and file the defence within the prescribed. Similarly, the Defendant's said insurers were duly served with Third Party Statutory Notice whose receipt they acknowledged. According to the deponent the withdrawal of the suit against the said **James K Mbugua** is immaterial as he was erroneously sued after the search records from the Kenya Revenue Authority mistakenly named him as the owner of the suit motor vehicle at the time of the accident. Prior to the filing of the suit the defendant was charged with the offence of reckless driving in Nairobi Traffic Case No. 13197 of 2003 and was convicted and fined Kshs 5,000.00. The defendant was also sued in Milimani CMCC No. 8930 of 2005 which arose from the same accident and was found 100% liable and judgement entered on 17th August 2011 after full trial. In the deponent's view, the defence is mere denials and does not raise any triable issue worthy of consideration for unconditional leave to defend. In the deponent's view the facts do not justify the delay of the action and any prejudice or injury ought to be visited on the defendant's advocates personally. There is, according to him, unreasonable delay of 6 years after entry of interlocutory judgement hence the application is brought in bad faith with the sole mischief of embarrassing oppressing and delaying the trial of the action contrary to the overriding objective of the court and speedy and fair trial guaranteed under the Constitution. It is further contended that the plaintiff suffered serious life

threatening injuries during the accident which led to serious deterioration in his health and the last time the matter came up for formal proof he had to be discharged from Hospital to attend the hearing whose trial has been extremely delayed by several adjournments which has made the prosecution of the matter difficult, resource consuming and cumbersome. It is therefore in the interest of justice that the application be dismissed with costs and the suit be set down for hearing on priority.

When the application came up for hearing on 19th November 2012, **Miss Maranga** learned counsel for the applicant informed the Court that she was relying entirely on the grounds on the face of the application together with the supporting affidavit.

On his part **Mr Odhiambo** learned counsel for the Plaintiff submitted that the interlocutory judgement is a regular judgement, since the summons were properly served. When the matter was fixed for formal proof the same did not take and in counsel's view, the present application is an attempt to delay the matter due to the fact that the application is not timely made. According to him no explanation has been proffered for the delay. Counsel contended that where there is a regular judgement a party ought to annex a defence and in this case the defence annexed is a mere denial which does not raise any triable issues. The Applicant, it is submitted was sued and the suit decided and the defendant found 100% liable. Further the affidavit in support of the application was sworn by the applicant's counsel and not by the applicant himself. Finally, it was submitted that the plaintiff's health is not in good condition and had to be discharged from Hospital. In his view the application is oppressive and an abuse of the process of the Court and the Court ought to consider the overriding objective and dismiss the application. In reply **Miss Maranga** was of the view that the defence filed raises triable issues and the application is not frivolous. In her view the supporting affidavit is competent as it is sworn by an authorised advocate.

I have considered the foregoing. The first issue for consideration is the competency of the supporting affidavit. That the supporting affidavit is sworn by the applicant's advocate is not in doubt. The law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. An advocate cannot be both counsel and witness in the same proceedings. In the case of **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was) stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".

In this case, paragraphs 7, 12 and 17 of the supporting affidavit are clearly factual depositions based on information. No reason has been given why the applicant could not swear the affidavit himself. In the absence of any explanation, I have no hesitation is striking out the said paragraphs.

The principles guiding the exercise of the Court's discretion to set aside a default or ex parte judgement or order are now trite. The Court of Appeal in **Macharia vs. Macharia [1987] KLR 61** held *inter alia* as follows:

"The Court had a very wide discretion to exercise under the relevant order and rule and there were no limits or restrictions on the discretion of the learned judge except that if the judgement was varied it had to be done on terms that were just... This discretion is intended to be exercised to

avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice...The matters which should be considered include the facts and circumstances, both prior and subsequent, and all the other respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex parte and whether or not it would just and necessary, upon terms to be imposed... 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, it should be always remembered that to deny the subject a hearing should be the last resort of a court... And because it is discretionary power it should be exercised judicially or in a selective and discriminatory manner, not arbitrarily and idiosyncratically for otherwise the parties would become dependent on judicial whim".

It is not in dispute that the judgement that was entered in default of defence was a regular one. That being the position the next issue is whether in the circumstances of this case the Court should set aside the judgement. On 8th March 2006, the Deputy Registrar of the Court entered interlocutory judgement against the applicant herein for default of appearance and defence. On 6th June 2006, the Court set aside a similar judgement which had been entered against the then 2nd defendant **Balwant Sagoo** who the applicant now contends was his deceased father. When the defendants' advocates made an application seeking to set aside judgement against the said 2nd defendant, they ought to have realised that there was a similar judgement against the applicant herein. They however chose not to apply for setting aside the judgement against the applicant. It is now contended that the failure to apply for setting aside the same was due to mistake of counsel. However, the nature of that mistake is not disclosed. This application is made 6 years after the said judgement was entered. Without a satisfactory explanation coming from the applicant, who has chosen not to swear any affidavit in the matter it is my view and I so hold that this is the kind of conduct that can be described as designed deliberately either by evasion or otherwise, to obstruct or delay the course of justice.The law is that though the court has a wide discretion in setting aside default judgements that discretion should be exercised judicially having regard to the particular circumstances of each case since the rules of the court must, *prima facie*, be obeyed, and in order to justify a court in exercising its discretion in favour of a party who has failed to comply with the set timelines during which some step in procedure requires to be taken, there must be material on which the court can exercise its discretion, otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation. See **Ratman vs. Cumarasamy [1964] 3 All ER 933 at 935.**

In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** **Kimaru, J** expressed himself as follows:

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case."

In the present circumstances I am not satisfied that the applicant has offered a satisfactory explanation as to why it took him more than half a decade to apply for setting aside the default judgement entered herein. I am not satisfied that the plaintiff himself was not guilty of negligence in following up his case. It is not enough for a party to simply blame the advocates but must show tangible steps taken by him in following up his matter. The decision whether or not to set aside a default judgement is an exercise of judicial discretion and like any other judicial discretion must be exercised upon reason, not like and dislike, caprice or spite. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

Inspite of that finding the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** held:

"**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."**

In this case the respondent has annexed a copy of the proceedings in Traffic Case No 13197 of 2003 in which the applicant was charged and convicted on his own plea of guilty. Apart from that there are proceedings in Nairobi CMCC No. 8930 of 2005 which the respondent contends arose from the same transaction in which the applicant was found 100% liable after he failed to offer any rebuttal evidence. The plaintiff herein claims that he was a passenger in one of the vehicles that was involved in the said accident. I have looked at the defence in question and since the judgement is regular I must satisfy myself that the draft defence raises *bona fide* triable issues before I can set the same aside. Having perused the said draft, I have not seen any express denial of the plaintiff's allegation that he was a passenger in the other motor vehicle. As was held by **Akiwumi, JA** in **Raghbir Singh Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996** every allegation in the claim or counterclaim must be traversed specifically otherwise it will be deemed to have been admitted whether intended or not. Consequently, the plaintiff's averment in the plaint that he was a passenger is deemed to have been admitted. If the same is admitted, then I do not see any bona fide triable issue raised in the rest of the averments in the draft defence in light of the determinations in the aforesaid two cases.

Whereas I appreciate the role of the overriding objective in civil litigation I am also aware of the holding by the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010,** in which the Court held *inter alia* that:

"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will...All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

In this case I am not satisfied that a proper foundation has been laid for the application of the overriding objective.

In the premises Notice of Motion dated 23rd May 2012 fails and is dismissed with costs to the Plaintiff.

Dated at Nairobi this 17th day of December 2012

G.V ODUNGA
JUDGE

Delivered in the presence of

Mr Odhiambo for Plaintiff

Miss Odhiambo for the Defendant