



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 820 OF 2009

DAVID JOSEPH GICHAMBA GICHUHI..... PLAINTIFF

VERSUS

AGRICULTURAL AND INDUSTRIAL HOLDINGS LTD.....DEFENDANT

RULING

This Application is made by way of a Chamber Summons dated 28th April, 2010, and taken out under Order IXA Rules 10 and 11 of the Civil Procedure Rules. The applicant seeks an order that the Interlocutory Judgment entered herein on 11th January, 2010 be set aside and the Defendant be allowed to defend the suit. He also prays for the costs of the Application to be provided for.

The application is supported by the Affidavits of JOHN N. GIKONYO, Advocate, and MICHAEL WANDEGWA, the General Manager of the Defendant Company, and is based on the grounds that –

- 1. The Defendant has a very good defence to the Plaintiffs claim.**
- 2. The Plaintiff's and the Defendant's Advocates have been negotiating with a view to finding an amicable solution.**
- 3. The dispute arose as a result of duplication of Deed Plan numbers by the Survey office which office has recalled all duplicated Deed Plans for sub plots of LR NO 57/32.**
- 4. The Plaintiff will not be prejudiced in any way if the orders sought herein are granted.**

In a replying affidavit sworn by one SIMON HIUHU KINYUA, Advocate, on 28th May 2010, it is contended on behalf of the Respondent that after the Plaintiffs served the summons to enter appearance, the Defendant's Advocates communicated to the Plaintiff's Advocates asking why the latter filed the suit and Mr Kinyua informed them that his clients had totally refused to respond to their letters, and therefore the court ought to decide the matter. Thereafter, the Defendant's Advocates entered appearance but did not bother to serve the appearance and have never served the same upon the Plaintiff's Advocate. The Plaintiff's Advocate thereupon concluded that the Defendant was only interested in delaying the matter, and the Plaintiff's Advocates did not enter into any further negotiations or reach any agreement with the Defendant's Advocates. He further avers that in view of the defendants delaying tactics, the Plaintiff's Advocate owed their client a duty to set down the matter for hearing and, in any case, the matter could still be settled even when it is fixed for hearing.

During the oral canvassing of this matter, Mr Gikonyo appeared for the Defendant/Applicant while Mr Kinyua appeared for the Plaintiff/Respondent. After considering the pleadings and submissions of the respective counsel, I note that this application is brought under Order IXA Rule 10 of the Civil Procedure

Rules. That Rule states –

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

The principles governing the setting aside of *ex parte* judgments are fairly well settled. These are that if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* on the application by the Defendant, and such judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. If, however, the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA, Rule 10 of the Civil Procedure Rules. These guidelines are to be found in such cases as PATEL v E A CARGO HANDLING SERVICES LTD [1975] EA 75; SHAH v MBOGO [1967]EA 75; SEBEL DISTRICT ADMINISTRATION v GASYALI [1968] EA 300 and PHILIP V CHEMWOLO & ANOR v AUGUSTINE KUBENDE (1982- 88) 1KAR 1036. The only caveat where the judgment sought to be set aside is regular is that the court will not usually set it aside unless it is satisfied that there is a defence on merits and a defence on merits does not mean a defence that must succeed, but one that raises triable issues, that is an issue which raises a *prima facie* defence and which should go for trial for adjudication. However, it does not follow that because a mistake may have been made that a party should therefore suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of cost.

Against that background two issues arise for determination. The first is whether the failure by the Defendant to file and serve a defence has been satisfactorily explained so as to entitle this court to exercise its discretion in favour of setting aside a regular *ex parte* judgment. According to the evidence by the Defendant, the parties were negotiating before the suit was filed, and this was why the Defendant did not file a defence on time. The fact of the negotiations is confirmed by Mr Kinyua’s replying Affidavit where he avers in Paragraph 5 thereof that **“... the Defendant was only interested in delaying the matter like it always had done and I did not enter into any further negotiations...”** In my view, the Defendant has reasonably explained the delay in not filing and serving a statement of defence.

The second issue is whether the Defendant has demonstrated that it has a reasonable defence which would warrant a grant of the orders sought. *Prima facie*, the contract which is the subject matter of this suit was entered into between the Plaintiff and one James Moses Thanu who is not a party to these proceedings. Secondly, the Defendant itself was not a party to the contract entered into between the Plaintiff and James Moses Thanu. This scenario raises fundamental points of law as to whether the Plaintiff herein can enforce against the Defendant the contract to which the later had no privity. It also raises the issue as to whether the Plaintiff’s claim for exemplary damages can validly lie against the Defendant. These are weighty triable issues which I think would entitle this court to set aside a regular judgment.

For the above reasons, I am satisfied that the application ought to be granted and I accordingly make the following orders -

1. **The interlocutory judgment entered herein on 11th January, 2010, be and is hereby set aside and the Defendant allowed to defend this suit as prayed.**
2. **The Defendant will pay the costs of this application as well as the Plaintiffs thrown away costs.**

DATED and DELIVERED at NAIROBI this 4th day of February, 2011.

L NJAGI

JUDGE