



NO. 2756

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL CASE NO. 35 OF 2009

JOEL SIMEKA ONYANGO.....PLAINTIFF

-VERSUS-

ANNA NYABONYI NYANG'WARA.....1ST DEFENDANT

PETER MIYIENDA.....2ND DEFENDANT

RULING

The application before me and the subject of this ruling is dated 10th October, 2010 and filed in this court the following day It is expressed to be brought under **Orders 1XA rules 10 & 11, XLIV rule 5 of the Civil Procedure Rules sections 3A, 63(e) and 95 of the Civil Procedure Act, section 159(b) of the Constitution of Kenya** and all **Enabling Provisions of the Law**. In the main, the application seeks two prayers; to set aside the interlocutory judgment entered against the 1st defendant on 2nd November, 2009, together with all Consequential Orders; secondly, extension of time within which the 1st defendant should file her amended statement of defence.

The grounds in support of the application which incidentally is mounted by the 1st defendant is that, the interlocutory judgment entered against her and in favour of the plaintiff in this suit was irregular, null and void as it contravened the mandatory Provisions of Order V rules 9(1) , 12 and 13 of the **Civil Procedure rules**. The interlocutory judgment was based on a fictitious service alleged to have been effected upon her when no such service was ever undertaken. It was entered when there was proper memorandum of appearance and defence on record. Accordingly, there is an apparent error on the face of the record. The

1st defendant had a strong and plausible defence against the plaintiff's claim, and it was therefore in the interest of justice that she is afforded opportunity to be heard on the defence and the case determined on merits. The plaintiff would not suffer any prejudice if the application was allowed. Otherwise it was contrary to the dictates of Natural justice to deprive a litigant a hearing, more so, when such litigant is desirous of being heard. The 1st defendant was willing to abide by any conditions that the court may impose when allowing the application and finally, that the application, had been made timeously, in good faith and with due promptitude.

In support of the application, the 1st defendant swore an affidavit. In pertinent paragraphs she deponed that initially she had instructed **Messrs S.G. Mbaabu & Company Advocates** to defend her in this suit. Later she instructed **Messrs O.M. Otieno & Company advocates** to take over the conduct of the suit from her earlier said firm of Advocates. When the current firm of Advocates perused the court record, they established that the plaintiff had obtained interlocutory judgment against her on 2nd November, 2009 on the grounds that she had been served with an amended plaint but failed to file a defence to the same. Prior to the amended plaint being filed, she had lodged an appearance, defence and amended defence and therefore it was improper for the plaintiff to obtain entry of judgment in the light of the presence of the said pleadings on record and when in any event the suit was part heard. Besides, it was unlawful for the plaintiff to purport to serve her in person with the amended plaint, the subject of the default judgment, whereas she had counsel on record who ought to have been served.

In response to the application, the plaintiff filed a replying affidavit in which he deponed where relevant that the application was incompetent, bad in law and ought to be struck out, the interlocutory judgment was properly entered, the amended plaint had been served on the 1st defendant on 29th July, 2009 and her then advocates on record on 10th August, 2009. Therefore the 1st defendant's claim that neither her nor her advocates were served with the amended plaint were false, malicious and calculated to delay the cause of justice and abuse of the due process of court. The application had been brought more than one year and four months after the period limited for filing amended defence. Such delay was inordinate.

Since the application only involved the plaintiff and 1st defendant, the 2nd defendant did not see the need to get engulfed in the dispute. He decided to sit outside the raging inferno. Infact the suit against him was soon withdrawn with no order as to costs by the consent of the parties.

When the application came up before me for plenary hearing on 3rd November, 2010, **Mr. Otieno** for the 1st defendant and **Mr. Ombachi** for the plaintiff, both learned counsel consented to canvassing the application by way of written submissions. They subsequently filed and exchanged the same. I have carefully read and considered them.

In an application to set aside an interlocutory judgment, it is not just the poverty of the applicant's excuse that is to be considered; the nature of the action should be considered, the defence if one is brought to the attention of the court, however irregularly, should be considered, the question as to whether the plaintiff can be reasonably compensated by costs for any delay occasioned should be considered; and finally, it should always be remembered that to deny a litigant a hearing should be the last resort of a court of law. It should also be noted that no sufficient reason is required to set aside a judgment under Order 1XA and that the court has unlimited discretion to set aside or vary a default judgment but as usual with all discretionary powers, the same discretion must be exercised judiciously and upon reasons. Where the judgment is regular the court will not usually set it aside unless it is satisfied that there is a defence on the merits and a defence on merits does not mean a defence which must succeed but one that raises triable issues; that is an issue which raises a prima facie defence and which should proceed to trial for adjudication. See generally **Sebei District Administration .v. Gasyali (1968) E.A.300, Shah .v. Mbogo (1967) E.A. 75 Pithon Waweru .v. Ndiga Volume 1 KAR 210, Kenya Commercial Bank Ltd .v. Ruben Waweru D. Kigathi & Anor, Milimani HCCC NO. 32 of 1999(UR).**

Applying the above considerations to the circumstances of this case, I have no doubt at all in my mind that, the interlocutory judgment impugned was irregularly entered and must be set aside *ex debito justitiae* (as a matter of right). I am not doing so in the exercise of my unfettered discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. The conduct of an advocate who looks the judge in the eye and makes submissions which find no support from the court record and the law must be deprecated in very strong terms. The law is very clear that not every amendment of a pleading must attract a corresponding amendment of the opposing pleading. There are occasions when a plaint is amended to correct minor details such as names of the parties, dates, time and or figures in a claim. Ordinarily such amendment would not attract amendments of the defence. At times there may be major amendments to the plaint but the defendants may feel content with the defence on record. In such a situation it will not be necessary for the defendant to amend his defence to be in tandem with the amended plaint. Counsel for the plaintiff apparently does not seem to appreciate this obvious and basic legal positions. He seems to come from the school which holds that every amendment of a pleading must be met with a corresponding amendment to the opposing pleading. Nothing can be further from truth. Otherwise what explanation can he possibly have for amending the plaint and having it served on the defendants and though the 1st defendant had a defence on record that was an answer to the initial plaint, the plaintiff at the expiry of the time allowed for service of plaint applied for interlocutory judgment. There having been a defence on record by the 1st defendant, the plaintiff had no basis to seek and obtain an interlocutory judgment in default of amended defence to the amended plaint. The 1st defendant having had a defence on record and having not elected to amend the same upon the lapse of fourteen days, of service of amended plaint the law assumes that the 1st defendant was then basing her defence on her earlier defence on record and not to be treated like someone who had not filed a statement of defence at all. Order VIA rule 1(6) of the **Civil Procedure rules** cannot be any clearer on the issue. It provides interalia:-

“.....where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1) then, if that party does not amend his pleadings under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order VI, rule 10 shall have effect at the expiry of the period within which the pleading could have been amended.....”.

In any event, the order to amend made on 10th July, 2009 was optional and self-regulating. The court granted the plaintiff leave to amend his plaint and the defendants were also at liberty to amend their defences if they so chose. It was therefore not mandatory that the 1st defendant must of necessity amend her defence in the light of the amended plaint. As she already had a defence on record it was within her to determine whether to amend or not amend her defence. In any event there is no provision under the said order which allows a party to seek for interlocutory judgment in the event that the party served with amended pleading fails to amend corresponding pleading.

Finally, it cannot be deemed that failure by the applicant to file an amended defence amounted to an admission since there was a joinder of issues on the denials contained in the initial defence already on record. Therefore the plaintiff could only get judgment upon full trial which in any event was already underway but not through the shortcut method he adopted .

In the result, the interlocutory judgment was obtained or entered without jurisdiction. The Deputy registrar was clearly misled into entering it. It was not founded on law nor any factual basis. Accordingly I grant prayers 2, 3 and 4 of the application dated 10th October, 2010.

Ruling dated, signed and delivered at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA

JUDGE

