



CIVIL PRACTICE AND PROCEDURE

- **Setting aside *ex parte* judgment of irregular judgment against the government.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 58 OF 2010

MAUA METHODIST HOSPITAL SACCO.....PLAINTIFF

VERSUS

COMMISSIONER KENYA REVENUE AUTHORITYDEFENDANT

RULING

The plaintiff filed this action against the commissioner Kenya Revenue Authority (KRA) seeking one order. The plaintiff sought mandatory injunction against the defendant restraining the defendant from tampering with the plaintiff's accounts in Barclays Bank, Co-operative Bank, Consolidated Bank and Equity Bank all based in Meru. Although that prayer is couched as a mandatory injunction prayer, in essence the plaintiff seeks a prohibitory injunction. The plaintiff appeared *ex parte* on 29th April 2010 under certificate of urgency and obtained *ex parte* injunction restraining the defendant from dealing with those accounts. Those *ex parte* injunction orders have been extended from time to time with the consent of the defendant counsel. The plaintiff unknown to the defendant sought the entry of interlocutory judgment against the defendant in default of a memorandum of appeal or defence. By an order by the deputy registrar of this court dated 18th November 2010, judgment was entered against the defendant. That entry of judgment provoked the defendant to file a Chamber Summons dated 29th

November and amended on 1st December 2010. The defendant by that application sought in the first instance stay of execution of interlocutory judgment entered on 18th November 2010. Further, the defendant sought the setting aside of that interlocutory judgment. In the affidavit in support of that application, it is deponed by the counsel representing the defendant that the defendant filed a notice of appointment on 13th May 2010 because the plaintiff had failed to serve summons on them. In urging the application, learned counsel Miss Ngugi for the defendant further submitted that KRA as defined by the Kenya Revenue Authority Act Cap 469 is the government and judgment should not have been entered against it without the leave of the court. In the replying affidavit sworn by the learned counsel Moses N. Kirima advocate for the plaintiff, the learned counsel deponed that the defendants had failed to file a defence within the time frame provided under the law. Cap 469 section 3 provides as follows:-

“3. (1) There is established an Authority to be known as the Kenya Revenue Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of:-

(a) suing and being sued.

Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act.”

As it can be seen from that definition, KRA is deemed to be the government within the meaning of Government Proceeding Act. That being so, order IXA rule 7 provides that no judgment in default can be entered against the government without leave of the court. That rule provides as follows:-

“7. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”

It should be noted that the Civil Procedure Rules have since been amended but I quote the above rule because at the time when the learned Deputy Registrar of this court entertained the application for interlocutory judgment, the previous rules were in operation. Suffice to say that the plaintiff under that Rule was required to file an application for leave to enter judgment against the defendant. The judgment therefore which was entered by the learned Deputy Registrar on 18th November 2010 was irregular. The courts have unlimited discretion to vary or to set aside judgment entered in default of appearance of defence. The main concern of the court in exercising that discretion is to do justice to the parties. As I have stated, the judgment entered here was irregular. The court therefore is of the view that that irregular judgment should be set aside *ex debito justitiae* and without conditions. As correctly argued by the learned counsel for the defendant, the affidavit of service filed before this court by the plaintiff’s counsel on 13th September 2010 indicates that what was served on the defendant was the plaint, the Chamber Summons application dated 29th April 2010 and the *ex parte* order of this court of the same date. When the learned Deputy Registrar entertained the application for interlocutory judgment, there was no evidence before court that summons had been served upon the defendant. Summons are defined in the Black’s Law Dictionary as:-

“A writ or process commencing the plaintiff’s action and requiring the defendant to appear and answer.”

From that definition, it becomes clear that it is the summons when served on a defendant which invites the defendant to enter an appearance. The importance of summons in an action are clearly seen by the provisions of order V of the Civil Procedure Rules. It is clear from that order that if summons are expired the action essentially terminates. That action is only reactivated if the summons are extended. In this case, the plaintiff did not serve the summons. There was therefore no document that invited the defendant to enter an appearance or to file a defence. Even if judgment could rightly have been entered against defendant without leave, such judgment could not be entered because the plaintiff did not serve the defendant with summons. That being so, the defendant's application to set aside *ex parte* judgment is merited. It is for that reason that I grant the following orders:-

1. *The ex parte judgment entered on 18th November 2010 against the defendant is hereby set aside.*
2. *The defendant is awarded costs of the Chamber Summons dated 29th November 2010 and amended on 1st December 2010.*
3. *The court hereby sets down for hearing the Chamber Summons dated 29th April 2010 on 14th March 2011. This is because the plaintiff was granted ex parte orders on 29th April 2010 and todate those ex parte orders have been extended which extension goes against the spirit of the new procedure rules.*

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE