



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HCCC NO. 383 OF 2010

PHELISIA WAWIRA DAVID..... PLAINTIFF

V E R S U S

JOHN GITAU

**AISHA MOTOR DEALERS LIMITED)
)..... DEFENDANTS
DAVID GAITHO WAINAINA)**

R U L I N G

The Plaintiff filed this suit on 28th July, 2010. It is a claim for damages arising out of a road traffic accident. The 1st Defendant is pleaded to be the registered owner of the motor vehicle involved in the accident while the 2nd Defendant is pleaded to have been the reputed owner thereof at the time of the accident. The 3rd Defendant has been pleaded to be the driver of the motor vehicle.

Summons to enter appearance and copies of the plaint are said to have been duly served upon all defendants. The 1st and 2nd Defendants, the court has been told, did not enter appearance or file defence.

It is common ground that the 3rd Defendant was served on 17th August, 2010. He did not enter appearance or file defence within the stipulated time.

On 10th September, 2010 the Plaintiff filed a request for judgment against all the defendants for failure to enter appearance within the prescribed period. Interlocutory judgment was entered against all the defendants on 21st September, 2010.

The 3rd Defendant has applied by **chamber summons dated 1st October, 2010** for two main orders-

1. That the interlocutory judgment entered against him be set aside.
2. That he be granted unconditional leave to defend the suit by filing a memorandum of appearance and statement of defence.

The application is brought under **Order IXA, rules 10 and 11** of the old **Civil Procedure Rules**.

The grounds for the application are:

1. That the interlocutory judgment was obtained irregularly.
2. That the 3rd Defendant has a good and meritorious defence that rises triable issues.
3. That the application has been made without unreasonable delay.
4. That the order sought will not occasion prejudice to the plaintiff and any convenience he may suffer can be compensated for by an award of costs.
5. That it is fair and just that the application be allowed.

There is a supporting affidavit sworn by the 3rd Defendant. A draft statement of defence is annexed thereto.

The 3rd Defendant has also deposed as follows:-

1. That his insurer, Africa Merchant Insurance Co. Ltd., forwarded instructions to his advocates on record on 10th September, 2010 to enter appearance on his behalf.
2. That on 13th September, 2010, the said advocates went to file memorandum of appearance but were informed by the registry that the court file was not available as it was then before a deputy registrar for directions upon a request by the Plaintiff for judgment.
3. That it was therefore the mistake of his insurer for failing to instruct counsel timeously to enter appearance of his behalf.

The Plaintiff has opposed the application as set out in grounds of opposition dated 29th November, 2010. Those grounds are:-

1. That the application is misconceived and incompetent.
2. That it is also frivolous and an abuse of the process of the court.
3. That no proper grounds have been shown for exercise of the court's discretion in favour of the 3rd Defendant.
4. That the 3rd Defendant is guilty of delay.
5. That the draft statement of defence amounts to mere denials and does not raise any triable issues.

There is also a replying affidavit sworn by the Plaintiff. It is deposed as follows, *inter alia*:-

1. That in terms of the summons to enter appearance served upon the 3rd Defendant on 17th August, 2010, he had twenty days within which to enter appearance.
2. That the 3rd Defendant should therefore have entered appearance on or before 6th September, 2010.
3. That request for judgment was regularly and properly filed on 10th September, 2010.
4. That the 3rd Defendant has not disclosed when he forwarded the summons served upon him to his insurers (and might therefore be the one guilty of the delay).
5. That no proper reasons for the delay have been given.
6. That the Plaintiff will be prejudiced if the order sought is granted as she has been without remedy for more than 18 months since the accident giving rise to the action occurred.

I have considered the submissions of the learned counsels appearing, including the cases cited.

Rule 10 of Order IXA of the old Civil Procedure Rules provided as follows:-

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

The court therefore has an unfettered discretion, subject only to dictates of justice. But like all discretions of the court, this discretion must be exercised judiciously and upon settled principles.

The principles to guide the court in applications of this nature are now well settled. The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, it will not be exercised in order to assist an indolent litigant, or one who has deliberately sought, by commission or omission, to obstruct or delay the course of justice. See the well known case of **SHAH – VS- MBOGO**, [1967] E.A. 116.

Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after the judgment sought to be set aside. It will also consider if the defendant has an arguable defence to the claim. To deny the defendant the right to a trial should be the last resort of the court.

Before we apply these principles to the present case, let us first of all deal with some preliminary legal issues raised.

Is the application misconceived and incompetent? The application has been brought under the proper rules of procedure. It seeks an order to set aside interlocutory judgment entered in default of appearance and/ or defence. The remedy is available to the 3rd Defendant. I hold that the application is neither misconceived nor incompetent. For the same reasons, it is not frivolous or an abuse of the process of the court.

The other legal issue that I would like to deal with upfront was raised by the 3rd Defendant. That issue is that the interlocutory judgment was entered irregularly.

The 3rd Defendant having been duly served with summons to enter appearance on 17th August, 2010, and same summons having given him 20 days within which to enter appearance, it is common ground that he had until 6th September, 2010 to enter appearance. He did not. The Plaintiff was thus entitled to seek interlocutory judgment from that date.

The Plaintiff sought interlocutory judgment on 10th September, 2010. The same was entered on 21st September, 2010. That judgment was thus regularly and properly entered.

What kind of delay are we dealing with here? The 3rd Defendant, as already stated, should have entered appearance on or before 6th September, 2010. The present application was filed on 1st October, 2010. On the face of it therefore, the delay is 25 days.

But there is in the supporting affidavit the averment that on 13th September, 2010 the 3rd Defendant's advocate sent their clerk to the registry to file memorandum of appearance, but that the same could not be done as the court file was not available because it was before a deputy registrar for directions on a request by the Plaintiff for interlocutory judgment. This is not unlikely as we have seen that a request for judgment was indeed filed on 10th September, 2010. The Plaintiff herself has not denied that the 3rd Defendant's advocate sent their clerk to the registry on 13th September, 2010 to file memorandum of appearance. As the deadline for entering appearance was 6th September, 2010 the real delay that we are dealing with here is between 6th and 13th September, 2010, that is 7 days.

But even such a short delay has to be satisfactorily explained. The explanation offered by the 3rd

Defendant is that his advocate received instructions late (on 10th September, 2010) to enter appearance. We have already seen that the 3rd Defendant was served with summons on 17th August, 2010. He does not disclose when he forwarded the summons to his (or rather the 1st or 2nd Defendants') insurers. So, there is a possibility that he caused the delay himself. Nonetheless, I will give him the benefit of doubt.

The draft defence annexed to the application alleges that the accident giving rise to the action was caused by the Plaintiff's negligence. This is an eminently triable issue, particularly bearing in mind that the 3rd Defendant is pleaded to have been the driver of the motor vehicle concerned.

Having considered all the matters placed before the court, I hold that the interests of justice will be best served by setting aside the interlocutory judgment and granting the 3rd Defendant conditional leave to defend. The said judgment is hereby set aside upon the following conditions:-

1. The Defendant shall enter appearance, file defence and serve the same within 7 days of delivery of this ruling.
2. The 3rd Defendant shall pay to the Plaintiff his thrown-away costs, hereby assessed at KShs. 10,000/00, within 14 days of delivery of this ruling.
3. In default of any of these conditions, the application shall stand dismissed with the same costs awarded to the Plaintiff.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 14th DAY OF JUNE, 2011

H. P. G. WAWERU
JUDGE

DELIVERED THIS 17TH DAY OF JUNE, 2011