



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 339 of 2008

METIAN KITAEI NKOIBONI.....PLAINTIFF

VERSUS

RICHARD SALATON TOROME.....DEFENDANT

RULING

This Ruling relates to an Application by the Defendant/Applicant by way of Chamber Summons dated 21st October, 2009 for orders that:-

1. *this Honourable Court be pleased to set aside the interlocutory judgment entered against the Defendant herein on the 30th April 2009, and all consequential orders thereon.*
2. *the Defendant's Defence accompanying this Application be deemed as duly filed upon payment of the requisite court fees.*
3. *the costs of this Application be provided for.*

The Applicant relied on the grounds on the face of the Application and the Affidavit of the Defendant/Applicant Richard Salaton Torome. The Applicant also relied on the case of **Mwalia vs. Kenya Bureau of Standards [2001]1 EA 148**, as summarized in the Editor's Summary:

"The discretion of the court to set aside judgments in default of appearance or defence was unfettered except that, if exercised, it had to be exercised in a rational manner on well-settled principles and on terms that were just. The court's main concern was to do justice between the parties and it would not impose conditions on itself that fettered its wide discretion. The factors to be considered by the court included (i) the nature of the action, (ii) the defence, if one had been brought to the court's notice, however irregularly, (iii) the question as to whether the plaintiff could reasonably be compensated by costs for any delay occasioned, and (iv) the fact that the denial of a hearing should be the last resort of a court."

The Application was opposed by the Plaintiff/Respondent Metian Kitaei Nkoiboni through a Replying Affidavit sworn on 9th December, 2009 claiming that he was a holder of a regular judgment. The Application was argued before me on the 4th of February 2010. The issues to be determined are whether the interlocutory judgment should be set aside, and the Defendant be allowed to defend the suit.

Having considered all the arguments by both the Applicant's - counsel as well as the Respondent's counsel I have no doubt in my mind that the application should be allowed. The request for judgment was made pursuant to the provisions of **Order IXA rule 9A** of the **Civil Procedure Rules**. Rule 9 provides as follows:

"The provisions of rules 3 to 8 inclusive shall apply with any necessary modification where any defendant has failed to file a defence."

Rule 3-8 inclusive of Order IXA provide for entry of interlocutory judgment where a plaintiff makes a demand for liquidated sum

(whether against one Defendant or several Defendants) (rules 3 & 4) or where there is claim for pecuniary damages under rules 5 and 6 of said order IXA. Rule 8 provides the general rule where no appearance is entered. The Plaintiff's remedy is only setting down the suit for hearing under order IXB rule 1.

Mr. Karanja Mbugua learned counsel for the Plaintiff contended that rule 9 of Order IX allowed entry of interlocutory judgment in all other causes of action besides claims for liquidated demands, pecuniary damages or for detention of goods with or without a claim for pecuniary damages where the Defendant fails to appear.

With respect rule 9 does not allow entry of judgment in respect of causes of action or claims beyond claims for liquidated demands or pecuniary damages etc. All that rule 9 provides is that entry of judgment may be made in respect of claims for liquidated demands or pecuniary damages etc where a Defendant has failed to file a defence. The phrase "*necessary modification*" does not mean substitution of causes of action in rules 3 to 8 inclusive but rather to a Defendant or Defendants who fail to file a defence to claims for liquidated demands or pecuniary damages or for detention of goods. It certainly does not provide for entry of judgment in respect of the claims for permanent injunction or trespass as is claimed in this suit.

In this case the claim by the Plaintiff was for;-

- a) that an eviction order be issued against the Defendant his agents and servants removing them with their structures buildings and other belongings from Plot No. 352 Ntulele Market.
- b) that a permanent injunction be issued restraining the defendant by himself his agents and servants from dealing with entering into remaining in, constructing buildings and/or structures or in any manner however interfering with Plot No. 352 Ntulele Market

Those claims are clearly inconsistent with the requirements of rules 3-8 inclusive of Order IX of the Civil Procedure Rules. The entry of judgment in this matter was clearly contrary to those rules and said judgment is therefore set aside *ex debito justitiae*. I have looked at the Defendant's defence herein. I am satisfied that it raises triable issues which should be adjudicated upon at a trial on its merits. For those reasons the Defendant's application dated 29th October, 2009 succeeds. The costs herein will however be in the cause.

Dated, delivered and signed at Nakuru this 22nd day of April 2010

M. J. ANYARA EMUKULE

JUDGE