



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 238 of 2008**

**JOHNSON MAINA STEPHEN.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MURATA FARMERS SACCO SOCIETY LTD.....DEFENDANT**  
**RULING NO 2**

The background information herein is that the plaintiff moved to this court, by way of a  
plaint dated 12th June 2008 and filed on the same date. Scheming through it reveals the  
following:-

-Vide paragraph 3- that the plaintiff was employed by the defendant as an acting  
general  
manager of the defendant having been employed on the 2/6/1977.

-Vide paragraph 4- that he was dismissed from the defendants' employment on 5th  
April 2007  
which dismissal was actuated by malice, was unlawful, wrongful and contrary to the  
laid  
down procedures stipulated in the bylaws of the defendant.

-Vide paragraph 8- that he claims damages for destruction of his career since he was  
dismissed at the age of 49 years which was quantified as Kshs. 3,840,971.40 and which  
sum  
form the basis of prayer (a) of the reliefs. In addition to the above the plaintiff claims  
costs of  
the suit and interest plus any other relief that this honourable court may deem fit to  
grant.

Summons to enter appearance were taken out on the 13th day of June 2008 and served.  
Memorandum of appearance is dated 1st day of July 2008 and filed on the second day  
of July  
2008.

Apparently there was delay in the filing of the defence where upon the plaintiff filed a  
request for judgement under order IXA rule 9 CPR dated 23rd July 2008 and filed the  
same  
date. The Deputy Registrar endorsed the said request on the 5th day of August 2008,

the entry  
having been made on the 4/8/08.

The entry of the interlocutory judgement prompted the defendant to move to this court, vide a chamber summons dated 11th day of August 2008 and filed the same date seeking the prayers sought. It is on record that the said application which had been filed under certificate of urgency went before Waweru J on 11/8/08 who granted interim orders of stay on condition that the amount claimed was deposited in court, within 14 days which order was complied with.

Interpartes hearing was first done on 30/10/08 and a ruling delivered by this court on the 4th day of March 2009 striking out the application on a point of technicality with leave to present a proper one. The represented application is dated 2nd April 2009 and filed the same date. 7 prayers are sought namely:-

1. Spent
2. Spent
3. The court be pleased to extend the order for stay made on 4/3/09 pending further orders of the court.
4. That the Honourable court, be pleased to stay the execution of the judgement entered herein on 5th August 2008 until further orders of the court.
5. That this Honourable court be pleased to set aside the judgement entered herein and consequential orders.
6. That the attached defence be deemed to be filed and served upon payment of court fees.
7. That cost of this application be provided for.

The application is grounded on the grounds in the body of the application, supporting affidavit, oral representations made on 30/10/08 which were adopted to operate for the filed application and case law.

The sum total of the same are that:-

-Indeed service of the plaint was effected on them on the 30/6/08.

-They entered appearance on 2/7/08.

-Their counsel required sufficient instructions to prepare a defence which was availed to him on 6/8/08.

-When the defence was ready for filing it was discovered that the same could not be

filed as  
interlocutory judgement had already been entered.

-They have a defence with triable issues among them an allegation that wrongful dismissal does not rise as the plaintiff was dismissed for gross misconduct.

(ii) That even if it turns out that he was unlawfully dismissed, then he had made an erroneous calculation of his entitlement as he is in law entitled to only 3 months salary in lieu of notice.

-That they have moved to court, with speed to seek leave to defend and their failure to file the defence in time is an act of inadvertence on their part.

-That the facts demonstrated herein are within the principles of law governing the setting aside of the ex parte orders.

The Respondent has opposed the application on the basis of a replying affidavit sworn by Johnson Maina Stephen on the 22nd day of April 2009 as well as their arguments made on 30/10/08 as adopted by them. The salient features of the same are as follows;-  
-The application is incompetent as it is supported by an affidavit whose exhibits have not been commissioned.

-There was inordinate delay in filing of the defence as the appearance was filed on 2/7/08 and yet the interlocutory judgement was entered on the 5/8/08.  
-The allegation for the causes of the delay have not been proved.

-The draft defence filed herein is a sham and does not raise any triable issues.

On case law the court, was referred to the case of PATEL VERSUS E.A CARGEO HANDLING SERVICED LIMITED (1974) EA 75 whose control holding is that "*the discretion of the court is not limited.*"

The court, of appeal decision of the case of ALFRED J. GITHINJI VERSUS MUMIAS SUGAR COMPANY LIMITED NAI CA (194/1991 decided on the 2nd day of April 1996 whose control holding is that it is established that "*where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been correct.*"

(2) *But where a contract of service is for an indefinite period with an element of permanency and a degree of security of tenure, in that it does not provide for its termination by the giving of the notice or payment of salary in lieu of thereof, what the employee who is wrongfully dismissed entitled to, is that which is reasonable in the given*

*circumstances”*

On the courts, assessment of the facts herein it is clear that the complaint herein is about unlawful termination of a contract of employment. The amount claimed as damages is in excess of three million (3m). The defendant wishes to defend the same on the basis of the intended annexed defence. What has been stressed in the grounds and oral submission in court are two namely:-

(i). The dismissal was lawful on the grounds of gross misconduct.

(ii). The plaintiff has committed an error in calculating what he alleges to be his dues.

(iii). That they are within the applicable principles of law as per the case law cited. In addition to what counsel has cited, the court, will also be guided by principles laid down in the case of SHAH VERSUS MBOGO AND ANOTHER 91967) EA 116 whose control theme is that *“the court’s, discretion to set a side a judgement is intended to be exercised to avoid injustice or hardship, resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

Applying the above principles to the rival arguments herein, the court, is of the opinion, that indeed the defendant moved with speed to enter appearance. However there was a span of over a month from the date of entry of appearance to the date of entry of interlocutory judgement. The defendant has asserted that no explanation has been given for the delay, which they term inordinate. Where as the defendant has given an explanation that they took time flushing out the relevant documents. In this courts’, opinion, in view of the fact that the claim arises from contract an explanation that relevant documents were being sought is not remote.

Having accepted the explanation for the delay, the court, has to deal with the issues of whether the defence raises a triable issues. In this courts’, opinion, paragraph 3 of the said defence raises a triable issue as to whether the termination was properly carried out within the applicable terms of the said contract of employment. Paragraph 7 also raises triable issues as to whether the plaintiffs’ conduct in the manner particularized there in, amount to a breach of his contract of employment. Paragraph 8 raises trial issues in that issues will arise as to whether the complaints raised by the defendant employer warranted a summary dismissal or

a normal termination of employment.

- Paragraph 9 also raises triable issues as to whether the plaintiff had any hand in the alleged contemplated loss, whether the loss was indeed occasioned. Paragraph 11 also raised triable issues as to whether there was evidence of gross misconduct.

- Lastly whether the defendant is entitled to counterclaim for the amount indicated. It is trite law that this court, has judicial notice of that, even where only one triable issue has been demonstrated, leave to defend has to be given. It is also trite that the leave to defend may be conditional or unconditional. Herein, in view of the fact that the judgement sum is already secured, there is no harm in ordering a conditional leave to defend so that who ever will be intimately successful at the end of the trial will have access to the sum adjudged in his favour.

Before winding up the reasoning, it is proper to comment on whether the application is incompetent or not, by reason of failure to mark the exhibits. Due consideration has been made of this argument, and considered the same in line with the court, findings herein and the court, finds that annexure RMK1 is the annexed defence and the commissioning stamp is duly signed. The rest of the documents are marked in a bundle as annexure RMK2 and that making is in order. There is also marking of a ruling as RMK3. The objection raised on the validity of the exhibits has therefore been ousted for the reasons given. The application is therefore competent and has rightly been disposed off on its merits. For the reasons given in the assessment the court, finds merits in the plaintiffs' application

dated 2/4/09 and filed on 3/4/09 and proceeds to make the following orders:-

1. The interlocutory judgement entered herein on 5/8/08 be and is hereby set aside.
2. The defence and counter claim raises triable issues as specified in the assessment.
3. For the reasons given in the assessment the defendant will have conditional leave to defend on the condition that the sum so deposited in court, to remain so deposited pending the hearing of the suit.
4. The defendant has leave to file and serve the defence and counterclaim within 30 days from the date of the reading of this ruling.
5. There after parties to proceed according to law.
6. The plaintiff will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

**R.N.**

**NAMBUYE**

**JUDGE**