

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

Civil Case 347 of 2006

JIMMY RAYANI.....PLAINTIFF

VERSUS

EAST F. M. LIMITED.....DEFENDANT

RULING

By a plaint dated 4th April 2006 and filed in this court the same day, the plaintiff sued the defendant for defamation seeking damages, aggravated and exemplary plus costs of the suit. The defendant on being served with summons entered appearance but failed to file defence.

The plaintiff applied and obtained interlocutory judgment on 8th June 2007 and the suit was to proceed by way of formal proof. The defendant seeks orders to set aside the default interlocutory judgment and that the defendant be granted leave to file its defence and be accorded the opportunity to defend the suit. The application is premised on the ground that the defendant had instructed the firm of Mohamed Madhan & Co. Advocates to enter appearance and file a defence who drew and filed a Memorandum of Appearance but failed to file and serve a statement of defence Mrs Waichugo counsel for the defendant submitted that failure to file a statement of defence was occasioned by the defendant's previous advocates who entered appearance but failed to file a statement of defence. She further submitted that failure to file a defence was due to oversight and that the defendant has a reasonable defence on the merits.

The application is opposed by the plaintiffs who has filed grounds of opposition Mr. Nagpal counsel for the plaintiff submitted that the interlocutory judgment which was entered against the defendant on 8th June 2007 was a regular judgment and the applicant has shown no valid reason to enable the court to exercise its discretion in its favour.

The judgment which was entered on 8th June 2007 in favour of the respondent was in my view a regular judgment which can however be set aside pursuant to Order IXA Rule 10 of the Civil Procedure Rules which gives the court very wide discretion. There are ample authorities to the effect that notwithstanding the regularity of it the court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits.

The principles to be followed in an application to set aside a judgment were set out in PATEL V. E A CARGO HANDLING SERVICES LTD 1974 E A 75 at p. 76 where Duffus p said:-

“I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where there is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect a defence on the merits does not mean, in my view, a defence that must succeed, it means as SHELDON J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In the present case it is upon the court to consider whether there is a defence or as often said “a bona fide defence” which ought to go for trial. In my view a look at the draft defence annexed to this Chamber Summons does raise triable issues. I have also considered whether the plaintiff will if judgment is set aside suffer any injustice or prejudice which cannot be compensated by an award of costs. I have come to

the conclusion that in the circumstances of this case, he would not.

All in all, I think this is a case where the interest of justice demand that the default judgment be set aside so that both parties approach the judgment seat with the merits of their respective cases.

The upshot of this matter is that I order the default interlocutory judgment entered herein on 8th June 2007 set aside with costs the plaintiff. I also order that the defendant do file and serve on the plaintiff a defence within ten (10) days from the date of this ruling.

Those are the orders of this court.

Dated at Nairobi this 28th day of February 2008.

J. L. A. OSIEMO

JUDGE