



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

Civil Suit 703, 704 & 705 of 2006 (Consolidated)

COASTAL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 704 OF 2006

COASTAL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 705 OF 2006

COASTAL ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

R U L I N G

The Applicant in this case is the Defendant who is the Attorney General. He has filed the Chamber Summons application dated 25th March, 2008 seeking three prayers. The application is brought under order IXA rules 10 and 11 of Civil Procedure Rules and Section 3A of the Civil Procedure Act. The first prayer is for a stay of execution pending the hearing and determination of this summons. That prayer is moot. The application also seeks to have the *ex parte* leave granted on the 27th February, 2008, allowing entry of judgment against the Government, and all consequential orders, certificates and decrees resultant there from be set aside *ex debito justitiae*.

The Attorney General has, for the purposes of the application, consolidated similar applications between

the same parties in **Milimani HCCC No. 705 of 2006** and **704 of 2006** are made. The circumstances and facts of all three cases are the same.

The grounds for the applications are on the face of the Chamber Summons. In brief, the Applicant contends that the leave granted to the Respondent to have judgment entered against the government for want of appearance and defence was irregular as there was on record duly filed copies of appearance and defence. The other ground is that the execution of the judgment is eminent since the Plaintiff has obtained a decree and certificate of stated costs in all three suits. In the supporting affidavits, the Applicant has annexed duly filed memorandum of appearance and defence for each of the three cases.

The application was opposed. Gilbert Josiah Mungu, Advocate for the Respondent filed a replying affidavit in which he deposes that he has authority to swear the Affidavit on behalf of the Respondent. In his affidavit Mr. Mungu deposes that about March 2007, he perused the court file and confirmed that there was neither a memorandum of appearance nor defence filed by the Defendant in all the three files. That it is upon confirmation of the default in entry of memorandum and defence that the Plaintiff on the 9th March, 2007 filed an application seeking leave to have judgment entered against the Defendant being the Government of Kenya. Mr. Mungu deposes that the application was served upon the Defendant. Eventually, the leave sought was granted and judgment was entered against the Defendant in all the three cases on the 27th February, 2008.

I have considered the application and the submissions by Counsel in the matter. I will deal with a preliminary issue raised by Mr. Mungu in his submission. Mr. Mungu submitted that the application was defective because the provisions invoked were for setting aside of judgment in default of appearance while the prayers in the application sought to set aside a decree. I do not see any error in the order and the rule invoked by the Defendant in the application. The Applicant invoked **Order IXA rule 10** of the Civil Procedure Code which stipulates thus:

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

It is clear that **Order IXA rule 10** provides for the setting aside of judgment entered for non-appearance and default of defence. The judgment challenged in this application was entered in default of defence. I am aware that the Defendant seeks to set aside the *exparte* leave granted to the Plaintiff to have judgment entered against the government, made on the 27th February, 2008. It is as a result of that leave that judgment was entered against the government in default of defence. If no leave for the entry of judgement against the government was granted, the judgments in issue in these applications could not have been entered. In the circumstances the provisions of the rule invoked by the Applicant in support of its application are in my view correct. Even if I am wrong in my finding on this point, under **Order L rule 12**, this court is obligated to consider the application even where no order or rule or other statutory provision by virtue of which the application is made is stated on the application. For this reason I find no merit in the objection raised by the Respondent’s advocate and therefore dismiss it.

I have also perused the record of the proceedings in all the three files. I think that Mr. Mungu has had his facts mixed up because contrary to his submission, it is not judgment which was entered on the 27th February, 2008, but leave was granted to the Plaintiff, by a judge of this court, to have judgment entered against the Defendant, which is the Government, in default of memorandum of appearance and defence. The judgment was itself entered by a Deputy Registrar of this court on 29th February, 2008.

I have perused the record of **HCCC No. 703 of 2006**. The only memorandum of appearance and the statement of defence on record is the one dated 12th June, 2007 and filed in court on 13th June, 2007. It is annexed to the Affidavit of Peter Bosire, a State Counsel in the Attorney General’s chambers. Mr. Bosire deposes that the two documents were duly filed in court in 2007, long before judgment was entered in this case. There is also an affidavit by David Mungai dated 25th March, 2008 in which he deposes that he received the memorandum of appearance and defence both dated 12th June, 2007, with instructions to present them for filing at the Milimani Commercial Courts Civil Registry on the 13th of June, 2007 which

he deposes that he did. The two documents bear a date stamp of this court of 13th June, 2007, and endorsement "Received".

In HCCC No. 704 of 2006 and 705 of 2006 a similar scenario is repeated. The Defendant has annexed a memorandum of appearance and a statement of defence both dated 12th June, 2007 and filed in court on 13th June, 2007, as proof that the two documents were duly filed with the court on the date indicated on them by a date and receipt stamp of the same date. This was long before judgment was entered against the Defendant. There is also the affidavit of the person who filed both documents in court in each of these files on the 13th day of June, 2007. The affidavit evidence of David Mungai has not been controverted.

From the record of these proceedings it is apparently clear that the Defendant duly filed the memorandum of appearance and the statement of defence in each court file with the Civil Registry of this court on the 13th June, 2007. It is also clear that the court must have misplaced the two documents in each of the three files to date. That explains why at the time that the Plaintiff applied for leave to have judgment entered against the Defendant, those documents were not in the file.

Can this court ignore the fact that the memorandum and the defence were actually filed in court in good time by the Defendant merely because they were not in the file at the time that the application for leave to enter judgment against the Defendant was made, and at the time judgment was eventually entered against the Defendant? That is a dangerous thing to do because it would encourage people to have such documents conveniently misplaced for the purposes of entry of default judgments. I must clarify that by saying so I am not imputing connivance between the Plaintiff and the registry staff to misplace or hide the two documents and neither am I implying that there was manipulation of the record in the three files. The position is that the Defendant has demonstrated that it indeed filed the memorandum of appearance and defence in these matters in good time, and did so long before the entry of judgment was effected against it in all the three cases.

The law is very clear that where judgment has been entered in default of memorandum of appearance and defence, that judgment is regular. If in fact the Defendant was in no such default, the judgment entered in these cases is irregular and should be set aside *ex debito justitiae*. At the time leave to enter judgment against the Defendant was made, the Defendant had already complied with the summons to enter appearance and had duly filed both the memorandum and the defence in court

I noted that the Defendant filed its defence four months after the service of the summons. Order VIII rule 1(1) of the Civil Procedure Rules gives the Defendant the choice to file its defence at any time before the first hearing of the case.

Even though the defence in all the three cases was filed long after the 14 days given in the summons to enter appearance, that defence was still valid and it cannot be ignored as it was entered before judgment and also before the first hearing. I am aware of subrule (2) of rule (1) Order VIII which requires the Defendant to file defence within 15 days of the service with summons. However, that subrule is in direct contradiction with rule 1(1) of order VIII. The contradiction notwithstanding, the relevant fact in all three cases is that the Defendant filed its memorandum of appearance and defence before leave for entry of judgment and before judgment was entered against it.

I do find and hold that the Defendant filed their defence within the time required under **Order VIII rule 1(1)** of the Civil Procedure Rules and that therefore the judgment entered in default of defence and appearance was irregular and it must be set aside *ex debito justitiae*.

The chamber summons application dated 25th March, 2008 is allowed as prayed in terms of prayer (4) of the application. Due to the circumstances of the case each party should bear its own costs of the application.

Dated at Nairobi, this 26th day of September, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Miss Oyula holding brief Mr. Bosire for the Applicant/Attorney General

Mr. Mungu for the Defendant

LESIIT, J.

JUDGE