



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Case 120 of 2007**

**MARY GATHONI WERU.....PLAINTIFF**

**VERSUS**

**MT. KENYA BOTTLERS LTD.....DEFENDANT**

**RULING**

The Plaintiff/Respondent filed this suit i.e RM CC No. 60/2006 before the Wang'uru Resident Magistrate's Court on 11/9/2006. She was claiming damages for loss of business of a rate of 150/- per day effective from 18/11/2005 and General damages. The plaint and summons were duly served on the defendant company. They did not enter an appearance or file a defence and so the plaintiff applied through her advocates for Interlocutory Judgment to be entered against the defendants on 25/10/2006. Judgment was entered in default of filing an appearance on 27/10/2006 and the matter therefore to proceed by way of formal proof. The record shows that the matter never proceeded to formal proof. That Interlocutory Judgment is what the applicant is asking this court to set aside. The application is based on the 4 grounds on its face and on the supporting affidavit of one Paul Okwemba Chimasra. He was tried to explain the reasons why the defence was not filed on saying that there was a mix up of documents with another case.

The respondent nonetheless urges that the alleged mix-up was inexcusable and further that there was inordinate delay between the time the Judgment was entered and the filing of the present application. I have considered the application in question, the grounds on its face along with the rival affidavits thereto and submissions by both counsel. To start with I wish to differ with counsel for the applicant as to whether interlocutory judgment could be entered in respect of a claim for non-liquidated damages. Interlocutory judgment may be entered in a claim like this but the matter must go to hearing for formal proof so that the plaintiff can prove his or her case. If the claim is for liquidate damages, then the court enters judgment as per the amount claimed without subjecting the same to formal proof. In the present case, the magistrate entered the judgment but the plaintiff still had the onus to prove her claim and the amount of damages she had claimed. There was therefore nothing illegal or unprocedural about the interlocutory judgment on record. The claim could still have been dismissed if the plaintiff failed to prove her case.

Secondly, the issue of confusing the documents is neither here nor there. That was sheer negligence on the part of the defendant and there is no plausible reason why that negligence should be listed on the plaintiff. Setting aside on ex-parte judgment is purely at the discretion of the court. This discretion must be exercised judicially and in the interests of justice for both parties. The discretion should be used to avoid hardship or injustice resulting from accident, inadvertence or excuseable mistake or error. It should not be used to aid a negligent party or an indolent one as is the case here. I am disinclined to allow this application. The same is therefore dismissed with costs to the plaintiff. The interlocutory judgment remains. The plaintiff is at liberty to fix her case for hearing by way of formal proof but like I have always warned, that does not lessen the burden on her to prove her case on a balance of probability.

**W. KARANJA**

**JUDGE**

**13/11/2008**

Delivered today in open court in presence of Mr. Okwaro for Plaintiff/Respondent and Mr. Ithiga for Mwenda for Defendant/Applicant

**W. KARANJA**

**JUDGE**

**13/11/2008**