REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 184 of 2004

JAMES MAINA MWANGI ……..……. PLAINTIFF

VERSUS

NADEM I. MOHAMMED ……...……..…… DEFENDANT

RULING

The applicant/defendant filed this chamber summons which is expressed to be brought under Order 9A Rule 10 and 11 of the Civil Procedure Rules. The applicant has sought for orders that the interlocutory judgment entered in favor of the plaintiff on *19th August 2004* be set aside and so are the proceedings of 12th November 2004 and the judgment delivered on *20th April 2005* and all consequential orders be set aside and vacated and the defendant be granted leave to file a defence. This application is premised on the grounds that are set out in the body of the application and elaborated in greater detail by the supporting affidavit of ***Francis Mwangi Njuguna*** which was sworn on *10th February 2006*.

The gist of the matters deposed to, are that the plaintiff filed this suit on *23rd June 2004*; the same was served upon the applicant who filed a notice of appointment of advocates on *28th June 2004*. Both the applicant and the respondent filed a consent on *24th July 2004* regarding the release of a log book for motor vehicle registration number KAQ 479T for purposes of the renewal of the road license of the same motor vehicle which was in possession of the respondent/ plaintiff.

On *14th October 2004*, an interlocutory judgment was entered in favor of the plaintiff and the matter proceeded for formal proof on *12th November 2004* where the plaintiff gave evidence in support of his claim. Judgment was delivered on *20th April 2004* and the following orders were made in favor of the plaintiff as follows;

(a) That the refusal by the defendant to release the logbook is illegal and unlawful.

(b) The defendant is hereby directed to hand over the logbook for motor vehicle registration number KAQ 479T to the plaintiff within thirty (30) days from today.

*(c) General damages for breach of contract Kshs.180, 000/- (**at the rate of Kshs.3, 000 for 60 days**).*

(d) *Costs to the plaintiff in any event*.

This judgment is challenged on the grounds that interlocutory judgment which was entered in favor of the

respondent was irregular. Secondly, failure to file a defence on the part of the defendant was due to an inadvertent mistake on the part of the Counsel for the defendant. Counsel for the applicant urged this court to consider that there is a valid defence on record which raises triable issues and which should be heard. Thus the court should exercise its discretion in favor of the applicant. Counsel relied on the case of **Abraham Kiptanui Vs Delphis Bank Hccc No. 864 of 1999** to support their submissions in this regard.

This application was opposed by the respondent who relied on the replying affidavit by ***James Maina Mwangi*** which was sworn on *24th February 2006*. In further submissions, Counsel for the respondent argued that the application to set aside the judgment has not demonstrated any or sufficient grounds to warrant this court to interfere with the judgment. Counsel invited this court to peruse the draft defence and the fact that the defendant was served with the summons, he appointed a Counsel on record who entered appearance but failed to file a defence within the time that is stipulated.

Secondly, when this matter was filed, there were negotiations which resulted to a partial agreement in which the registration documents of the motor vehicle were surrendered to the respondent. Furthermore a demand letter *18th May 2004* which was addressed to the applicant, he admitted that there was an agreement for the sale of the motor vehicle. The denial in the defence that he was not party to the agreement has no basis, it is an afterthought. Counsel submitted further that there was no reasonable defence that should warrant the setting aside of the judgment.

On the issue of interlocutory judgment, Counsel submitted that it was properly entered. The matter was set down for formal proof and the applicant was duly notified of the hearing but failed to attend the hearing, at which point he could have applied to set aside the interlocutory judgment or even seek for the extension of time within which to file a defence.

Lastly, this application was been brought to court too late. The applicant had been aware of the judgment and the fact that this application was filed almost one year after the judgment is an abuse of the court process.

The principles to be applied when dealing with an application for setting aside a judgment have been articulated in several authorities. The leading case is **Shah Vs Mbogo and Another [1967] E.A. 160.** The matters to be considered are the circumstances both prior and subsequent to the filing of the application. Also the respective merits of the defence, together with any material factors which appear to have been entered into before the passing of the judgment, which would not or might not have been presented, had the judgment not had been entered **exparte.**

The second consideration is whether or not it would be just and reasonable to set aside or vary the judgment upon terms to be imposed.

Lastly the nature of the action should be considered. The defence if one has been brought to the notice of court however irregularly should be considered. The question as to whether the plaintiff can reasonably be compensated by cost for any delay occasioned should be considered. *See* the case of **Pithon Waweru Maina Vs Thuku Muginia [1982 – 1988] 1LAR 171**. A further consideration to take is the delay or whether the application to set aside has been brought within a reasonable time.

Bearing the above principles in mind, I have subjected this application to careful consideration. It is clear that the applicant was duly served with the summonses as a result of which some negotiations took place and consent was recorded. The applicant did not file a defence and the respondent therefore sought for an interlocutory judgment which was entered and the matter proceeded to hearing by way of a formal proof. All that time the applicant was informed and did not attend court. The reasons given for this failure to file defence and to attend court for the formal proof was was due to an oversight by the advocate. This is obviously not a good reason for setting aside a judge there is no plausible reason why an advocate should overlook to file a defence and overlook to attend court during the formal proof when he is served and then come to court after almost a year to apply the proceedings be se aside. Advocates should be diligent when they take up matters for their clients and remain accountable to them in terms of professionalism.

This application coming almost, one year after the judgment inordinately late and the delay in my view disentitles the applicant from the exercise of this courts discretion.

I have also considered the statement of defence and for matters stated here above, I agree with Counsel for the respondent that the defence does not raise any triable issues. Considering the fact that the parties had entered into a partial consent where the documents of the motor vehicle were released to the respondent to renew the license and the fact that the applicant waited until the matter reached taxation for him to deny the existence of the agreement which was the subject of the sale of the motor vehicle.

In the circumstances, I hold that this application is without merit and dismiss it with costs to the respondent.

Ruling read and delivered on this 20th day of April 2007.

MARTHA KOOME

JUDGE