



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

**Civil Case 744 of 2006**

**STEPHEN MURIGI MUHUTHU .....1<sup>ST</sup> PLAINTIFF**

**REUBEN MUSINGI .....2<sup>ND</sup> PLAINTIFF**

**JOHN KYALO KASOO .....3<sup>RD</sup> PLAINTIFF**

**V E R S U S**

**PZ CUSSONS (E.A.) LIMITED .....DEFENDANT**

**R U L I N G**

The Defendant herein seeks by this application (chamber summons dated 18<sup>th</sup> of April 2007) two main orders; one, to set aside interlocutory judgment entered against it on 26<sup>th</sup> October 2006 and, two, unconditional leave to defend the suit. The application is brought under Order 9A rule 10 of the Civil Procedure Rules (the Rules). Under that rule, where judgment has been entered under Order 9A the court may set aside or vary it and any consequential decree or order upon such terms as are just. This is an unfettered discretion. But, like all judicial discretions, it must not be exercised capriciously; it must be exercised upon settled principles. Those principles were reiterated in the Court of Appeal decision of MAINA –vs- MUGIRIA, (1983) KLR 78. They are:-

- (a) there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties;
- (b) the discretion is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error; but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice;
- (c) a discretionary power should not be exercised in a selective, discriminatory, arbitrary or idiosyncratic manner;
- (d) the power to set aside judgment does not cease to apply because a decree has been extracted;
- (e) some of the matters to be considered are the facts and circumstances of the case, both prior and subsequent to the entry of judgment, including the respective merits of the positions of the parties, the nature of the action, the defence, if one has been brought to the attention of the court, however irregularly;
- (f) the court will consider also if the plaintiff can be reasonably compensated by costs for any delay that would be occasioned by setting aside the judgment; and

(g) the court will bear in mind that to deny a litigant a hearing should be its last resort.

The application is brought upon the grounds:-

- (i) that the Defendant duly enter appearance on 18<sup>th</sup> of August 2006;
- (ii) that it filed defence, though belatedly, on 6<sup>th</sup> September 2006;
- (iii) that the delay of filing defence was inadvertent and not inordinate;
- (iv) that the defendant's defence raises triable issues;
- (v) that there has not been any unreasonable delay in filing this application; and
- (vi) that it is in the interests of justice that the relief sought be granted.

There is a supporting affidavit sworn by one HASNA MBONE MUDEIZI, the learned advocate for the Defendant.

The Plaintiffs have opposed the application upon the grounds set out in the replying affidavit sworn by their advocate, NICHOLAS SUMBA. Those grounds are:-

- (i) that the application is procedurally defective as it contravenes (unstated) civil procedure rules;
- (ii) that the defence on record was irregularly filed and ought to be disregarded;
- (iii) that the court file was available all the time, and in any case there is no evidence of loss of the file;
- (iv) that there has been inordinate delay in bringing the application;
- (v) that the Defendant's defence is a mere denial that raises no triable issues.
- (vi) that if the court will be inclined to allow the application, it should do so upon such terms as are just as the Plaintiffs' claim is a liquidated one; and
- (vii) that the application otherwise lacks merit.

I have considered the submissions for the learned counsels appearing, including the one case that was cited. I have already set down the principles that guide the exercise of the discretion of the court in applications such as the present one.

To begin with, the Plaintiff's claim being a liquidated demand together with some other claim, interlocutory judgment was available under rule 3 (2) of Order 9A. So, the judgment now sought to be set aside was properly entered.

There is no dispute herein that shortly after entering appearance the Defendant's learned counsel proceeded on maternity leave. However, she made arrangements with another learned counsel for defence to be filed. Unfortunately, she was let down by that other counsel, and defence was not filed within time.

I have considered all the circumstances of this case including the fact that the claim is large. I have also considered the defence, though it is not properly on record. It appears to me that the same raises triable issues. In paragraphs 3 and 6 of the defence it is pleaded that each plaintiff acknowledged receipt of their terminal dues in full and final payment. This is a triable issue. In paragraph 7 it is denied that the Plaintiffs' termination of employment was in breach of the terms of their contracts of employment. Again this is a triable issue.

I consider that it in the interests of all the parties this suit ought to go to trial so that the respective rights of each one of them can be established upon evidence. I will in the circumstances allow the application. The interlocutory judgment entered on 26<sup>th</sup> of September 2006 is hereby set aside. The Defendants' defence filed on the 6<sup>th</sup> of October 2006 is hereby deemed to have been duly filed and served. The Plaintiffs shall have the costs of this application. There will be orders in the above terms.

DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE 2007

**H. P. G. WAWERU**

**J U D G E**