



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 7 of 2005**

**AL-ISLAMIYA ESTATES LIMITED..... PLAINTIFF**

**VERSUS**

**KHAMIS OMAR SALIM.....DEFENDANT**

**RULING**

The defendant, Khamisi Omar Salim has made an application under the provisions of **Order IX A rule 10 and 11** of the **Civil Procedure Rules** seeking the orders of this court to have the default judgment entered against him to be set aside. He has also sought to be granted leave to file a defence against the suit filed by the plaintiff, Al-Islamiya Estates Limited. The grounds in support of the application are that the defendant contends that the default judgment was entered when the defendant's former advocates failed to file a defence in time as instructed. The defendant contends that the mistake of counsel should not be visited on an innocent litigant. He further stated that the plaintiff would suffer no prejudice as he would be adequately compensated by an award of costs. He stated that he has a good defence which raised triable issues. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The plaintiff has sworn a replying affidavit opposing the said application.

At the hearing of the application, Mr Ikua learned counsel for the defendant submitted that the defendant had failed to file a defence due to the mistaken belief that his former advocate on record had failed to follow instructions to file the same. He submitted that the defendant had a good defence on merit and should therefore be allowed to ventilate the issues raised in the said defence on merits. He submitted that the defendant had established that he had failed to file a defence to the suit due to a mistake of his counsel. He further submitted that this court should strive to hear matters and determine them on substantive justice and not on technicalities. He argued that the issues raised in the draft defence were triable issues as it concerns the occupation of part of the suit land by third parties. This being a land matter, the defendant submitted that this court should hear the parties and determine the suit on merits. He argued that the plaintiff would adequately be compensated by an award of costs. He urged this court to allow the application.

Mrs Omwenyo, learned counsel for the plaintiff opposed the application. She submitted that Mr Ikua learned counsel for the defendant was improperly on record because he had not sought the leave of the court to act for the defendant as required by the provisions of **Order III rule 9A** of the **Civil Procedure Rules**. She submitted that the draft defence was not annexed to the application to set aside but was rather filed separately from the said application. She submitted that the said defence was therefore filed without leave. She further submitted that the defendant had not given any valid reason why he did not file a defence within the requisite period. She argued that the advocate for the defendant who was formerly on record had compromised an application for injunction which consent had been made in favour of the plaintiffs. She submitted that this court should not exercise its discretion to assist an indolent party who was bent on obstructing the course of justice. She argued that the draft defence filed did not raise any triable issues and therefore should be disallowed and the application to set aside be dismissed as the same lacked merit.

In response, Mr Ikua submitted that he was properly on record. He submitted that the judgment which

was entered was only interlocutory and not a final judgment. He urged this court to allow the application.

I have carefully considered the rival arguments made before me by learned counsel for the defendant and learned counsel for the plaintiff. I have also read the pleadings filed by the parties to this application. Both counsels appreciate the law as regard the setting aside of interlocutory judgments. As was held in the case of **Remco Ltd –vs- Mistry Jadva Parbat and Co. Ltd & Others [2002] 1 E.A. 233** by Ringera J. (*as he was then*)

***“Firstly, if there is no proper or any service of summons to enter appearance to the suit the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* (as a matter of right) on application by the defendant. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one, the court has unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of discretion is plenty. The cases show that main concern of the court is to justice between the parties: Patel –vs- E.A. Cargo Handling Services Ltd. [1975] E.A. 75. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought either by evasion or otherwise to obstruct or delay the course of justice: Shah ... –vs- Mbogo [1967] E.A. 116 and Maina –vs- Mugiria [1982] LLR 49.”***

In this case the defendant has explained that he had instructed his then advocate on record to file a defence to the suit filed by the plaintiff. The said advocates however did not file the defence in time. The defendant submits that he has a good defence on merits and should be allowed to file the same. The plaintiff has opposed the application. It submitted that the defendant had sought to delay the just determination of this case.

Having carefully considered the arguments made, certain facts are not in dispute in this case. It is not disputed that the defendant was served with the summons to enter appearance. Indeed the defendant duly entered appearance, defended an application for injunction but failed to file a defence within the requisite period. The subject matter of the suit relates to certain parcels of land which the plaintiff claim the defendant sold without its authority. The parcels of land in question are seven in number. The defendant in his draft defence has stated that he had the authority of the plaintiff to sell the said properties. He further states that the money which he obtained from the said sale was deposited in an account of the plaintiff. In my view these are substantial issues which can only be ventilated and determined after the court has heard both sides in this case.

For that reason alone, I will exercise my unfettered discretion and set aside the *ex-parte* judgment which was entered on the 21<sup>st</sup> of March 2005. The defendant is hereby granted leave to file and serve his defence within fifteen (15) days of today’s date. The plaintiff will have a corresponding leave to file a reply to that defence upon the same being served on it by the defendant. Since it is the defendant’s mistake which resulted in this application, I will award costs to the plaintiff. I assess the said costs at Kshs 5,000/=. The said amount will be paid within fifteen (15) days of today’s date or in default thereof the order setting aside the *ex-parte* judgment herein shall stand vacated.

**DATED at NAKURU this 8<sup>th</sup> day of March 2006.**

L. KIMARU

JUDGE