



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 167 of 2006

REGINA W MACHARIA – GITAO (REGINA RE) .....  
PLAINTIFF

VERSUS

BARAZA LIMITED.....  
.....DEFENDANT

R U L I N G

At all material times there existed a contract between the plaintiff and the defendant.

The defendant owns and runs a television station called Kenya Television Network (KTN) while the plaintiff was a television programme presenter. The plaintiff presented on KTN a television programme called “*who’s smatter now,*” until the termination of the contract, by the defendant’s letter dated 13<sup>th</sup> January 2006.

The plaintiff filed this suit and sought; declaration that the purported termination of the plaintiffs contract by the defendant was illegal, inequitable and void; a permanent injunction restraining the defendant from terminating the said contract on apportioning the plaintiff’s contractual rights to any other party; permanent injunction against re-airing programmes recorded by the plaintiff; general damages; kshs 1, 250, 000; costs and interest.

Defence on being served with the summons to enter appearance and the plaintiff failed to enter an appearance within the prescribed period and an ex parte judgement was entered in the following terms on 26.4.06: -

**“The defendant herein Baraza Limited having been duly served with summons to enter appearance within the prescribed period and having failed to file appearance within the prescribed period and upon application by the advocate for the plaintiff I enter interlocutory judgement against the said defendant as prayed in the plaint.**

**The award of costs shall await judgement upon the remainder of the claim when the suit will be set down for formal proof.”** (Signed Deputy Registrar)

The defendant by a chamber summons brought under Order 9A Rules 10, 11, Order 49 Rule 5, Order 21 Rule 22 and Order 50 Rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act,

seeks to set aside that ex parte judgement.

The application is based on the grounds; that the decree is irregular in that the plaintiff's claim herein is for pecuniary or special damages which ought to have been presented to the court for formal proof or assessment of damages; defendant's failure to enter an appearance within the prescribed period was inadvertent, due to unfortunate and excusable oversight; that the defendant has a good and strong defence and should be allowed its day in court; that the plaintiff prejudice, if any can be compensated in costs.

It is important to note that on the ex parte judgment being entered as aforesaid the plaintiff's counsel wrote to the court, a letter dated 10<sup>th</sup> May 2006, whereby the plaintiff withdrew all the prayers in her plaint except prayer (e), (f), (g) and (h). These prayers that were left subsisting related to the plaintiff's claim for kshs 1 million, representing plaintiffs alleged entitlement to payment for December, January, March and April; the prayer for kshs 250, 000 being entitlement for services incidental to airing of the programmes and the prayer for costs and interest. In other words the plaintiff did away with prayers for injunction.

Defence counsel defined the word liquidated as seen in the judicial dictionary K.J. Aiyars as follows:

**“Liquidated means ascertained apportioned generally, the amount clearly shown to be payable is referred to as a liquidated amount.”**

Defence counsel firstly submitted that the amendment to the decree sought by the plaintiff when certain prayers were abandoned was wrong and ought not to have been entertained.

Further defence counsel argued that the amount of kshs 250, 000 was a kin to special damages and accordingly ought not to have been entertained in the application for judgement without formal proof.

Defence also sought the setting aside of ex parte judgment on the basis that a mistake occurred in defendant's counsel's office when the summons and plaint were overlooked and hence, the appearance was not filed in time.

The defendant's application was opposed. Plaintiff thought very little of explanation given by defence counsels in advertence in failure to file an appearance in time,

Plaintiff even suggested that defendant should seek redress from its counsel for the negligence.

Plaintiff further stated that the defendant on 27<sup>th</sup> April 2006 was served with notice of entry of ex parte judgment and yet this time again failed to file an appearance or defence.

I have considered the arguments presented before me by both counsel and I must commend both counsels in a job well done in representation of their respective client.

In regard to an application to set aside ex parte judgment the court has undoubted discretion but discretion which must be judicially exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors, and the court will not assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the court of justice. See SHAH V MBOGO & ANOTHER [1967] E.A. The court will exercise that discretion when the judgement entered is regular.

Is the judgment hereof regular, I ask myself. The plaintiff's claim for kshs 250, 000 being incidental to airing of programme is not by a stretch of imagination a liquidated claim. The court therefore ought not to have entered the ex parte judgement for this amount before the same was formally proved. The plaintiff would of necessity have shown by giving oral evidence, at a formal proof hearing, how she incurred the said amount in airing the programmes; was it by purchasing items necessary for the programmed, if so then she ought to have proved the same by production of receipts representing those expenditures. See

Order 9A Rule 3 (2).

I am therefore of the firm conclusion that the ex parte judgment entered for the plaintiff was irregular for having included a claim for special damages, without proof of the same.

I also find favour in the argument by the defendant, that once judgement was entered on 26<sup>th</sup> April. 2006, the plaintiff could not seek to amend her plaint, other than first setting aside that judgment. All amendments as the Civil Procedure Rules provide can only be entertained before judgement.

These issues I have highlighted clearly show that the defendant is entitled to the setting aside of exparte judgment ex debito justitiae.

The orders of this court are

- (1) That judgement and or decree entered against the defendant on 26<sup>th</sup> April 2006 is hereby set aside.**
- (2) That the defendant is granted leave to file within 14 days from todays date a defence hereof.**
- (3) That the defendant is granted costs of the chamber summons dated 29<sup>th</sup> May 2006.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 31<sup>st</sup> July 2006.

**MARY KASANGO**

**JUDGE**