



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

**Civil Case 738 of 2003**

**ARTHUR K. APUNGU.....PLAINTIFF**

**VERSUS**

**M/S JUSTNICE LIMITED.....1<sup>ST</sup> DEFENDANT**

**JUSTRY PATRICK L. NYABERI.....2<sup>ND</sup> DEFENDANT**

**ROSE M. LUMUMBA.....3<sup>RD</sup> DEFENDANT**

**RULING**

This is an application brought by the plaintiff, seeking the setting aside of the Interlocutory Judgement which was entered on 2<sup>nd</sup> June, 2005. The plaintiff also seeks an order for the stay of execution of any decree which might be passed pursuant to the interlocutory judgement.

When prosecuting the application, Mr. Mureithi, advocate for the plaintiff, submitted that the only issue for determination was the question as to whether or not there was a proper judgement on record.

It was the plaintiff's case that pursuant to the provisions of Order 9A rule 3 of the Civil Procedure Rules, judgement could only be entered in default of a defence, if the claim was liquidated. Therefore, as the claim by the defendant herein was for vacant possession, an injunction and general damages, the plaintiff submitted that it was improper for the court to have granted interlocutory judgement on the counterclaim.

The plaintiff also submitted that the defendant's counterclaim did not fall within the perspective of Order 9A rule 5, which related to claims for pecuniary damages or for the delivery of goods.

In support of its case, the plaintiff relied on the authority of **CYRUS K. WAITHAKA V HEZRON K. WAITHAKA, HCCC NO. 146 of 2005** (unreported).

A reading of that decision reveals that the plaintiff's claim was for orders that the defendant held the parcels, which were the subject matter of the suit, in trust for him.

Even though the advocate for the plaintiff sought to persuade the court that the claim was based on a quasi contract for money had and received, the learned trial judge nonetheless held that the plaintiff had not claimed for a specific amount, which could have entitled him to an interlocutory judgement. The court therefore went on to hold that ;

**“a claim for special damages is not a liquidated one. It requires to be proved”**

In the face of those submissions, Mr. Mutemi, advocate for the defendant said that in his understanding of the law, when a party had defaulted in either entering an appearance or alternatively in filing a defence, the other party to the suit was entitled to apply for and to obtain interlocutory judgement.

Therefore, as the plaintiff had failed to file a defence to the counter-claim, the defendant believes that the court was right to have granted judgement in their favour. In that regard, the defendant faults the plaintiff for the views expressed through the affidavit in support of the application. The said affidavit was sworn by Mr Patrick Kibuchi, advocate for the plaintiff.

Mr. Kibuchi did depone, inter alia, that pursuant to the provisions of Order 8 rule 1(2) of the Civil Procedure Rules, a defendant ought to file his defence within fifteen days of entering appearance. Therefore, the defendant herein is faulted for filing their defence some 384 days after their advocates had filed a Notice of Appointment of Advocates. For that reason, the plaintiff contends that the Defence and Counterclaim was filed out of time, but without the mandatory leave of the court.

In my considered view, the plaintiff has misapprehended the provisions of Order 8 rule 1 (2) of the Civil Procedure Rules, as being applicable to the scenario in this case.

First, when the said subrule (2) states that a defence should be filed within fifteen days of the defendant entering an appearance, it must be appreciated that that is in a case in which summons have been served upon the defendant. Therefore, inasmuch as the summons were served on the 27<sup>th</sup> of November 2003, the defendant should have filed a defence within 15 days of entering appearance. But, the defendant did not enter appearance. Instead, their advocates filed a Notice of Appointment of Advocates, on 27<sup>th</sup> November 2003.

The failure to enter appearance, if the defendant had been served with summons to enter appearance, would have entitled the plaintiff to apply for judgement in default, after the period provided for the entry of appearance had lapsed.

However, I hold the considered view that provided the court had not yet granted judgement in favour of the plaintiff, the defendant could still have filed their defence, at any time. In such circumstances, the defendant did not need to obtain leave of the court to file a defence, even though the defence was filed outside the period prescribed. The delay in filing the defence only exposed the defendant to the risk of having judgement entered against them.

Since no judgement had been entered against the defendant by the date when they filed their Defence and Counterclaim, the said pleadings were properly on record. Therefore, it was wrong of the plaintiff's advocate to have presumed that the Defence and Counterclaim were improperly on record.

However, the court now has to consider whether or not the court was entitled to grant judgement in favour of the defendant, following the plaintiff's failure to file a Defence to the Counterclaim.

By virtue of Order 9A rule 3, if a defendant failed to enter appearance on or before the day fixed in the summons, the court would enter judgement against the defendant **“for any sum not exceeding the liquidated demand together with interest thereon .”**

Meanwhile, by virtue of Order 9A rule 5, the court is entitled to enter interlocutory judgement against any defendant who fails to appear, provided that the claim against such defendant was

**“for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages.”**

In such a scenario, the plaintiff would then set down the suit for assessment , by the court, of the damages or the value of the goods and damages, as the case may be.

When one peruses the prayers in the Plaintiff herein, it is obvious that the claims are neither for liquidated demands, pecuniary damages nor for detention of goods, as envisaged in Order 9A rules 3 and 5 of the Civil Procedure Rules. Accordingly, I hold that the court ought not to have entered interlocutory judgement, against the plaintiff. Therefore, the said judgement ought to be set aside as a matter of right.

However, even if the judgement on record were regular, there is no doubt that this court would have an unfettered discretion to determine whether or not it should be set aside. In the well known case of **SHAH V MBOGO & ANOTHER [1967] EA 116**, the court held as follows, at page 123;

**“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgement obtained ex parte. The discretion is intended to be exercised 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, whether by evasion or otherwise, to obstruct or delay the course of justice.”**

In this case, the plaintiff has held the belief that the Defence and Counterclaim were improperly on record. Based on that belief, the plaintiff has even filed an application to strike out the said pleadings. The plaintiff also reiterated that belief, in the replying affidavit sworn in relation to this application. To my mind, that conduct cannot be described as being that of a party who had deliberately sought to obstruct or delay the course of justice. He who holds a belief which is mistaken, but uses it to pursue his case through a court process cannot, in circumstances such as these, be construed to have intended to obstruct or delay the course of justice. I cannot see how the plaintiff could have been deemed to have deliberately sought to delay this case, by his action of not filing a Defence to the Counterclaim. As far as I am concerned, the said conduct was of a party who was putting themselves at risk, as opposed to someone who was deliberately causing the delay of the proceedings.

Therefore, having taken into consideration the various assertions and counter-assertions contained in the affidavits already filed in this matter, I hold the view that there are triable issues regarding the ownership of the suit property. The plaintiff is demanding the specific performance of the Agreement for Sale. He is also seeking compensation for an alleged breach of contract. On the other hand, the defendant seeks the eviction of the plaintiff from the suit property, as well as an injunction to restrain him from entering, occupying or interfering with the suit property. Furthermore, the defendant seeks compensation for the plaintiff’s continued occupation of the said suit property.

In a nutshell, the plaintiff’s claim is so intertwined with the counterclaim, that in my considered view, the justice of the case demands that the interlocutory judgement be set aside, so that the plaintiff can file his defence to the counterclaim. It is only by so doing that I believe the court would have given an opportunity to all the parties, to place before the court all issues which ought to be given consideration, before the court can adjudicate on the matter.

For all those reasons, the interlocutory judgement which was entered on 2<sup>nd</sup> June 2005 is hereby set aside. The plaintiff shall have fifteen (15) days from today, to file and serve his Reply To Defence and defence to the counterclaim.

However, the costs of the application dated 9<sup>th</sup> September 2005 shall be borne by the plaintiff in any event. He was not sufficiently prudent when he chose to file no defence to the counterclaim, on the grounds that he believed the Defence and Counterclaim to have been improperly on record. By his said choice, the plaintiff brought upon himself the need to bring this application. It is for that reason that he must bear the costs of the application, even though he has been successful.

Dated and Delivered at Nairobi, this 20<sup>th</sup> day of July 2006.

**FRED A. OCHIENG**

**JUDGE**