REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Case 10 of 2003

STEPHEN ISOE NYACHIRO…….....……..PLAINTIFF

VERSUS

SAMWEL ORINDO MANANI *alias* SAMWEL MOKAYA…….1ST DEFENDANT

JOHN MATONGA NYARINDA…….....…...2ND DEFENDANT

RULING

On the 3rd of May, 2004, the defendants' counsel on record sought an adjournment of the main hearing of this suit on the grounds that he had just been instructed by the defendants to come on record. The application of the adjournment was not opposed by the plaintiff's counsel. It was granted. The court fixed the hearing of the case for the 27th of October, 2004. On the 27th of October 2004, the plaintiff attended court. Neither the defendants nor their advocate were present in court. After being satisfied that the hearing date had been taken by consent, this court ordered the plaintiff to proceed with his case in the absence of the defendants. This court heard the plaintiff's case and delivered its judgment on the 10th of December 2004. The judgment was entered in favour of the plaintiff.

On the 12th of April 2006, the defendants moved this court by a notice of motion made under the provisions **of Order L, Order XXI Rule 18 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act** and **Section 10 (1) of the Insurance** (*motor vehicle third party risks*) **Act** seeking the orders of this court to stay execution pending the hearing and determination of the application. They further sought the judgment which had been entered against the defendants to be set aside and the defendants be granted leave to be heard on his defence. In the alternative, the defendants sought an order of the court to compel the plaintiff to submit his claim to the statutory manager United Insurance Company Limited for consideration among other claimants. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Samwel Orindo Manani O'Mokaya, the 1st defendant herein. The application is opposed. The plaintiff swore a replying affidavit dated the 23rd of June 2006 in opposition to the application.

At the hearing of the application, Mr Kiboi, learned counsel for the defendants submitted that the exparte judgment which was entered should be set aside because the defendants were not aware of the proceedings due to the fact that after summons were served on them, they handed it over to United Insurance Co. Limited who were their insurers. He submitted that it is the insurance company which appointed the firms of Muhoro Kariuki & Company Advocates and Adhonga & Staussi Advocates to act on behalf of the defendants. He submitted that the said firms of advocates did not communicate to the defendants the date that was listed for the hearing of the suit. He further submitted that subsequently thereafter during the pendency of the suit, the said insurance company was put under statutory management thus leaving the defendants exposed to the risk of paying the claim. He argued that in the circumstances of this case, the defendant should be given an opportunity to prosecute its defence. He submitted that the plaintiff had the alternative of seeking to be paid the amount awarded to him from the statutory management instead of executing against the defendants. He urged this court to allow the application with costs.

Mr Ochieng, learned counsel for the plaintiff opposed the application. He submitted that the judgment which was entered against the defendants was regular. The defendants had been served with the summons to enter appearance, had entered an appearance and filed a defence, and had participated when the hearing date of the case was taken. He submitted that there are no grounds which had been advanced by the defendants to enable this court set aside a regular judgment entered. He complained that the defendants had been indolent in that they had made the application to set aside more than one and half years after the judgment was delivered. He submitted that the delay by the defendants in bringing the application to court was not excusable. He argued that the plaintiff was not obliged to present his claim to the statutory manager; rather it was the defendants who are required to present the liability that they had incurred to the statutory manager of the insurance company. He urged the court not to interfere with the judgment which in his view was regularly entered.

I have carefully considered the rival arguments made by the parties to this application. I have also read the pleadings filed by the parties to this application including the decided cases which were referred to. The issues for determination by this court is whether the defendants have made a case to enable this court grant them the order setting aside the judgment entered against them. The principles to be considered by this court in deciding whether or not to set aside exparte judgment are well settled. As was held by the Court of Appeal in **Chemwolo & Anor. Vs Kubende [1986] KLR 492** at page 496 (*Platt JA*),

"***Order 9A Rule 10 of the Rules confers upon the court unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just. In Patel vs E.A Cargo Handling Services Limited [1974] E.A 75 (Supra) the Court of Appeal, following its previous decision in Mbogo vs Shah [1968]E.A 93 adopted the opinion of Harris J, in Kimani vs McConnell [1966] E.A 547 where he said***:

'*In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be opposed*.'

But the court went on to explain (*on page 76****), that the main concern was to do justice to the parties would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment had been entered, the court would not usually set aside the judgment unless, it was satisfied that there were triable issues which raised a prima facie defence which should go for trial*."

In the present case, the defendants made the application to set aside a judgment which was entered in default of attendants to court during the hearing of the case. The principles stated herein above as regard the setting aside of a judgment in default of appearance equally applies in circumstances where a judgment has been entered in default of a party attending court during the hearing of the case. In the instant case, the hearing date was taken by consent. The defendants and their counsel chose not to attend court during the hearing of the case. This court heard the case and delivered its judgment in the absence of the defendants. Now the defendants have made an application to set aside the said judgment entered by this court. The application was made 1½ years after the said judgment was entered. It was made after the plaintiff had made several attempts to execute against the 1st defendant. It is the defendants' application that they were not aware of the hearing dated which had been taken by their then advocate on record who they contend was appointed by their insurers.

I have evaluated the grounds advanced by the defendants in seeking to have the said judgment set aside. As submitted by the plaintiff, the said judgment was regularly entered by this court. The defendants have not given an explanation why it took them more than 1 ½ years to bring the application to set aside before court. They have not given an explanation why they did not pursue their advocates then on record so that they would know the progress of their case. This court has scrutinized the defence which was filed by the defendants. The same does not raise any triable issues that would make this court overlook the indolent conduct of the defendants. Further, justice demands that there be an end to litigation. Where a judgment has been regularly entered it can only be set aside on grounds that would assist in the promotion of justice

between the parties to the suit. In the circumstances of this case, the conduct of the defendants precludes this court from interfering with the judgment entered in favour of the plaintiff.

This court therefore finds no merit with the application filed by the plaintiff. It is not prepared to exercise its unfettered discretion to set aside the judgement in favour of the defendants who have exhibited an indolent and a casual conduct as regard the prosecution of their defence. The application is therefore dismissed with costs.

DATED at KERICHO this 2nd day of November, 2006

L. KIMARU

JUDGE