



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE 107 OF 2004

MBUNI DRYCLEANERS LIMITED.PLAINTIFF

VERSUS

MARGARET CHELANGAT)
WILLIAM MUDAKI)
PATRICK ONGORI)
DAVID NJEKA)
WILSON OWINO)
RUTH WAITEHRA NJOGU)
ROBERT KAMAU)
V. PASOLOI)
JOHN NGUGI)

ESTHER MUTHONI KARANJA)

.....DEFENDANTS

JOSEPH KAIRU)
TEMINAII MENGO)
BENSON MENGO)
CHEMERE RICHARD)
P. NYAMBO)
MESHAK MUSODA)
CHARLES ANIKA)
PAUL GATHIKA)
MR. MAINGI)

RULING

This is an application by the Plaintiff which seeks to primarily set aside an ex-parte judgment entered against it in default of filing a defence to a counterclaim by the Defendants. There is also a prayer that the attachment of the Plaintiff's machinery and equipment be lifted.

On 14.2.2003 the Plaintiff filed a suit against 20 Defendants in the Chief Magistrate's Court for an injunction restraining the said Defendants from denying the Plaintiff access to its premises and or

interfering with the Plaintiff's use and/or enjoyment of its business. Simultaneously with the Plaintiff the Plaintiff filed a Chamber Summons seeking a temporary injunction restraining the Defendants from entering the Plaintiff's premises, threatening the Plaintiff's employees and interfering with its business pending the hearing and determination of the suit and/or further orders of the Court.

On 17.2.2003 an ex parte order in terms of the prayer sought in the Chamber Summons was granted pending the hearing of the application inter partes on 4.3.2003.

On 25.2.2003, the Defendants except the 9th and 18th Defendants entered appearance through M/S Nyatundo & Co. Advocates. Before delivering a defence the 18 Defendants who had entered appearance filed H.C. Misc. Application No.489 of 2003 seeking the transfer of the Chief Magistrate's suit to the High Court. That application was heard ex-parte on 6th May 2003 and the suit was transferred to the High Court.

On 30.3.2004 the 18 Defendants filed a defence through the same Advocates M/S Nyatundo & Co. Advocates and although the word counterclaim is not at the heading of the defence, paragraph 12 makes a claim against the Plaintiff for Kshs 5,642,581/= being service dues, three months salary in lieu of notice and allowances. On 6.5.2004, the Defendants requested for judgment against the Plaintiff for the said sum on the grounds that the Plaintiff had failed to file its defence to the counterclaim within the prescribed time. On 14.6.2004 the Deputy Registrar of this Court entered judgment as prayed in the counterclaim with costs and a decree issued on 20.6.2005.

The Defendants applied for execution on 28.6.2005 and on the same date a Warrant of attachment of movable property of the Plaintiff was issued for execution by M/S Keysian Auctioneers provoking this application to set aside the default judgment.

The Application is based essentially on the grounds that:-

- (i) ***the alleged ex -parte judgment was entered illegally and without appropriate notice and service on the plaintiffs as required by the Law;***
- (ii) ***the defence as filed did not indicate and/or contain a counterclaim and***
- (iii) ***that the Defendants were paid all their dues after the suit was filed and it was wrong and unfair for them to come back to Court.***

The Application is supported by an affidavit of one Zakaria Kimemia Gakunju a director of the Plaintiff.

The Application is opposed and there is a replying affidavit by the first Defendant.

The Application was canvassed before me on 19.7.2005 by Mr. Njiru, Learned Counsel for the Plaintiff and Mr. Gitangi, Learned Counsel for the Defendants. In the submissions before me Counsel for the Plaintiff contended that the Application to transfer the suit from the subordinate Court to this court was not served upon his firm or the Plaintiff and the order of transfer was made ex parte. According to Counsel the defence that was filed did not indicate that the Defendants were raising a counterclaim and indeed no fees were paid for the counterclaim until the time a request for judgment was made of which notice was not served. It was also submitted for the Plaintiff that, other Defendants, 51 in number, were joined in the counterclaim without the leave of the Court and without the knowledge or consent of the Plaintiff. Counsel contended that to date the Plaintiff has not been served with the claim of the additional Defendants. In Counsel's view the judgment entered against the Plaintiff is irregular and, should be set aside. He further contended that the supporting affidavit disclosed a good defence to the counterclaim.

Mr. Gitangi for his part submitted that the judgment entered against the Plaintiff on the counterclaim was regularly and properly entered as the defence containing the counterclaim was served and no reply or defence to the same was filed. In his view failure to indicate the counterclaim in the heading did not affect its validity. Counsel however, admitted that there was no formal application to join the additional Defendants and that the judgment entered included their claim. This according to Counsel was not fatal. He contended that the Plaintiff had not shown any grounds for the exercise of the Court's discretion in its favour. In the event that the Court was inclined to set aside the ex parte judgment, Counsel submitted that the same should be on terms that the entire sum in the judgment be deposited in an account in the joint names of the Advocates appearing.

I have now considered the record, the application and the submissions of learned Counsels. Having done so, I take the following view of the matter. The discretion of the Court to set aside a default judgment is unfettered. However, the discretion is to be exercised on such terms as are just (See PATEL -V- E.A. CARGO HANDLING SERVICES LTD (1975) E.A. 75) and 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 whether by evasion or otherwise to obstruct or delay the course of justice (See SHAH -V- MBOGO (1967) E.A. 116 and PHILIP CHEMWOLO & ANOTEHR -V-

AUGUSTINE KUBENDE (1982 -88) KAR 1026). In exercising the discretion the Court should consider, among other things, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment which would not or might not have been present had the judgment not been ex parte (See KIMANI –V- McCONNEL AND ANOTHER (1966) E.A. 547). The question as to whether the Respondent can reasonably be compensated by costs for any delay occasioned should be considered always remembering that to deny a party a hearing should be the last resort of a Court. (See SEBEI DISTRICT ADMINISTRATION –V- GASYALI AND ANOTHER (1968) E.A. 300.)

I will decide this application with the above principles in mind. Several procedural errors were committed by the Defendants which errors have caused me grave concern. The first error was committed when the Defendants obtained an ex parte order transferring the subordinate Court suit to this Court. The Defendants should not have obtained a final order in ex parte proceedings. The second error was committed when the original 18 Defendants whom the Plaintiff had sued filed a defence for themselves and on behalf of others who were not named in the defence. The third error was committed when they made a counterclaim for themselves and on behalf of others whose claim was not distinguished from the rest to enable the Plaintiff respond to the same. The fourth error was committed when they requested for judgment for a claim which was not liquidated. A debt or liquidated demand is defined as follows in the SUPREME COURT PRACTICE (1985) VOLUME at page 33:

“A liquidated demand is in the nature of a debt; i.e. a specific sum of money due and payable under or by virtue of a contract. It is amount which must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a “debt or liquidated demand” but constitutes “damages..... The words “debt” or “liquidated demand” do not extend to unliquidated damages whether in tort or in contract, even though the amount of such damages be named as a definite figure”.

The Defendants claimed shs 5,642,581/= being service dues three months salary in lieu of notice and allowances. The way the claim was pleaded would require formal proof. Besides it is doubtful if a default judgment may be entered in default of defence to the counterclaim. Order VIII Rule 13 of the Civil Procedure rules reads:-

13. ***Where in any suit a set-off or counterclaim is established as a defence against the Plaintiff's claim, the Court may if the balance is in favour of a Defendant give judgment for the Defendant for such balance, or may otherwise adjudge to the Defendant such relief as he may be entitled to upon the merits of the case"***

It would appear therefore that the Defendants would only be entitled to the balance if any and upon the merits of the case. In my view adjudication of the Defendants case would have had to wait a determination of the plaintiff's claim.

In the result I agree with the Plaintiff that the ex parte judgment entered against it is an irregular judgment and must be set aside *ex-debito justitiae*. The orders of this Court therefore are:-

1. **The ex – parte judgment entered on 4.6.2005 and all consequential orders and decree be and are hereby set aside;**
2. **The Defendants to pay the Plaintiff the costs of this application in any event.**
3. **The Defendants do file reply and defence to counterclaim within 15 days of today.**

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2005.

F. AZANGALALA
JUDGE