REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 157 OF 2004

ISAAC MORACHA ONGWACHO…….……...……PLAINTIFF

VERSUS

DENNIS WILLY MICHUKI……..……...…..1ST DEFENDANT

RIFT VALLEY PETROLEUM LTD…….……...2ND DEFENDANT

RULING

This is an application made by the defendants, Dennis Willy Michuki and Rift Valley Petroleum Ltd, under **Order IXA rules 10 and 11 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act** seeking to have the interlocutory judgment entered against them on the 25th of June 2004, after they had failed to file a defence, set aside together with all the consequential orders thereto. The defendants are further seeking the leave of this court to file a defence to the suit filed by the plaintiff herein. The grounds in support of the application are stated on the face of the application and is supported by the annexed affidavit of the 1st defendant Dennis Willy Michuki. The application is opposed. The plaintiff, Isaac Moracha Ongwacho, has filed a lengthy replying affidavit in opposition to the defendant's application.

In his submission before court on behalf of the defendants, Mr Karanja Learned Counsel for the defendants conceded that the defendants were served with summons to enter appearance together with copies of the plaint. The defendants instructed the firm of Karanja Mbugua & Company Advocates who duly filed a memorandum of appearance on behalf of the defendants. However, the defendants did not file a defence.Interlocutory judgment was therefore entered against the defendant in default of filing a defence. The defendants contend that the amount which was entered as judgment against them was different from the amount which the plaintiff had pleaded in his plaint. The defendants were further aggrieved that the notice of entry of judgment was served irregularly one day before the interlocutory judgment was endorsed by the Deputy Registrar of the court.

It is the defendants' case that the suit against them is based on a tort of conversion and therefore the plaintiff ought to have applied for interlocutory judgment to be entered against the defendants pending the hearing and determination of the suit by way of formal proof. The defendant's argue that the plaintiff's suit was not one of a liquidated claim. The defendants further complained that after interlocutory judgment was entered, the plaintiff taxed his costs without serving the advocates who were on record for the defendants. The defendants further submit that the plaintiff went further and proclaimed the properties which did not belong to the defendants. For the above reasons, the defendants urged this court to set aside the irregularly entered ex-parte judgment and also set aside the orders flowing from the said ex-parte interlocutory judgment. The defendants submit that their defence *(draft*) raises substantial issues, and presumably triable issues, which should be allowed to be ventilated in a full trial. The defendants urged the court to allow the application with costs.

Mr Otieno, Learned Counsel for the plaintiff strenuously opposed the application. He submitted that the interlocutory judgment was regularly entered after the defendants had been properly served and failed to file a defence within the requisite period. He submitted that the application filed by the defendants was based on forged documents, - specifically annexture DW1. In his view, the said application was therefore made in bad faith, the defendants having come to court with unclean hands.Learned Counsel submitted that the reasons advanced by the 1st defendant as to why defence was not filed within the requisite period were not tenable. He argued that the delay of one year from the period which the defendants ought to have filed a defence to the time they made an application to set aside the ex-parte judgment was inordinate and in the circumstances inexplicable.

The plaintiff argued that the application filed by the defendants was meant to delay the just determination and conclusion of this suit. It was further argued on behalf of the plaintiff, that the affidavit filed in support of the application was incurably defective and ought to be expurged as the annextures to the said affidavit were improperly marked. The plaintiff relied on decision of **Chemwolo & Anor –vs- Kubende [1986] KLR 492** to support his submission that the defendant's application did not have any merit at all. Learned Counsel finally submitted that the draft defence annexed to the application did not raise any triable issues to warrant this court to grant leave to the defendants to defend this suit. The plaintiff urged the court to dismiss the defendants' application with costs.

I have read the pleadings filed by the parties to this suit and particularly the present application by the defendant and the replying affidavit thereto filed by the plaintiff. The issue for determination by this court is whether or not the defendants have established a case to enable this court exercise its discretion in their favour and set aside the ex-parte judgment entered against them and allow the defendants to defend the suit upon appropriate terms as to costs. The law as regards the setting aside of ex-parte judgments is now well settled. As was held by the Court of Appeal in **Chemwolo & Anr –vs- Kubende [1986] KLR 492** at page 496, Platt JA stated that:

> "**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 Pater –vs- E.A. Cargo Handling Services Ltd [1974]E.A. 75, 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 Mc Connell [1966]E.A. 547 where he said:-**
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> 'I**n 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 imposed.'**
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> *But the court went on to explain (on page 76), that the main concern was to do justice to the parties and 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 to trial.The court adopted the views expressed by the House

of Lords in the case of ***Evans –vs- Bartlam [1937]A.C. 473."***

This court is also aware of the requirement that courts of law should always lean towards deciding cases on merits and not on technicalities (See **Karatina Garments Ltd –vs- Nyanarua [1976] KLR 94** ***per Wambuzi P, at page 95 Para C).***

In the present case, the facts are, in general, not in dispute. The plaintiff filed suit against the defendants and duly served with the summons to enter appearance together with a copy of the plaint. The defendants have not denied that they were properly served with the said summons to enter appearance. Indeed, the defendants duly instructed the firm of Karanja Mbugua & Company Advocates who entered appearance on their behalf. However no defence was filed within the requisite period.The explanation by the 1st defendant why he did not instruct his advocate to file a defence within the requisite period is that he fell ill and was admitted in hospital at the material time. He has annexed a discharge summary issued by the Provincial General Hospital – Annex Nakuru and marked "DWM1". The plaintiff however disputes this document. The plaintiff is of the view that the document is a forgery.

Having carefully perused the said discharge summary, it is clear that the 1st defendant made an effort to tamper with the dates on the discharge summary to read the year 2004 instead of the year 2005. The admission number is stated as IP No. 3421/2005. The 1st defendant from the said discharge summary was actually admitted in hospital in June 2005 and not June 2004 as he would like the court to believe. The 1st defendant was in effect trying to dupe this court to issue order in his favour. The submission by the plaintiff that the said document is a forgery is *prima facie* correct.

In the circumstances of this case, it is evident that the defendants do not have any reason why they did not file the defence within the requisite period as provided by the rules. In a desperate attempt they latched on to something which would persuade (in this case dupe) the court to issue the orders in their favour. Unfortunately in so doing they abused the due process of the court. As stated earlier in this ruling, this court has unfettered discretion to set aside *ex-parte* judgments. However this discretion will not be exercised in favour of a litigant who attempts to circumvent the cause of justice by uttering false and forged documents. I therefore decline to exercise my discretion in favour of the defendants to set aside the ex-parte judgment entered against them.

The defendants were properly served. They chose not to file a defence on their own free will. When the plaintiff sought to execute against them, that is when they awoke from their slumber. Their complaint that they were not served with the notice of entry of judgment by the plaintiff is not true. Upon perusal of the court file I have noted that the defendants were served with the said notice before an application for execution was made by the plaintiff. Likewise although the defendants were not served with the notice of taxation, upon perusal of the bill of costs presented to the court by the plaintiff, I noted that the Deputy Registrar of this court duly taxed the same in accordance with the provisions of the **Advocates Remuneration Order.**

Further having perused the draft defence annexed to the defendants application, I noted that the same consists of averments merely denying the statement of claim by the plaintiff. The said defence does not raise any triable issues nor as was stated in the case of **Chemwolo** *(supra) d*oes it raise a prima facie defence to the plaintiff's suit.

In the premises I decline to exercise my discretion to set aside the ex-parte judgment as sought by the defendants. The ex-parte judgment entered by the Deputy Registrar of this court against the defendants was proper. Their application lacks merit.

The same is dismissed with costs.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE