



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Civil Suit 85 of 2003

JACKSON BIEGON PLAINTIFF

VERSUS

CHARLES TOO 1ST DEFENDANT

DAUDI MUNAI 2ND DEFENDANT

PAUL ROTICH 3RD DEFENDANT

JONAH ROTICH 4TH DEFENDANT

RULING

This is an application made under the provisions of *Order IXA Rule 10 and 11 of the Civil Procedure Rules*. The Defendants are seeking the orders of this court to have the *ex parte* judgment entered on the 24th of February, 2005 set aside. The Defendants are further seeking the orders of this court to be allowed to file a defence as per the draft defence annexed to their application. The grounds in support of the application are stated on the face of the application. It is supported by the annexed affidavit of Billy A. Amendi and Charles Too. The application is opposed. The Plaintiff, Jackson Biegong has filed a lengthy replying affidavit opposing the application.

I heard the submissions made by Miss Muhoma Learned Counsel for the defendants and Mr. Onyango Learned Counsel for the Plaintiff. The summary of the arguments made by the defendants are that, the interlocutory judgment entered on the 24th of December, 2004 was irregularly entered because no time frame had been given by the court for defendants to file their defence. Learned counsel for the defendants argued that the proposed draft defence raised triable issues and should therefore be allowed so that the same could be ventilated on merits. She further submitted that the said proposed defence raised a *prima facie* case and should not be disallowed on technicalities. She argued that this court should invoke its unfettered discretion and allow the setting aside of the said interlocutory judgment entered. Counsel for the defendants conceded that the advocates for defendants made a mistake in not filing a defence on time. She however submitted that the mistake of counsel should not be visited upon the defendants. The defendants pleaded with this court to give them an opportunity to have their defence heard and determined on merits.

Mr. Onyango for the plaintiff opposed the application. He reiterated the contents of the replying affidavit sworn by the plaintiff, Jackson Biegong. Mr. Onyango urged this court not to exercise its discretion in favour of the defendants in view of their past conduct. He submitted that the defendants had not given a satisfactory explanation why they twice failed to file a defence even when in the second instance they were ordered to do so by the court. He submitted that the defendants had been guilty of laches in that they had, for a period of over six months, failed to file their defence to the plaintiff's claim. Learned counsel for the plaintiff's argued that the plaintiff had been prejudiced by the defendants' indolent attitude and conduct. He further submitted that although it had been claimed that the defence had not been filed due to purely the mistake of counsel, that fact had not been raised by the defendants in their application to set aside. He argued that the defendants were given a second chance but they opted not to take advantage of it. He argued that this court should not indulge them further. The plaintiff contended that the defendants did not have a good defence on merits to the plaintiff's claim. The plaintiff further argued that this court should not aid a litigant who has deliberately sought to delay or obstruct the course of justice. He urged

this court to disallow the application to set aside the interlocutory judgment.

I have carefully considered the rival submissions made by the parties to this application. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is whether the defendants have established a case to enable this court be persuaded to exercise its unfettered discretion and set aside the interlocutory judgment entered. The principles to be considered by this court in considering whether or not to set aside the interlocutory judgment entered are well settled. As was held by Ringera J (as he was then) in Mwalia versus Kenya Bureau of Standards [2001]1EA at page 155.

“I think it is now convenient to state the law applicable to applications to set aside judgment in default of appearance or defence. It is indisputable that the discretion of the court is unfettered except that if the judgment is set aside it must be done on terms that are just. That is what order IXA Rule 10 itself ordains. It reads: “where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just”

And in Ceneast Airlines Ltd versus Kenya Shell Ltd [2000]2EA (Supra) the Court of Appeal quoted with approval the following remarks of Duffus P in Patel versus EA Cargo Handling Services [1974] EA 75:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue”, that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

As regard any other consideration to be borne in mind, I always find the following words of Ainley J adopted with approval by Sheridan J In Sebei District Administration versus Gasyali [1968] EA 300 pertinent;

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

What are the facts of this case? The Plaintiff in this case filed suit against the defendants seeking *inter alia* a perpetual injunction to restrain the defendants from trespassing into the suit land. At the time of filing the suit, the Plaintiff made an application seeking interlocutory orders of injunction. The defendants instructed the firm of Billy Amendi & Company Advocates who entered appearance on their behalf. The said firm of advocates also filed pleadings in answer to the application for interlocutory injunction. The defendants did not however file a defence. The hearing of the application for injunction did not however take place as scheduled. Several times it was adjourned for one reason or the other. On the 25th of October, 2004 Mr. Gacathi for the Plaintiff and Mr. Amendi for the defendants recorded the following consent which was adopted as an order of this court;

“By consent the defendant is granted leave to file his (their) defence. The application dated the 20.11.2003 is hereby marked as withdrawn with no orders as to costs. Status quo to be maintained. Meanwhile matter is SOG (Stood over generally).”

This consent order granted the defendants leave to file their defence out of time. The defendants recognized the fact that they had not filed their defence in time. Having been granted leave, it was presumed that the defendants would file their defence within a reasonable time. Although a time frame was not given in the said consent order, the defendants, being conscious of the fact that they had been indolent and therefore not filed their defence in time in the first instance, should have taken the second chance given to them and filed a defence within a reasonable time. In the circumstances of this case, a reasonable time should have been fourteen (14) days. The defendant did not file such a defence. On the 24th of December, 2004 the plaintiff applied for and was granted his application to have interlocutory judgment entered against the defendants in default of filing a defence. Thereafter the plaintiff fixed the hearing of his case on formal proof. He served the defendants with a hearing notice as required by the law. It is then that the defendants were jolted into action. They filed this application to set aside.

On the facts of this case, can this court exercise its unfettered discretion in favour of the defendants and set aside the interlocutory judgment? The law and the facts of this case militate against this court exercising its discretion in favour of the defendants. The defendants have been indolent. For a period of nearly a year they did not file a defence to the suit filed by the plaintiffs. When they were given a second opportunity by this court, they spurned the chance. Two months after they were granted leave to file a defence, they had not taken any such action. They filed this application to set aside only after they had

