**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 542 OF 2003**

**WALLACE MWAURA MBUGUA ……PLAINTIFF/RESPONDENT**

**VERSUS**

**DAVID NGIGE ITANGI ……..…… DEFENDANT/APPLICANT**

**RULING**

This was a Chamber Summons application by the Defendant, brought under Order IXA Rules 2 and 10 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all enabling provisions of the law. The application is dated 19th September, 2003 and was filed on 26th September, 2003. The application seeks Orders as follows:

(i) that the interlocutory judgment which had been entered against the Defendant on 30th July, 2003 together with all consequential Orders, be set aside and the Defendant be allowed to defend against the Plaintiff's suit on the merits;

(ii) that upon the first prayer being allowed, the draft Statement of Defence annexed, *be deemed as duly* filed and served;

(iii) that the costs of the application be provided for.

Grounds to support the application are stated as follows:

(i) the Defendant was always desirous of being heard on the merits, and the delay in filing the Defence in time was inadvertent;

(ii) the delay in filing the Defence was by no means inordinate, and could thus be cured;

(iii) the Plaintiff will not be prejudiced if the Defendant is given leave to defend;

(iv) the Defendant/Applicant has a good defence which raises triable and substantive issues of law and fact;

(v) the Defendant is ready and willing to comply with such terms as the court may deem just.

The Defendant's application is supported by the affidavit of Charles Njuru Kihara, the Defendant's Advocate. He sets out the pertinent facts as follows:

(i) the Defendant retained his firm on 1st June, 2003 to conduct the defence in this matter;

(ii) the deponent entered appearance, dated 24th June, 2003 filed and served the same on the Plaintiff's Advocates;

(iii) the deponent thereafter undertook necessary research, apart from taking instructions from his client;

(iv) even as the deponent continued to prepare the Defence case, he was on 21st August, 2003 served with a formal proof hearing, and this conveyed to the deponent for the first time that the Plaintiff had already obtained an interlocutory Judgment;

(v) at the time of the hearing notice for formal proof, the draft Defence was ready and the deponent signed it on 8th August, 2003 ready for filing in Court;

(vi) the delay in drafting and filing the Defence was inadvertent and highly regrettable;

(vii) the Defendant has an arguable defence which raises triable issues of fact and law;

(viii) no prejudice will be suffered by the Plaintiff if the Orders sought are granted, and the Plaintiff could be appeased by way of costs.

This matter came before the Honourable Lady Justice Aluoch who ordered as follows:

"There is an application on record for setting aside the *ex parte* judgment. In the circumstances, the formal proof cannot proceed."

The learned Judge ordered that the parties take a date at the Registry for the hearing of the case; and the matter came before me for hearing on 27th January 2004. It had to be taken out of the list, however, and was heard on 19th February, 2004.

Mr. Saini for the Defendant/Applicant presented the case for his client. He submitted that the delay in the filing of the Defence, which was highly regretted, was inadvertent and, as it was not inordinate, there was a good case for setting aside the *ex parte* Judgment, and according the Defendant a chance to have his draft Defence formally admitted, and then to proceed to prosecute the Defendant's claims. He urged that since the Plaintiff's case was not yet heard, there would be no prejudice coming the Plaintiff's way if the Defendant was given a hearing on his Defence. He suggested that, should there be any prejudice falling at the doors of the Plaintiff, then such could be compensated through an award of costs. He submitted that the Defendant had a good Defence raising triable issues of both law and fact. He expressed the willingness of the Defendant to comply with any such terms and conditions as the Court might impose to travel alongside the grant of leave to prosecute the Defence case. Counsel pleaded that the delay in filing the Defence was caused by the research work that the Advocates were carrying out, and the Defendant personally had no control in the matter. He submitted that it would not be just to visit the consequences of the mistake of the Advocates upon the Defendant himself. He submitted that, not allowing the Defendant to defend against the suit would cause hardship to the Defendant and would occasion injustice. Counsel submitted that the rules of natural justice dictated that the parties should as far as possible be heard on the merits of their case; and that it would not be right to sacrifice the substance of the law at the altar of technicalities.

Counsel for the Defendant/Applicant sought to rely on the case, LION OF KENYA INSURANCE CO. LTD. v. TRINITY PRIME INVESTMENTS LTD, Civil Appeal No.120 of 1999. The following passage in the Judgment of the Court of Appeal is pertinent:

"O. XXXV rule 2 (1) of the Civil Procedure Rules enacts that in an application [by the Plaintiff] for summary judgment under rule (1) of the same Order, a Defendant may show either by affidavit, or by oral evidence, 'or otherwise' that he should have leave to defend [against] the suit. To succeed the applicant has to show that a defendant who has appeared has no defence, or whatever defence

> he has or may have is merely a sham defence. If, however, a defence put forward by a Defendant raises some issue or issues which require investigation then the Court is obliged to grant leave to defend, and depending on the facts and circumstances of the case, the leave may be either conditional or unconditional (See Trikam Maganlal Gohil v. John Waweru Wamai [1983] 1 K.A.R. 116). A sham defence is one in which pleas are proffered merely for the purpose of delay (See Jacob v. Booths Distillery Co. 85 TLR at P.262) .."

Mr. Saini stated that the claim against Defendant in the main suit is for defamation; and his instructions are that the Defendant will be pleading justification, *inter alia*. Counsel submitted that the Defendant was raising triable issues which should be heard in a full trial.

Counsel cited the case of WAWERU V. NDIGA, Civil Appeal No. 64 of 1982, [1983] KLR 236, and remarked the relevance of the second holding in the summary of holdings set out of page 237:

> "The Court has an unfettered discretion to do justice between the parties; it may be just on the facts of the particular case to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice."

Counsel for the Defendant/Applicant then made submissions on the Replying Affidavit of the Plaintiff, Wallace Mwaura Mbugua, dated 4th October 2003 and filed on 24th October, 2003. In this affidavit the deponent ascribes to the Defendant/Applicant "untenable neglect of duty"; misrepresentation on material facts before the Court; lack of professional diligence; laxity on the part of counsel; inexcusable mistakes; etc.

Counsel for the Applicant submitted that the Replying Affidavit was not in good form, as, by Order XVIII rule 3 (1), an affidavit is required to confine itself to such facts as the deponent can prove from his own knowledge. He submitted that the Plaintiff's affidavit should be struck out for being scandalous, irrelevant and replete with oppressive material. The Respondent, counsel submitted, had deponed to matters of fact and law which he did not have personal knowledge of, and he had failed to disclose his sources.

Mr. Nyaga for the Plaintiff/Respondent opposed the application, on the basis of the affidavit impugned by Counsel for the Defendant/Applicant. Mr. Nyaga submitted that the said affidavit showed neglect of duty on the part of the Applicant's Counsel. Mr. Saini, however, contended that the propriety or impropriety of the affidavit was a preliminary matter which should be considered before the affidavit was relied upon. This was a valid argument. The replying affidavit was marked by prolixity and its strength as a document of evidence to help the Court in its deliberations stood in serious doubt. However, it made practical sense to hear all the submissions before coming to a decision on all the matters in issue together.

Counsel for the Plaintiff/Respondent disputed the validity of the reasons for delay given by the Defendant/Applicant. Counsel submitted that there was no hardship to which the Defendant/Applicant would be subjected if the cases proceeded to formal proof on the basis of the interlocutory Judgment.

Counsel for the Plaintiff argued that the principle in LION OF KENYA INSURANCE CO. LTD. v. TRINITY PRIME INVESTMENTS LTD. had no application in the present case, because there was in the present matter a summary judgment and there was no Defence on record; whereas in the Lion of Kenya case the application for summary Judgment was only just being made. With reference to Waweru v. Ndiga, Counsel for the Plaintiff/Respondent contended that the goal of the Defendant/Applicant was none other than to delay the course of justice. Counsel cited the case of KETTLEMAN V. HANSEL PROPERTIES LTD [1988] 1 ALLER 38, at P. 62, where the following passage in the dictum of Lord Griffins appears:

> "Another factor that a judge must weigh in the balance is the pressure on the Courts caused by a great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the

> same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings".

This principle was applied by the Honourable Mr. Justice Ringera in CHARLES OMWATA OMWOYO V. AFRICAN HIGHLANDS & PRODUCE CO. LTD., Civil Suit No. Misc. Application 308 of 2002. The learned Judge remarked:

> "I am of the same persuasion. Even if the matter involved an exercise of discretion (and not want of jurisdiction as is the case here) I would have declined to exercise the Court's discretion in favour of the Applicant on the grounds that he found himself in a predicament as a result of his Advocate's alleged mistake. I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour."

Now while I will readily adopt the principles expressed in the two passages, respectively, from the Kettleman case and the Charles Omwata Omuoyo case, I am disinclined to apply them in favour of the Plaintiff/Respondent, for the reason that the lengthy affidavit in support of the Plaintiff's case tends to lack focus, and is essentially argumentative in character. Its evidentiary value is limited and I do not think it should be the basis for upholding the Plaintiff/Respondent's application.

I have addressed my mind to the circumstances attending the present application. It is not disputed that the Defendant/Applicant did not file a Statement of Defence in time, and the Plaintiff/Respondent then moved swiftly to secure interlocutory Judgement. Counsel for the Defendant/Applicant admits to the mistake and makes an apology. The Applicant's essential argument is that there is a draft Defence now ready which carries triable issues and, as the lateness in filing the Defence is not inordinate, the Court do exercise its discretion, in favour of a trial process as the primary forum of justice in the case, to set aside the interlocutory Judgement and to validate the draft Defence.

Such a case, on its face, appears meritorious and could be the basis of a favourable ruling. But the key point against this position is that the High Court, so busy as it clearly is, should be slow to allow the hearing of a Defence which, with more diligence on the part of counsel, should have been filed timeously. The general principle emerging from the case law is that the triable character of a Defence, should be the main consideration in allowing it to be heard once an interlocutory Judgement has been given. I have considered the content of the draft Defence, and it clearly raises triable issues, so that it would merit an opportunity to be heard.

The Plaintiff/Respondent has not convinced me that he has some major reason to stop an opportunity being opened up for the Defendant/Applicant to be heard.

In the circumstances, I find in favour of the Defendant/Applicant, and make the following Orders:

1. The interlocutory Judgement entered herein against the Defendant, on 30th July, 2003 together with all consequential Orders, be and is set aside; and the Defendant be and is allowed to defend against the Plaintiff's suit herein on the merits.

2. The draft Statement of Defence be and is hereby deemed duly filed and served.

3. The costs of this application shall be paid by the Defendant/Applicant in any event.

DATED and DELIVERED at Nairobi this 26th day of March, 2004.

**J.B. OJWANG**

**Ag. JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk: Mwangi**

**For the Defendant/Applicant: Mr. Saini, instructed by M/s. C.N. Kihara & Co. Advocates**

**For the Plaintiff/Respondent: Mr. Nyaga, instructed by M/s. J.M. Njenga & Co. Advocates**