REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 6739 OF 1992

MARY MUTIO MWASYA ..... PLAINTIFF

VERSUS

ARMED FORCES CANTEEN

ORGANISATIONS ..... DEFENDANT

RULING

This is an application dated 25th September, 2003 supported by an affidavit of one Cletus Edson Lyambila sworn on 25th September, 2003.

He seeks to set aside an exparte judgment entered on 4th October 2002 and an order for stay and that the defendant be given unconditional leave to defend.

Three grounds have been advanced in favour of the applicant namely that Colonel F Q Mbewa, advocate passed away and this is the reason the defendant was not represented at the hearing and that the defendant has a good defence and counterclaim on record.

On 18th August 2003 when a new advocate took over the defendants realized that a decree had been obtained against them whereupon M/s Ocharo & Company advocates were instructed to take over. They urged the court not to punish them for mistake of the deceased counsel.

The plaintiff/respondent relies on the grounds of objection dated 9th October, 2002. The grounds are:-

1) That order of 2nd September, 2003 was not complied with by the applicants.

2) Judgment was not entered exparte but after the Judge took note of arguments by both parties

3) The application is a delaying tactic as the defendant is aware that the plaintiff/respondent is terminally ill

4) Application has not been brought in good faith.

It is important to mention that there is a defence and counterclaim on record filed on 20th December, 1994. The counterclaim is for Kshs 150,881/- plus interest. There is also a reply to defence to counterclaim filed on 24th March, 1995. Contrary to what the applicants state concerning service there is an affidavit of service in the file indicating that the Department of Defence had been served and they had endorsed at the back of the notice of hearing for 24th and 25th June 2004. The affidavit of service was filed on 24th June, 2002. This has not been challenged.

No date has been given for the demise of Colonel Mbewa.As at the time Honourable Mr Justice Mbito heard the matter exparte after being satisfied that a hearing notice had been served there was a defence and counterclaim on record. It has not been suggested that the defence and counterclaim is a sham.

Although the details of the death of the defendants counsel the late Colonel Mbewa have not been satisfactorily set out in the affidavit in support it is possible that as at the date of the hearing ie 20th June 2002 the deceased had passed away and the Department of Defence was not able to brief an alternative counsel. The defendant heard of the matter next after the decree and subsequently briefed the firm on record to apply to set aside the judgment. When the applicants became aware of the judgment in August 2003 they filed the application on 1st October 2003. The apparent delay in having the application heard appears due to the take over process by the new advocates. They had to seek leave to come on record.

Putting the affidavit evidence on the scales including the fact that there was a defence and counterclaim on record at the time the hearing proceeded exparte and the death of the defendant's counsel the court is of the view that the court ought not to have ignored a defence on record.

I have read the defence and although the learned judge does make reference to it and the counter claim – it is clear any proof of the counterclaim could have affected the ultimate outcome in a drastic manner.

In the case of **MAINA MURIUKI 1984 KLR 40** the High Court O'Kubasu J reiterated very well known principles for setting aside judgments entered in default. One of the principles he touched in holding 3 is:-

> **"Before exparte judgment can be set aside it must be satisfied that there is valid defence. There was a valid defence filed in the suit and there was no suggestion that the defence was a sham."**

In the case of **MAINA v MUGERIA 1983 KLR** 78 the Court of Appeal at pg 79 set out the principles which the High Courts ought to consider include the following:-

> **(a) there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties**
>
> **(b) the power to set aside the judgment does not cease to apply because a decree has been extracted**
>
> **(c) the defence should be considered.**

In the case of **PATEL v EA CARGO HANDLING SERVICES** of the Court of Appeal considered the meaning of defence although in the context 0 9A rule 10 and not O 9B rule 8 and, held at page 76 that:-

> **"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".**

In exercise of my unfettered discretion the defence and counterclaim on record do reveal some triable issues which need to be ventilated in a full trial and on merit and since the respondent can be compensated by way of costs no prejudice will be suffered by the respondent. Although the application to set aside was filed out of time and two weeks after the time stipulated by the order of Mr Justice Ransley there was no application filed by the defendant to dismiss the application for this reason.

The fact that the figures relating to the judgment have not been agreed does not deny the judgment of its finality.

All in all court discretion is hereby exercised in favour of the applicant and the judgment entered on or given on 4th October, 2002 is set aside. All thrown away costs to be paid to the respondent in any event.

Defence and counterclaim restored.

Matter to proceed to full hearing.

It is so ordered.

DATED and delivered at Nairobi this 18th day of March, 2004.

J G NYAMU

JUDGE

CIVIL PROCEDURE

- setting aside judgment
- Principles revisited
-

Defence on record not to be ignored.