



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1058 OF 2000

CHARLES MWALIA

**T/A HOLIDAY
ENTERPRISES**

.....
PLAINTIFF

VERSUS

**KENYA BUREAU OF
STANDARDS**
..... DEFENDANT

RULING

The defendant Kenya Bureau of Standards has brought this application under O. XLIV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for a review and setting aside of this court's ruling dated 27.10.2000. The application is supported by an affidavit sworn on 2.11.2000 by Mr. Michael J. Iseme, an advocate of this court who has the conduct of the matter on behalf of the defendant.

The grounds upon which the application is based are:-

1. That a defendant may appear at any time before final judgement and may file a defence at any time before interlocutory judgement is entered against him or if no interlocutory judgement is so entered, at any time before final judgement.
2. That this Honourable Court in its ruling of 27th October, 2000 did not take into account the fact that at the time the default judgement was entered, there was infact a Defence on record filed on 7th July, 2000.
3. That where a Defence has been filed albeit irregularly, the Court is nevertheless obliged to look at it, so that if it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgement without regard to the Defence, but will take steps to have the case properly tried on merits.
4. That as the Plaint as drawn claims for pecuniary damages, then interlocutory, but not final judgement should have been entered, if at all.
5. That the wider interests of justice would best be served if this case is properly tried on merits.

The ruling sought to be reviewed dismissed an earlier application by the defendant seeking to set aside a judgment entered against the defendant in default of appearance. The reason for the dismissal of the application as stated in the ruling was that the defendant had failed to explain the reason for the non appearance.

It is common ground that at the time the default judgment was entered, there was a defence on record filed on 7.7.2000. However no memorandum of appearance had been filed by then. The court's dismissal of the application to set aside the default judgment was premised on the ground that no explanation was put forward as to why no appearance had been made. The court did not however proceed to consider what effect, if any, the filing of the defence had on the subsequent entering of the default judgment.

Mr. Iseme's contentions in this application are that the court's failure to consider the defence on record was an error or mistake apparent on the face of the record; he also submitted that the court's failure to deal effectively with or determine an important issue in the case namely whether or not it is proper for a judgment in default of appearance to be entered when there is a defence on record is sufficient ground for review.

By virtue of O. XLIV Rule 1, an application for review may be made under O. XLIV Rule 1:-

"..... on account of some mistake or error apparent on the face of the record" and in Mulla, Code of Civil Procedure Vol. III, 15th Edition at page 2726 it is stated:- "where the judgment did not effectively deal with or determine an important issue "it can be reviewed on the ground of error apparent on the face of the record."

Mr. Nzamba Kitonga for the plaintiff thought that no basis had been established for the review of the ruling in question and that in the circumstances of the matter, the correct procedure would have been an appeal against the ruling. He accordingly submitted that the instant application was an abuse of the process of the court. However, since it is common ground that the ruling did not deal with the issue whether or not it was proper to enter a default judgment when there was already a defence on record, which said issue was canvassed at the hearing of the application giving rise to the ruling and also having regard to the legal position on the matter (see O. IX rule 1) by virtue of which a defendant "may file a defence at any time before interlocutory judgment is entered against him" and the commentary in Mulla on the subject, I am of the opinion that the applicant in the instant application has established a case for the review of the order dated 27.10.2000.

Accordingly, the application is partly allowed and the order dated 27.10.2000 set aside. As to the chamber summons dated 2.10.2000, I do not think it would be proper for me to revisit the arguments made in that application and rewrite a ruling. In my opinion, the correct procedure is to re-argue the application for determination by another judge. Costs of this application will be in the cause. There will be orders accordingly.

Dated at Nairobi this 16th day of January, 2001.

T. MBALUTO

JUDGE