

REPUBLIC OF KENYA
CAMMERT HUBERT T/A WORLD CLOTHES & ANOTHER V ELIZABETH A OKECH
High Court of Kenya at Nairobi
August 25, 2000
Milimani Commercial Courts
T Mbaluto, Judge
Civil Case No 790 of 1999

August 25, 2000 T Mbaluto, Judge delivered the following ruling.

This application has been brought by the defendant herein under Order IXA rules 5, 8, 9, 10 and 11, Order IXB rules 1(2) and 8, Order XXI rule 22 (1) and 91 of the Civil Procedure Rules for orders in the following terms:-

- (a) that this court be pleased to stay execution of the decree issued herein;
- (b) that this court be pleased to set aside and vacate the default judgment ruling and decree issued herein and all orders consequential thereto and; (c) that this court be pleased to permit and grant leave to the defendant to file her statement of defence to the plaintiffs' claim out of time.

The application is supported by an affidavit sworn on June 15, 2000 by the defendant, the relevant parts of which contain the following averments:-

- (a) That a hearing notice was served upon the defendant's advocates indicating that the suit against her would be coming up for formal proof on October 7, 1999;
- (b) That no notice of judgment and/or entry of judgment was ever served upon the defendant or her advocates then on record;
- (c) That when this matter came up for formal proof, the defendant's advocate reserved the defendant's right to apply for further orders;
- (d) That the defendant has a valid reasonable defence on merit to the plaintiffs' entire claim; and
- (e) That the failure and default in filing the defence was occasioned by the confusion attendant to the service of pleadings and prosecution of the Chamber Summons application lodged on by the plaintiffs.

In response to the application, the plaintiffs' advocate Mr Kamau Mbugua has sworn and filed a comprehensive replying affidavit which details all the steps that have been in this matter from the filing of the plaint and the Chamber Summons application on June 21, 1999 up to November 23, 1999 when judgment in the matter was delivered. The affidavit reveals that the plaint and the application were served upon the defendant on June 23, 1999 well before the appointment of the former advocates for the defendant M/S Shapley Barret & Co who came into the picture through their notice of appointment of Advocates filed in court on August 18, 1999. Although M/S Shapley Barret & Co Advocates should have obtained the documents served upon the defendant directly from her, the plaintiff's advocates on receiving a request from the defendant's advocates in that behalf, did provide extra documents to the said advocates and consequently the averment in the defendant's affidavit that her failure to file a defence was occasioned by confusion connected with the service of pleadings cannot be true. In my view there should have been no confusion at all. Indeed even her own advocates, who cannot possibly be said to have suffered from the same alleged malaise of confusion, though well aware of the fact that no defence had been filed as at the time of filing their notice of appointment did nothing with regard to filing the defence till after the time of formal proof. Notwithstanding their failure to file a defence, the defendant's advocates represented the defendant during the formal proof of the suit and crossexamined the plaintiffs' witness.

It is I think necessary at this stage to observe that before the matter came up for hearing on October 14, 1999, it had been adjourned on 3 different occasions on September 29, 1999, October 7, 1999 and

October 13, 1999. The last adjournment was specifically granted to allow the defendant's advocate, Mr Gaya, to obtain instructions from the defendant. In the order, the court expressly stated endorsed that "No further adjournments were likely to be granted."

When the matter finally came up for hearing on October 14, 1999, Mr Gaya for the defendant did not say anything about the instructions he was supposed to have received from the defendant. By that time, the defendant could not of course have filed any defence in the matter because the interlocutory judgment entered on September 15, 1999 against her in default of defence was still in place. Faced with that situation, Mr Gaya at the commencement of the hearing of the case made the curious statement:-

"I reserve my clients rights to put in any application that may be appropriate."

Which said statement, I must confess, I found meaningless and of no relevance. Be it what it may, thereafter, Mr Gaya as aforesaid fully participated in the trial of the case on behalf of the defendant in the course of which he cross examined the plaintiff.

In view of what I have stated above, there is no doubt in my mind that both the defendant and her advocates have not only been indolent in the manner they have handled this suit but they are also guilty of laches. Moreover, in her affidavit in support of the application, the defendant has not been forthright; it is also my view that she has also made statements which are clearly intended to mislead this court. In short, the defendant has not come to this court with clean hands and for that reason she is not deserving of this court's discretion.

For all those reasons, I would dismiss the defendant's application with costs.