



Curve Development Limited v Creative Jioners Limited (Commercial Case E174 of 2024) [2025] KEHC 4801 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E174 OF 2024
JWW MONG'ARE, J
APRIL 8, 2025**

BETWEEN

CURVE DEVELOPMENT LIMITED PLAINTIFF

AND

CREATIVE JIONERS LIMITED DEFENDANT

RULING

1. on 21st October 2024, the defendant/applicant under a Certificate of Urgency filed a Notice of Motion application brought under order 7 rule 5, order 10 rule 10 and 1 of the Civil Procedure Rules seeking the following orders:-

Spent

2. There be a stay of execution of the decree or any consequential orders pending the hearing of this Application.
3. The interlocutory judgment and all consequential orders entered in this matter against the Defendant herein on 11th July 2024 be set aside.

The costs of this application be provided for.

4. The court do make any or other order that it may deem fit in the circumstances.
5. The application is supported by the grounds set out on its face and the supporting affidavit of David Wilfred Onyonkasworn on 25th October 2024. It is the Defendant's case that it was not served with all the pleadings as is required by law to allow it file its defence to the suit within the timelines set by law. The Defendant argues that it was served with the Summons to enter appearance and part of the



plaint and verifying affidavit but was never served with the rest of the documents that automatically accompany the plaint such as the witness statements and list of documents.

6. That the Defendant filed its Memorandum of Appearance dated 9th May 2024 on 11th June 2024 and was surprised to be served with an entry of judgment before all the necessary pleadings were served. The Defendant urges the court to set aside the summary judgment and allow it to file its defence to the suit. The Defendant maintains that it requires to be served with all the necessary document in order to respond to the Plaintiffs claim and file its defence. The Defendant maintains that the said supporting documents to the Plaintiffs claim have not been uploaded to the CTS portal despite being referenced to in the Plaintiff's affidavit of service. The Defendant has urged the court to set aside the summary judgment entered in default of defence and allow it to defend the suit.
7. The Application is opposed and the Plaintiff has filed a replying affidavit sworn by Shyam Wadia on 5th November 2024. The Plaintiff argues that the Defendant was duly served and went ahead to file a Memorandum of Appearance but failed to file a defence to the claim and hence leaving the suit undefended and hence the judgment was entered in default of appearance. The Plaintiff argues that despite the judgment having been entered, the Defendant waited for 83 days before filing the present application and without offering an explanation for the inordinate delay. The Plaintiff further argues that despite all that the Defendant has not annexed to his application a draft defence to allow the court to consider whether the said defence raises triable issues sufficient to warrant the setting aside of the judgment. The Plaintiff urges the Court to dismiss the application and allow execution of the judgment and decree to proceed.

Analysis and Determination

8. I have carefully considered the application and the supporting affidavit as filed by the Defendant. I have equally considered the Plaintiffs replying affidavit and the rival submissions by both parties. I note that the only issue that arises for determination by this court is whether the Defendant has made out a case to allow the court to set aside the judgment herein.
9. Order 7 rule 1 of the Civil Procedure Rules provides as follows:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

From the record it is admitted that indeed the Defendant was served with the Court Documents and was able to retain an advocate who then filed a Memorandum of Appearance. The Advocates arguments are that while they were served with the Plaint and Summons to enter appearance, they did not receive the complete record that included witness statement and list of documents from the Plaintiff to allow them come up with a defence for the suit and none of those documents were filed on the Court CTS portal and as such they lacked sufficient material to file a defence.

10. The Court in *Patel vs EA Cargo handling Services Ltd*(1974) EA 75 at 76 and E states as follows; “there are no limits or restrictions on the Judge's discretion except that if he does vary the judgment, he does so on such terms as may be just.... 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 by its rules”. It is therefore clear from the above decision that in application for setting aside a judgment entered in default of defence, the court has wide discretion. It is however clear that the said discretion should be exercised judiciously to avoid visiting an injustice on either party.



11. I have considered the arguments put forward by the Defendant in seeking to set aside the ex parte judgment. I have also considered the counter arguments by the Plaintiff in urging the court to dismiss the application. I note that the Defendant has not annexed to the application to allow the court to consider if indeed the Defendant has a defence that raises triable issues. I note also as argued by the Plaintiff that this application was brought 83 days after the court entered the judgment in default of a defence. I agree with the Plaintiff that no explanation has been provided to explain the delay. I find therefore this application was brought with inordinate delay and that the same has not been explained. I also note that failure by the Defendant to annex to its application a draft defence for the court to consider makes it difficult for the court to determine if the Defendant has a defence to the suit that raises triable issues to warrant setting aside the judgment of the court. The Defendant had notice of the suit and did indeed file a Memorandum of Appearance. The Defendant in my view has been indolent and has offered no good explanation as to the failure to put in his defence in a timely fashion and as dictated by order 7 rule 1. I therefore find that the present application is without merit and I dismiss the same. Costs of the application are awarded to the Plaintiff. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF APRIL 2025

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

PARA 1.

Mr. Vincent Kitana holding brief Mr. Ochieng for the Plaintiff/Respondent.

PARA 2.

Ms. Kache holding brief for Mr. Ooge for the Defendant/Applicant.

PARA 3.

Amos - Court Assistant

