



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 213 OF 2018

A-PLUS MOTORS LIMITED.....PLAINTIFF

=VERSUS=

JOHNSON KIGUNDU.....DEFENDANT

RULING

1. The plaintiff, A-Plus Motors Limited, brought this suit on 3/5/2018 through a plaint dated 2/5/2018. They sought from the defendant a sum of Kshs 5,300,000, being money paid to the defendant as purchase price for property **Title Number Nairobi/Block 110/880**. They also sought liquidated damages of Kshs 3,400,000 being the 10% agreed damages for breach of contract. Further, they sought incidental legal expenses of Kshs 620,000 and valuation costs of Kshs 80,000. Their liquidated claim totaled Kshs 8,700,000/-
2. The defendant filed a notice of appointment of advocates through the firm of Matundura & Wamalwa Advocates but did not file a defence to the claim. Consequently, on 16/1/2019, at the request of the plaintiff and upon withdrawal of the claim for unliquidated damages, the Deputy Registrar of the Court entered final judgment in favour of the plaintiff at Kshs 8,700,000 plus interest and costs of the suit. The plaintiff's party and party bill of costs was subsequently taxed. The defendant did not satisfy the decree. Consequently, the decree was executed through committal of the defendant to civil jail.
3. Arrest and committal of the defendant to civil jail is what triggered the notice of motion dated 25/3/2021 which is the subject of this ruling. Through it, the defendant seeks an order setting aside the judgment and a consequential order releasing him from civil jail. The application was supported by the defendant's affidavit sworn on 25/3/2021. He deposed that upon being served with summons to enter appearance, he instructed the firm of Matundura & Wamalwa Advocates to act for him and the said firm filed a notice of appointment of advocates. He added that his appointed advocates did not keep him apprised on the case and he was shocked to learn that there was default judgment against him. He did not exhibit any draft defence he may be having against the plaintiff's claim.
4. The plaintiff opposed the application through a replying affidavit sworn on 21/5/2021 by James Mwangi Muri. He deposed that it was the duty of the defendant to follow up with his advocates for appropriate update on the case. He added that setting aside the judgment would occasion prejudice to the plaintiff because the defendant had held the plaintiff's money since 2016 and had failed to honour an agreement dated 2/2/2018 in which he undertook to refund the money. He further deposed that the defendant was a perennial fraudster. He urged the court not to set aside the judgment.
5. The application was canvassed through brief oral submissions in the virtual court. Mr Ongoto, counsel for the plaintiff, submitted that the matters raised in the replying affidavit were irrelevant. He added that the defendant ought to be given a chance to be heard on merits. Counsel argued that the plaintiff's claim arose from a failed land transaction and there was no doubt that if the plaintiff's claim were to ultimately succeed, the plaintiff would be refunded their money.
6. In response, Mr Thimba, counsel for the plaintiff, submitted that although failure to file a defence was blamed on a law firm, there was no evidence that the law firm was paid the requisite instructions fees. He added that the money was lawfully owed to the plaintiff and the defendant had formally promised to refund it. He faulted the defendant for selling the same land to a third party, pocketing the purchase price, and ignoring to refund the plaintiff's money. Counsel argued that in the absence of a draft defence and appropriate security, there was no basis for setting aside the judgement. Lastly, counsel submitted that should the court be inclined to set aside the judgment, the defendant should be ordered to deposit in court the entire purchase price.
7. I have considered the application, the response thereto, the parties' respective submissions, and the principles which guide our trial courts when exercising jurisdiction to set aside a regular judgment
8. The judgment which the defendant seeks to set aside is a regular one. **Order 10 rule 11** of the **Civil Procedure Rules** grants trial courts unfettered discretion to set aside a regular judgment. The criteria upon which this discretion is exercised was summarized by the Court of

Appeal in **James Kanyiita Nderitu & another v Marios Ghikas & another** [2016] eKLR as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raised triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other”

9. I have considered the application in the context of the above criteria. The applicant did not place before court any draft defence which he has against the plaintiff’s claim. He similarly did not contest the plaintiff’s claim in the supporting affidavit. The decree herein relates to money which the defendant received from the plaintiff as purchase price for property that the defendant purported to sell to the plaintiff. There is uncontroverted evidence that the defendant has in the past promised to refund the money but has failed to do so. Without an iota of draft defence upon which to evaluate this application, there is no proper basis for setting aside the regular judgment in this suit. I do not therefore find merit in the defendant’s application. The defendant’s application dated 25/3/2021 is accordingly declined for lack of merit. The same is dismissed. The defendant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Mutemi holding brief for Mr Thimba for the Decree-holder/Plaintiff

Court Assistant: Hilda