Landmark Holdings Limited v Boleyn Magic Wall Panel Limited & another (Civil Appeal E003 of 2023) [2024] KEHC 646 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 646 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E003 OF 2023

MW MUIGAI, J

JANUARY 19, 2024

BETWEEN

LANDMARK HOLDINGS LIMITED ..... APPELLANT

AND

BOLEYN MAGIC WALL PANEL LIMITED ..... 1ST APPLICANT

JACK LIU ..... 2ND APPLICANT

RULING

1. Vide a Notice of Motion dated 25Th September ,2023 brought under Sections 1A (2) 3A, 38A and 51 of the *Civil Procedure Act* and Order 42 Rule 6 (2) of the Civil Procedure Rules wherein, the Applicants sought the following orders that:

    1. Spent

    2. This Honorable Court be pleased to grant stay of proceedings in this matter and for the avoidance of doubt that formal proof in the matter be stayed pending the hearing and determination of this application.

    3. That the interlocutory judgement entered against the 1st and 2nd defendants together with all the consequential orders be set aside and leave be granted to them to defend the suit.

    4. That upon grant of prayer 3 above, leave be granted to the 1st and 2nd defendants to file their defence together with the list of documents, list of witnesses and witness statements within 14 days from the date of the order and the matter be heard on merit.

    5. That the cost of this application be in the cause.

Supporting Affidavit

2. The application was Supported by Supporting Affidavit dated 25th September 2023 sworn by Jack Liu, a director- of the 1st Defendant Company and deposed that from the onset he was never aware of the suit since he was never served with the summons to enter appearance or any pleadings in the matter.

3. He deponed that he only learnt that a judgement in default against them had been entered after the advocate on record being served with a hearing notice informing that the matter was scheduled to proceed for formal proof hearing and that they have never been served with pleadings and their advocates tried to obtain the pleadings from the registry in order to draft a suitable defence.

4. It was deposed that the amount claimed by the respondent was disputed and that the delay in entering appearance and defending the suit was not intentional and that they had real prospects of successfully defending the claim.

5. It was further deposed that the applicant has a defence that raises triable issues which it prays to be given leave to file and the same be heard on merit and that the failure to notify them of the matter was actuated by malice and the judgement in default was entered unprocedurally, irregularly and therefore illegal.

6. He deponed that they had advanced a reasonable defence and good reasons explaining why the defendants were unable to file their documents within the stipulated time and that unless the court intervenes, the applicants will be driven out of the seat of justice and condemned unheard.

Grounds of Opposition

7. By a Grounds of Opposition dated 26th September 2023, it was averred that the application was an afterthought as the defendant was duly served through his email address and physically and which the defendants has not disputed the email address and physical address thus the service is deemed as proper and that service on the lawyers was out of abundance of caution.

8. It was contended that the draft defence is a mere general denial that attributes faults to third parties and that the intended counterclaim is farfetched and only meant to set aside the judgement herein and earn the defendant a delay to the conclusion of the matter and urged the court to disallow the application.

Further Affidavit

9. By a further Affidavit dated 11th October 2023, the 2nd applicant stated that that the office at Liberty Plaza where the respondent alleged to have served to was closed in 2019 hence the allegation that they were served were untrue and the office has been closed for 4 years and it was important for the respondent to disclose who they served and evidence that service was done at the said office.

10. It was stated that the email address that the Respondent alleged to have served through did not belong to the applicant and that if they indeed served, it was peculiar why they attempted to serve the applicant's advocates.

11. It was contended that no service of pleadings was done and the interlocutory judgement entered was irregular.

12. The application was canvassed by way of written submissions.

Submissions

The Appellant/Applicant's Submissions

13. The Defendants/Applicant filed his written submissions dated 12th October,2023 and submitted that the issues for determination were whether the default judgement in this case was a regular one, whether the defendants should be given leave to defend the plaintiff's suit and whether the court should exercise its discretion and set aside the exparte judgement.

14. On the first issue on whether the default judgement was a regular one, it was submitted that the alleged office where the plaintiff claimed to have served was closed in 2019 thus the allegation of service was untrue and that the email address alleged to have been served through did not belong to the applicant.

15. Reliance was made to the case of James Kanyita Nderitu & another v Marios Philotas Ghikasa & another [2016]eKLR on the difference between a regular and irregular judgement. It was submitted that the interlocutory judgement was irregular noting that they were not properly served with the summon to enter appearance and the pleadings in accordance with the law.

16. On the issue of whether the defendants should be given leave to defend the plaintiff's suit, it was submitted that the draft defence and the intended counterclaim raises triable issues which cannot be wished away and which call for full trial and urged the court to give them a chance to be heard under Article 50 of *the Constitution*.

17. Reliance was placed in the case of Elizabeth Kavere & another v Lilian Atho & another [2020]eKLR to buttress the point of arguable case. And Article 50 of *the Constitution* on the right to a fair hearing.

18. Reliance was also made in the case of Tree shade Ltd v DT Dobie Co Ltd CA38/39 which the court held that even if an exparte judgement was entered lawfully, the court should look at the draft defence to see if contains valid or reasonable defence.

19. On the issue of whether the court should exercise its discretion and set aside the ex parte judgement, reliance was made to order 10 Rule 11 of the Civil Procedure Rules on the power of court to set aside or vary a judgement.

20. Reliance was made on the case of Patel v EA Cargo Handling Services Ltd[1974]EA 75 to buttress the point that the judge has discretion to vary a judgement as long as he does it on just terms. Reliance was also made in the case of Rahman v Rahman[1999] which spelled out the 3 elements that a judge had to consider in setting aside default judgement as the nature of the defence, the period of the delay and any prejudice the applicant was likely to suffer if the default judgement was not set aside and the overriding objective.

21. It was submitted that the application was made without undue delay and that the plaintiff would not suffer if the default judgement was set aside yet the applicants were likely to suffer immensely if the default judgement was not set aside.

22. Reliance was made to the case of Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd[2018] eKLR, the court was urged that in the interest of justice, parties should be heard fully on merit of their respective claim and thus that the application be allowed as prayed.

23. The Respondent filed his written submission dated 2nd October 2023 and submitted that Order 10 rule 11 of the Civil procedure Rules gives the court unfettered discretion to set aside an exparte judgement where it is just to do so. Reliance was made to the case of Mohamed & anor v Shoka [1990]LLR 463 which set out the tenets a court should consider in setting aside interlocutory judgement. In Mwala

v Kenya Bureau Of Standards E.A.LR [2001] where the court distinguished between a regular and irregular judgement.

24. It was submitted that the applicant admitted in its supporting affidavit that they were aware that their advocates was served with the summons and pleadings and that the respondent had filed an affidavit of service as proof of service of the summons and pleadings and thus the judgement entered was regular and just.

25. Reliance was mad to the case of Tree Shade Ltd v DT Dobie Co. Ltd CA38 0f 1998 and the case of Board of Management St Augustine Secondary School Vs Chambalili Trading Co. Ltd[2021].

26. It was submitted that the applicant's draft defence raise no triable issues thus has no merit but mere denials. That the plaintiff stand prejudiced if the court set aside the judgement as there was no just reason provided by the applicants to warrant setting aside of the judgement.

27. It was finally submitted that should the court set aside the judgement, the applicants be condemned to pay throw away costs of kshs 100,000 and also deposit the claimed sum in a joint interest account within 3 days to compensate the delay.

Determination

28. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.

29. It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*.

30. In the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, Ringera J stated

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)

31. The only issue necessary for determination would be whether the application seeking stay of proceedings is merited.This Court's discretion in deciding .whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

    a) Whether the applicant has established that he/she has a prima facie arguable case.

    b) Whether the application was filed expeditiously and

    c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Primafacie/Arguable case

32. On the first condition, the court in the case of Athuman Nusura Juma v Afwa Mohamed Ramadhan,2016] eKLR the holding/proposition was that

> " whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word "possibly"."

33. The Applicant averred that their defence raises triable issues in which it prays to be given leave to file and the same be heard by the Court on merit. That the amount claimed by the Respondent was disputed.

34. The Applicant contends that he was never aware of the suit since he was never served with summons to enter appearance and or any pleadings and that they only learnt a judgement in default had been entered against them upon their Advocates on record being served with a hearing notice dated 18.08.23 informing them that the matter was scheduled to proceeding for formal proof hearing.

35 I am prepared to find on the basis of the material placed before me that the application cannot be said to be a frivolous one. It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues.I think that the applicant has demonstrated that it has an arguable case regarding in the draft defence

Expeditious Filing of The Application

36. On the second condition, the court notes that the judgement in default was entered on 24.07.23 and the application was filed 0n 26. 09.23. two months later is not unreasonable delay taking note on the back and forth issues of service

37 The court finds that there is no undue delay in filing the application herein.

Whether the Applicant will suffer Prejudice if the Orders sought are not granted

38. The Applicant sought orders of grant of stay of proceedings in the matter and formal proof in the matter be stayed pending the hearing and determination of the application, that the interlocutory judgement entered against them with all the consequential orders be set aside and leave be granted to defend the suit and that they be granted leave to file their defence together with list of documents, list of witnesses and witness statements and that the matter be heard on merit.

39. The Applicant contends that they were not served with sermons to enter appearance and the pleadings and thus the interlocutory judgement entered was irregular.

40. The Respondent vide the grounds of opposition stated that the Applicants were duly served through email address and physically and that they had not disputed that the email address indicated in the affidavit of service belonged to them. The Respondent further averred that service on the lawyers was out of abundance of caution since the lawyers were handling other matters on their behalf.

41. The Respondent in his further affidavit that the office at Liberty Plaza Mombasa road which service was allegedly done by the Respondent was closed in 2019 thus for 4 years now thus the allegation that service was done there was untrue and that it was important for the respondent to disclose and give evidence on who they served and that the email address infok@boleyngroup.com does not belong to the applicant.

42. The Court takes note that there is an Affidavit of Service dated 26th May 2023 where a process server deponed that he received copies of a Plaint, Verifying Affidavit, list of witnesses, witness statements and summons to enter appearance from M/S Magare Musundi & Co Advocates with instructions to serve the defendants herein and he proceeded to serve them on the email infok@boleygroup.com and on 26th May 2023 physically served the Managing director at their Liberty Plaza Office which he accepted service but declined to stamp or sign on the copy.

43. In Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233 the Court set out the principles guiding setting aside ex parte judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

44. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the Respondent, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective and in view of Article 159 (2)(d). The inconvenience caused may be compensated by way of costs other than denying the applicant a right to defend the suit.

Disposition

18. In the premises: -

a. There will be setting aside of interlocutory regular judgment on condition that the Applicants pay the Respondents cost of Kshs 50,000/- within Thirty (30) days.

b. Interlocutory judgment entered against the Applicants is hereby set aside.

c. Leave is hereby granted to the Applicant to file their defence and accompanying documents within 14 days from the date of this Order and serve. Consequently the matter be heard on merit interpartes.

d. Further Mention for Directions on 8/02/2024.

It so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 19TH JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE