



Mwaura t/a Kirumba Mwaura & Co. Advocates v Britam General Insurance Company (K) Limited (Commercial Suit E306 of 2023) [2024] KEHC 8078 (KLR) (Commercial and Tax) (4 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E306 OF 2023**

PM MULWA, J

JULY 4, 2024

BETWEEN

**KIRUMBA MWAURA T/A KIRUMBA MWAURA & CO.
ADVOCATES PLAINTIFF**

AND

BRITAM GENERAL INSURANCE COMPANY (K) LIMITED DEFENDANT

RULING

1. This ruling is in respect of an application dated 2nd October 2023 made under Order 10 rule 11 of the *Civil Procedure Rules*. The defendant seeks to set aside the interlocutory judgment entered in favour of the plaintiff and be granted leave to file a defence out of time. The application is supported by the defendant's deposition through its advocate sworn on 2nd October 2023 and opposed by the plaintiff's deposition sworn on 12th February 2024. The parties' advocates made brief written submissions in support of the respective positions.
2. The defendant's case is that after he was served with the plaint he instructed the firm of G.M. Gamma Advocates who filed a memorandum of appearance dated 2nd August 2023 in readiness to defend the suit. He states that the defence was not filed in time as a document critical to the case was not obtained and the officer expected to supply the information was bereaved, having lost a close family member and stayed away for about 40 days.
3. The defendant argued that it was diligent and the delay in filing the defence was rather unfortunate; that the draft defence is cogent and raises serious triable issues and the instant application had been filed promptly.



4. It is contended by the plaintiff that the instant application is a mere attempt to delay the just and expeditious determination of the matter and the defendant failed to provide evidence to substantiate the reasons it alleged led to the delay in filing a defence. The plaintiff submits the draft defence discloses no defence in law and is only meant to delay the conclusion of this suit.
5. Order 10 rule 11 of the Civil Procedure Rules empowers the court to set aside judgment in default of appearance or defence on such terms as are just. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court held that:

“There are no limits or restrictions on the judge’s discretion except that if he/she does vary the judgment, he does so on such terms as may be just. It is now trite that the said discretion is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.”
6. It follows that the main concern of the court is to do justice to the parties without imposing conditions on itself or fetter wide discretion given to it by the rules of procedure. In exercising this discretion, the court is invited to look at the entire circumstances of the case, the conduct of the parties, whether the defendant has a defence to the claim and any prejudice that may be occasioned to the plaintiff.
7. In this case the defendant does not deny that he was served with the plaint and summons to enter appearance. Indeed, through a firm of advocates the defendant filed a memorandum of appearance on 2nd August 2023. Later, it filed this application dated 2nd October 2023. The defendant explained the cause of delay as unavailability of a crucial document and information in the custody of its officer who was then bereaved having lost his mother. I find the reasons advanced to be excusable.
8. While being mindful that this is not the trial of the main suit, I have considered the plaint vis-a-vis the draft defence. The defendant admits his relationship with the plaintiff, but contends various aspects of the insurance policy cover for which the plaintiff did not qualify after expiry thereof. The amounts payable under the insurance policy are also contentious. I am satisfied that this is a reasonable defence.
9. For the reasons I have set out above, I allow the application dated 2nd October 2023 on the following terms:
 - a. The interlocutory judgment herein be and is hereby set aside.
 - b. The defendant shall file and serve its defence to the claim within seven (7) days.
 - c. The defendant shall pay costs of this application assessed at Kshs. 30,000/- within seven (7) days.
 - d. In default of any of the conditions set out above, the interlocutory judgment shall stand reinstated and the plaintiff shall be at liberty to proceed with the formal proof.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY 2024.

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P. MULWA
JUDGE

In the presence of:



Ms. Wambui h/b for Mr. Mwangi for Plaintiff

Mr. Prvavin Opiyo for Defendant/Applicant

Court Assistant: Carlos

