



Corporate Insurance Company Limited v Orient Insurance Agencies Limited (Civil Case E587 of 2023) [2024] KEHC 11862 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E587 OF 2023
FG MUGAMBI, J
OCTOBER 4, 2024**

BETWEEN

CORPORATE INSURANCE COMPANY LIMITED PLAINTIFF

AND

ORIENT INSURANCE AGENCIES LIMITED DEFENDANT

RULING

1. On 30/11/2023, the plaintiff filed suit against the defendant seeking the liquidated sum of Kshs. 21,117,991/=, damages for breach of contract, exemplary and aggravated damages, interest and costs of the suit.
2. In a letter dated 11/1/2024, the plaintiff requested the court for default judgment as the defendant had neither entered appearance nor filed a defence. When the matter came up for mention on 30/1/2024 before the Deputy Registrar, the defendants advocate, Mr. Gathara informed the court that the defendant had been served with the summons and pleadings on 6/12/2023 and that the defendant filed its memorandum of appearance on 19/12/2023. Counsel further stated that they were following up with the registry for mapping on the court's tracking system (CTS).
3. The plaintiff's advocate, Mr. Ali, responded by stating that he was not able to see the said memorandum of appearance and he requested for physical copies of the same. The court, through the Deputy Registrar, also stated that it could not see the documents on the CTS. The defendant was granted until the end of the day to regularize its appearance and file its defence in default of which the court would proceed to consider the request for judgment.
4. On 31/1/2024, the plaintiff filed a request for judgment application in which they stated that the defendant had failed to comply with the court's directions above. The matter came up before the court on 20/2/2024. The Deputy Registrar confirmed that indeed the defendant had failed to comply with



- the court's directions and that it had instead filed the memorandum of appearance and defence on the previous day, that is on 19/2/2024.
5. The court proceeded to enter interlocutory judgment as prayed in prayer (i) of the plaint, for the sum of Kshs. 21,117,991/= and directed that the other prayers which are non-liquidated proceed for formal proof hearing.
 6. On 4/3/2024, the plaintiff requested for a partial decree of the court pursuant to the default judgment which partial decree issued by the court on 6/3/2024 for Kshs.21,117,991/=. The court then heard the plaintiff on an application dated 9/4/2024 to have the partial decree adopted as the full and final decree of this court capable of execution. In a ruling dated 15/5/2024, the court noted that the plaintiff was not keen to proceed with formal proof for the other prayers and that no appeal had been preferred against the judgment and decree.
 7. It was further noted that the stay orders issued on 20/2/2024 against the order entering default judgment had since lapsed. As such the partial decree issued by this court on 20/2/2024 for the sum of KShs.21,117,991/= was adopted as the full and final decree of the court and the plaintiff was granted leave to execute. The matter was marked as settled and the file closed.
 8. The defendant has now filed the application dated 5/6/2024 under inter alia sections 1A and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 10 Rule 11 of the Civil Procedure Rules and Article 159 of *the Constitution*. It seeks to set aside the ex-parte judgment entered on 15/5/2024 and that the court deems its defence dated 8/12/2023 as properly on record. The application is supported by the affidavit by Jagdeep Singh, a director of the defendant, sworn on 5/6/2024. It is opposed by the plaintiff through the replying affidavit of its Chief Executive Officer, Anna Kavulunze, sworn on 14/6/2024.
 9. The defendant prays that the court should not punish the defendant for the mistakes of its former advocates and that it has a valid defence against the plaintiff's claim. The defendant contends that it has paid the monies the plaintiff seeks to recover and that the plaintiff has concealed relevant facts from this court. As such, it is the defendant's case that the ex-parte judgment ought to be set aside in the interest of justice. The defendant pleads for an opportunity to defend this suit to its logical conclusion and contends that it has approached the court without delay.
 10. On its part, the plaintiff asserts that the defendant filed its documents on 19/2/2024 beyond the prescribed timeframe, in breach of the procedural requirements as per the Civil Procedure Rules. The plaintiff contends that the defendant's claims have not addressed the non-compliance with the prescribed timelines and that despite receiving the Summons on 6/12/2023, the defendant delayed filing their memorandum of appearance and defense until 19/2/2024, a lapse of 75 days, starkly surpassing the stipulated 14-day window.
 11. The plaintiff also contends that the evidence provided, including the acknowledgment of the summons receipt and the court receipt, irrefutably underscores the defendant's failure to adhere to procedural obligations without reasonable cause or justification. Consequently, it is abundantly clear that the defendant's actions were not only dilatory but also devoid of any valid explanation. It is therefore the plaintiff's case that these actions warrant judicial scrutiny and appropriate consequences for the defendant's disregard of the rules of procedure.
 12. The plaintiff asserts that they personally served the defendant at the defendant's physical office, ensuring direct acknowledgment. As a result, the defendants were fully aware of each stage of the matter. Therefore, their claim of not understanding the reason for being served is without merit, as the method of service clearly demonstrates their awareness and involvement in the legal proceedings.



13. Furthermore, it is the plaintiff's case that the defendant had ample opportunity to challenge the notice of entry of judgment upon receiving it, yet failed to do so and that their failure to file an application to contest the notice further undermines any claim of ignorance or confusion regarding the legal proceedings. Therefore, they have no valid excuse for any delay in responding to the notice, as they had both notice of the proceedings and the opportunity to challenge it, which they did not avail themselves of.
14. The plaintiff avers that any shortcomings on the part of the defendant's legal representation cannot excuse the defendant's failure to comply with court orders or its procedural obligations. It is the plaintiff's further position that the defendant's assertion of having paid the monies in question is unsubstantiated, as they have not presented any evidence to the court. The plaintiff sees the application to set aside the judgment as an afterthought.
15. This is evidenced by the fact that despite being granted stay orders on 20/2/2024, which orders have since lapsed, and having the option to appeal or file relevant applications within the given timeframe, the defendant failed to take any such action. It states that this omission is particularly significant given the court's acknowledgment in its Ruling that "no appeal has been preferred against the judgment and decree" and that "the stay orders issued on 20th February 2024 have since lapsed".
16. According to the plaintiff, this clear indication of the defendant's failure to avail themselves of the opportunities presented to them underscores their lack of diligence. Consequently, the plaintiff urges that the defendant's application, lacks merit and should be dismissed in its entirety with costs.

Analysis and determination

17. I have carefully considered the pleadings, submissions, authorities and evidence presented by the parties. The main issue for determination is whether the judgment entered against the defendant ought to be set aside.
18. Order 10 rule 11 of the Civil Procedure Rules empowers the court to set aside or vary such judgment and any consequential decree or order upon terms that are just. This power is discretionary and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. This was held in *Mbogo & Another v Shah*, [1967] EA 116 as well as *Richard Nchapai Leiyangu v IEBC & 2 Others*, [2013] eKLR.
19. The defendant admits that they were served with the summons but that their former advocates, by mistake, filed the defence out of time on 19/2/2024. As stated, the defendant's former advocates also stated on 30/1/2024 that the CTS had a problem uploading their pleadings and the court indulged them and allowed them time to regularize the same by close of business on that day. However, the said documents were only uploaded the day before the matter was to be mentioned next, that is on 19/2/2024 with counsel still claiming that the CTS had a problem uploading documents.
20. Counsel provided no explanation for why the documents were not uploaded on the date directed by the court or on any other day prior to 19/2/2024. There is also no evidence that the CTS was not working for the entire period between 30/1/2024 and 19/2/2024. The defendant has not presented any notice to this effect from the court of a system downtime or responses that they got when trying to file their pleadings.
21. In my view, the failure by the defendant to file its defence within the prescribed timelines was therefore not an honest mistake but utter disregard of the statutory and court timelines. I fully subscribe to the



view expressed by Kiage JA, in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & Others, [2013] eKLR that:

“I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen principles which both command Courts to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for all in the administration of justice. This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and timeliness.

Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

22. The ex parte judgment was entered after the defendant was given a chance to file its defence but failed to do so despite the court’s initial indulgence. Since the defendant was properly served, the judgment entered was regular and, in the circumstances, the defendant is not entitled to an order setting aside the judgment ex debito justitiae.

23. I am however alive to fact that even in such circumstances, the court has the power to set aside an ex-parte judgment if the defence raises any triable issue. In *Tree Shade Motors Limited v DT Dobie Company Ltd*, [1998] eKLR, the Court of Appeal stated that:

“ Even if the service was valid, judgment will be set aside if [the] Defence raised triable issues.”

See also *James Kanyiiita Nderitu and Another v Marios Philotas Ghikes & Another*, [2016] eKLR and *Shanzu Investments Ltd v Commissioner of Lands*, [1993] eKLR.

24. I have reviewed the statement of defence and I find that the same is made up of general denials of the plaintiff’s claim and is plainly evasive and obscure. On one hand the defendant states that it does not owe the plaintiff any money and on the other, it seeks the plaintiff for a sit-down and reconciliation of what is allegedly owed. This is an implied admission that it actually owes it money.

25. In *Raghibir Singh Chatte v National Bank of Kenya Limited*, [1996] eKLR Akiwumi JA, cited with approval the statement as set out in *Halsbury’s Laws of England* that:

“It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof.”



26. Further, in *Magunga General Stores v Pepco Distributor Ltd EA*, [1986 – 89] 334 the Court of Appeal restated that:

“First of all, a mere denial is not a sufficient defence in this type of cases. There must be some reason why the Defendant does not owe the money. Either there was no contract, or it was carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

27. It is therefore my finding that the statement of defence does not raise any triable issue to merit inviting trial by oral evidence. No just purpose would be served by delaying the plaintiff from getting judgment on the face of the unsubstantiated defence.

Disposition

28. Accordingly, I find no merit in the application dated 5/6/2024. The same is dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

