



Corporate and Pensions Trust Services Ltd v Kenya Railways Corporation & another (Civil Suit E329 of 2019) [2023] KEHC 1810 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E329 OF 2019
A MSHILA, J
MARCH 10, 2023**

BETWEEN

CORPORATE AND PENSIONS TRUST SERVICES LTD PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME 2ND
DEFENDANT**

RULING

1. Before the Court are two Applications filed by the 1st and 2nd Defendants. The two Applications will be canvassed together. The 1st Application is a Notice of Motion dated 10th December 2019 brought pursuant to Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Order 10 Rule 11 of the [civil Procedure Rules](#) for the following orders;
 - a. The interlocutory judgment entered against the Defendants on 3rd December 2019 and all other consequential decree and/or orders emanating therefrom be set aside.
 - b. The Court deems the 1st Defendant's Defence filed herein on 9th December 2019 as properly filed and be admitted on record.
 - c. The costs of this Application be provided for in favour of the 1st Defendant/Applicant.
2. The Application was supported by the sworn Affidavit of Justus Omolo who stated that pursuant to Order 7 Rule 1 of the civil Procedure Rules the 1st Defendant ought to have filed its Defence within 14 days from the date of entering appearance but failed to do so as the Advocate who was in conduct of the matter proceeded on an emergency leave within the month of November 2019 to attend to his spouse who was then expectant.



3. Further, upon the filing of the Defence and service of the same to the firm of Masore Nyang'au & Co. Advocates, the 1st Defendant's advocate's copy was indicated that 'interlocutory judgment already entered'. The same was confirmed upon perusal of the Court file.
4. The 1st Defendant stated that there has been no inordinate delay in filing its Defence. The Defence filed on 9th December 2019 raises triable issues which ought to be heard and determined on merit by the court. The Plaintiff will not suffer any prejudice in the event the interlocutory judgment is set aside by the court herein and if any, can be adequately compensated by costs.
5. The second Application is a Notice of Motion dated 21st February 2020 brought pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 10 Rules 6, 10 and 11 & Order 51 Rule 1 of the *Civil Procedure Rules* for the following orders;
 - a. The interlocutory judgment entered against the 2nd Defendant on 3rd December 2019 and all other consequential decree and/or orders emanating therefrom be set aside ex debito justitiae.
 - b. The Court deems the 2nd Defendant/Applicant's draft Statement of Defence and Counterclaim attached herein to be properly filed upon payment of requisite court fees and be admitted on record.
 - c. The costs of this Application be provided for in favour of the 2nd Defendant/Applicant.
6. The Application was supported by the sworn Affidavit of Victoria Mulwa who stated that the Plaintiff filed the instant suit on 2nd October 2019 and served the pleadings together with a defective and undated Summons to Enter Appearance upon it on 17th October 2019.
7. The 2nd Defendant was unable to timeously instruct an advocate to enter appearance on its behalf because at the time the 2nd Defendant was undergoing transition in its management which deprived it of the capacity to effectively conduct its day to day affairs.
8. The Applicant stated that the Plaintiff obtained the interlocutory judgment irregularly on 3rd December 2019 in breach of the express and mandatory provisions of Order 10 Rule 6 of the Civil Procedure Rules. An interlocutory judgment can only be entered where the Plaintiff is drawn with a claim for pecuniary damages only. The Plaintiff herein was drawn with claims not only for pecuniary damages but also for general damages for alleged breach of contract, interests, costs among others.

Applicants' Case

9. The Applicants submitted that Plaintiff herein was not entitled to interlocutory judgment in the circumstances herein and accordingly, the Deputy Registrar ought not to have entered interlocutory judgment in favour of the Plaintiff. The interlocutory judgment entered against the Defendants herein was irregular as the Plaintiff's Plaintiff is drawn with multiple claims which do not contain pecuniary damages only. These non-pecuniary reliefs included a prayer for general damages for breach of contract and such relief disentitles the Plaintiff from obtaining interlocutory judgment.
10. The Applicant's while relying on the case of Court of Appeal in the case of *Abdalla Mohamed & another v Mbaraka Shoka* [1990] eKLR stated that 2nd Defendant's Draft Defence raises the following triable issues namely whether there exists privity of contract as between the Plaintiff and the 2nd Defendant.
11. Further to the above, the 2nd Defendant raises triable issues in its counterclaim against the Plaintiff in breach of fiduciary duty and/or in breach of trust wherein the Plaintiff fraudulently, irregularly and without any colour of right withdrew from the 2nd Defendant's bank accounts the sum of



Kenya Shillings Twenty-Two Million, Three Hundred and Twelve Thousand and Five Hundred (Kshs 22,312,500/-).

12. The Applicants added that where the Defendants' Defences raises a triable issue, the Court ought to set aside the interlocutory Judgment and allow the matter to be heard on the merits.
13. It was also the Applicant's argument that the Plaintiff has not disclosed in its responses to the Applications herein that it would suffer any prejudice if the Applications herein were to be allowed. Even if such prejudice would be occasioned to the Plaintiff, which has not been disclosed, any such prejudice may be mitigated by damages and/or costs.
14. It was the Applicants' submission that the delay in filing the Defence was not inordinate. The 1st Defendant has averred that the Statement of Defence was not filed within time as the advocate who had personal conduct of the matter had proceeded on emergency leave in the month of November 2019 to attend to his spouse who was expectant and had given birth at the material period.
15. The reasons advanced for the delay are genuine and the 1st Defendant cannot be held responsible for the circumstances giving rise to the delay. If the reasons constitute mistake in the circumstances, then they can only be attributed to counsel for the 1st Defendant. Inadvertence on the part of the counsel ought not to be visited upon the 1st Defendant by driving the 1st Defendant away from the seat of justice unheard.
16. As regards the 2nd Defendant's delay, the Applicants contended that the 2nd Defendant was served with the pleadings and defective Summons to enter appearance, the 2nd Defendant was unable to timeously instruct an advocate to enter appearance on its behalf and defend its interests in the instant suit because at the material time when the Plaintiffs suit was filed herein the 2nd Defendant was undergoing transition in its management which deprived it of the capacity to effectively conduct its day to day affairs.
17. The 2nd Defendant was never notified of the entry of interlocutory judgment but only learned upon being informed that the 1st Defendant's Application to set aside the interlocutory judgment was fixed for hearing on 25th February 2020.
18. The Applicants urged the Court to find that Defendants' Applications herein are merited and the interlocutory judgment entered herein be set aside and the Defendants heard on the merits of their respective defences.

Respondent's Case

19. In response, the Respondent submitted that the judgment entered against the defendants in default of appearance and defence was absolutely regular and proper. Further, whether the claim is for pecuniary damages, meaning liquidated, together with other non-pecuniary damages and any defendant fails to appear or fails to file defence after appearing rule 10, the court has power to enter judgment in default. Upon entry of that judgment the plaintiff will then set down the suit for assessment of damages for the nonpecuniary claim (general damages).
20. On the issue of delay, the Respondent contended that the Applicants' reasons for delay are not sufficient explanation which a court, exercising its discretion judicially, can or should accept. In addition, failure to supply evidence which, if the purported facts are correct, the advocate should have, is not treating the court seriously.



21. It was the Respondent’s submission that none of the defences, or counterclaim, of the defendants raise any triable issue worth going for trial. Thus, the application is misconceived, the same has no merit and should be dismissed with costs.

Issues For Determination

22. Having carefully considered the two Applications and the written submissions by the parties; the court drafts the following issue for determination:
- a. Whether interlocutory judgment entered against the Defendants on 3rd December 2019 and all other consequential decree and/or orders emanating therefrom should be set aside?

Analysis

23. Order 10, rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it states as follows: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

24. A simple reading of the above provisions shows that a court has the discretion to set aside a default judgment. In the case of *Patel vs 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 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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

25. In the case *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:

- i. Whether there is a regular judgment;
- ii. Whether there is a defence on merit;
- iii. Whether there is a reasonable explanation for any delay;
- iv. Whether there would be any prejudice.

26. Whether there is a regular judgment? The Plaintiff was filed on 2nd October 2019. The Plaintiff and summons to enter appearance were served on/to the Defendant on 17th October 2019 as evidenced by the Kenya Railways Stamp inscribed ‘received’, signed and recorded time 2.40 pm.

27. In accordance with Order 6 rule 1 and Order 7 Rule 1 *Civil Procedure Rules*, the Defendants had 14 days to enter appearance from 17th October 2019 and then thereafter another 14 days to file and serve Statement of Defence. The 2nd Defendant herein stated that despite being served it was unable to instruct an advocate to enter appearance on its behalf. On the other hand, the 1st Defendant filed its Memorandum of Appearance on 28th October 2019 but failed to file its Defence.



28. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

29. This position was reiterated by the Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu V Maries Philotas Ghika & Another* [2016] eKLR where it was held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another V Shab* (supra); *Patel V EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings Vs Nzioki* [2004]1 KLR 173).”

30. In light of this it is the Court’s view that the said judgment was entered regularly as both Applicant’s failed to file their defences despite being served with the Plaint and Summons to enter appearance.
31. Whether there is a defence on merit? A cursory glance at the Defence shows that the Statement of Defence raises triable issues. The 1st Defendant contended that the Plaintiff withdrew Kshs.22 Million from the bank accounts of the 2nd Defendant which monies the Plaintiff did not give credit for.
32. Whether there is a reasonable explanation for any delay? From the chronology of events the interlocutory judgment was entered on 3rd December 2019 and the present Applications were filed on 10th December 2019 for the 1st Applicant/Defendant and 21st February 2020 for the 2nd Applicant/Defendant. For the 1st Defendant there was no delay in filing this Application while for the 2nd Applicant/Defendant of almost 3 months which is an inordinate delay.
33. The reasons advanced by the 2nd Applicant for the delay was that it was unable to issue substantive instructions to appoint advocates to act for it due to the transition process.



34. Whether there would be any prejudice? In the circumstances, it is this Court's considered view that the Respondent will not suffer any prejudice that cannot be compensated by way of costs.
35. In exercise of the court's discretion the court, while acknowledging that the judgment was regular, is satisfied by the reasons advanced by the 2nd Applicant are satisfactory and the Application is allowed.
36. Regarding the 1st Application, the failure to file the defence was blamed upon the advocate who had a personal matter to attend to. This was the Advocate's mistake and the same should not be visited upon the client. It has been stated that mistakes do occur in the process of litigation was appreciated by the Court of Appeal in *Murai vs. Wainaina* (No. 4) [1982] KLR 38 where it was held that:
- “A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”
37. The upshot of the above is that in the interest of justice this court exercises its discretion to set aside an ex parte judgment to avoid injustice or hardship resulting from inadvertence.

Findings And Determination

38. For the foregoing reasons this court makes the following findings and determinations;
- i. The two Applications are found to have merit and are hereby allowed.
 - ii. The interlocutory judgment entered against the Defendants on 3rd December 2019 and all other consequential decree and/or orders emanating therefrom be and are hereby set aside.
 - iii. The 1st Defendant's Defence filed herein on 9th December 2019 upon payment of the requisite fee be deemed as properly filed and be admitted on record.
 - iv. The costs of this Application be borne by the 1st Defendant/Applicant.
 - v. Mention before the Deputy Registrar on 14/03/2023 for case management.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Masore Nyang'au for the plaintiff/Respondent

Ochieng Brian holding brief for Kamande for the 1st and 2nd Applicants

Lucy-----Court Assistant

