Hari v Invesco Assurance Company Limited & another; Okinyi (Interested Party) (Civil Suit E003 of 2020) [2023] KEHC 1650 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E003 OF 2020

FN MUCHEMI, J

MARCH 9, 2023

BETWEEN

NOOR AHMED HARI ..... PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED ..... 1ST DEFENDANT

INSURANCE REGULATION AUTHORITY ..... 2ND DEFENDANT

AND

KEVIN DUKE OMBAGI OKINYI ..... INTERESTED PARTY

RULING

Brief Facts

1. This application dated 23rd April 2022 brought under Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A & 63 of the *Civil Procedure Act* seeks for orders of setting aside the interlocutory judgment against the applicant entered on 15th June 2021 as well as orders for leave to file its defence out of time.

2. The respondent and the interested party opposed the application through Replying Affidavits dated 8th June 2022 and 13th January 2023 respectively.

The Applicant's Case

3. It is the applicant's case that the respondent obtained interlocutory judgment against it pursuant to a request for interlocutory judgment dated 30th March 2021. The request for judgment was based on the applicant's failure to enter appearance and file defence.

4. The applicant deposes that the failure to enter appearance and file a defence within the stipulated time was not deliberate or intentional but was due to an excusable mistake and omission on its part. The applicant states that it received a hearing notice in mid April 2022 to the effect that the hearing of the suit was scheduled on 25th April 2022. The applicant further states that it managed to peruse the file on 22nd April 2022 whereas it noted that it had been served earlier on 2nd November 2020. It is further stated that the officer who received the notice did not make any further follow-up or bring the matter to the relevant office for action. In addition, the said officer misfiled the documents due to an oversight and misplaced the relevant file. As such, it is deposed that the failure to enter appearance and file defence was not deliberate and ought to be treated as an excusable error.

5. The applicant states that it has a strong, plausible, credible and triable defence to the respondent's claim and it ought to be allowed to file it and have the case determined on merit. The applicant argues that the draft defence raises triable issues particularly that the respondent seeks to be compensated in CMCC No. 454 of 2016 in excess of Kshs. 20,000,000/- whereas the statutory limit pursuant to Section 5(6) (v) of the *Insurance (Motor Vehicle Third Party Risks Act)* is Kshs. 3,000,000/-. Furthermore, the applicant states that its draft defence raises an issue against the prayer seeking cancellation of the licence issued to it and deposes that it is an abuse of the court process as it is not envisioned in the *Insurance Act*. As such, the applicant urges the court to afford it an opportunity to file its defence and advance the said defence.

6. The applicant argues that the respondent shall not suffer any prejudice if it is allowed to file its defence out of time and in any event, the respondent can be compensated by way of costs if any prejudice is occasioned.

7. The applicant further argues that it is in the best interests of justice that it be afforded an opportunity to be heard so that the matter can be determined on merits of both parties' cases. Further, the applicant contends that the rules of natural justice dictate that no one should be condemned unheard and that no one should be deprived the opportunity to be heard if one is desirous of being heard. Moreover, the applicant states that it is ready and willing to abide by any condition that the court may deem fit with regard to throw away costs to the respondent for prejudice and inconvenience of setting aside judgment.

The Respondent's Case

8. The respondent deposes that he had insured his motor vehicle, registration number KBT 713H with the applicant. He further states that on 12th October 2012, the said motor vehicle was involved in a road accident along Karatina – Mukurweini road in which the interested party was injured. The interested party filed a suit being Nyeri CMCC No. 454 of 2016 and the applicant accepted to take up the matter and instructed two firms of advocates to defend the said suit.

9. The respondent contends that the applicant and the said advocates failed to defend the suit accordingly and that he attended court personally and organized for his own legal representation leading to a colossal and heft judgment against him. Subsequently after, the respondent states that the applicant failed to pay the decretal amount and or file an appeal leading to execution proceedings against him. The respondent further states that attempts to reach the applicant to settle the decretal amount was futile. However, the respondent states that the applicant repaired his motor vehicle fully and settled all other claims emanating from the said accident save for the instant one.

10. The respondent avers that the applicant has never indemnified him despite him having a valid insurance policy and paying up all his premiums. Thus, the respondent filed the current suit which was served upon all the defendants and an affidavit of service sworn by the George Kinyanjui Njenga on 11th December 2020. Upon service and the defendants not entering appearance or filing their defences,

the respondent states that he requested for interlocutory judgment to be entered against the applicant which the court did on 15th June 2021.

11. The respondent avers that the applicant has been served at all times with the pleadings and as such the applicant has no excuse whatsoever for the delay in filing its defence. In the circumstances, the respondent argues that the suit was instituted and proceeded with the full knowledge of the applicant who elected out of its own volition not to participate in the said process. Moreover, the respondent contends that the applicant's explanation and reason for delay is misleading, implausible and a futile attempt to cure its failure to enter appearance and/or file defence to the suit. As such, the respondent states that there is no just cause to warrant the exercise of discretion of this court to set aside the judgment in default of appearance.

12. The respondent argues that it has taken over 11 months since judgment was entered against the applicant and therefore the applicant is guilty of inordinate delay and is undeserving of the remedies prayed for.

13. The respondent further states that the applicant has not shown that it owes him for its draft defence actually admits the claim statutory limit of Kshs. 3,000,000/-. Moreover, the respondent avers that the draft defence has no merit as it consists of mere denials and admissions. Additionally, the draft defence raises no triable issues, is a mere sham, frivolous, scandalous and entertaining such a defence is a waste of judicial time.

14. The respondent states that he shall suffer great prejudice if the application is allowed as the applicant has refused to make good the decree in Nyeri CMCC No. 454 of 2016 of over Kshs. 20,000,000/- which remains unpaid entirely and continues to accrue interest and which he will eventually be forced to pay. Furthermore, the respondent argues that if the applicant has defended the suit in the lower court, the award would not have been to the tune of Kshs. 20,000,000/-. The applicant further states that the application is devoid of merits as the applicant has not seriously demonstrated that there is any just cause to warrant setting aside of the court's judgment and to be granted leave to defend its suit out of time.

The Interested Party's Case

15. The interested party is suing on behalf of his son who has been incapacitated since the accident that occurred on 12th October 2012 and he avers that the applicant admitted that despite being served with the plaint on 2nd November 2020, it did not implore any efforts to enter appearance or defend the suit. The interested party further avers that the reasons issued for failure to file a defence for over one (1) year are not sufficient to warrant the court to set aside the interlocutory judgment that was regularly obtained. The interested party deposes that his son was rendered immobile since the occurrence of the accident and he is currently in a vegetative state. The interested party avers that he and his wife are currently unable to afford medical care despite the fact that judgment was obtained in favour of his son.

16. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

17. The applicant relies on Order 10 Rule 11 of the *Civil Procedure Rules* and the cases of *Patel vs EA Cargo Handling Services* [1974] EA 75 and *Kenya Commercial Bank Ltd vs Nyantange & Another* (1990) KLR 443 and submits that the powers of the court to set aside interlocutory judgment are discretionary. The applicant further submits that the discretion ought to be exercised judiciously, to avoid an injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. To support its contentions, the applicant relies on the cases of

Shah vs Mbogo (1967) EA and *Rayat Trading Company Limited vs Bank of Baroda & Tetezi House Ltd* (2018) eKLR.

18. The applicant submits that there has been no inordinate delay in bringing the instant application as it received the hearing notice in mid April 2022 and it filed the instant application on 26th April 2022. Further, the applicant contends that the respondent stands to suffer no prejudice as the suit was only about one year by the time the current application was filed. Further, the request for interlocutory judgment was filed on 1st April 2021. Thus form al proof had not been heard and final judgment had not been entered for the respondent to claim being denied the fruits of his judgment. As such, the applicant argues that the respondent has not suffered much prejudice and will not suffer much prejudice if judgment is set aside.

19. The applicant further contends that pursuant to the court order of 25th April 2022, it paid Kshs. 15,000/- as adjournment fees and further states that it is willing to compensate the respondent by paying throw away costs taking into account the sum of Kshs. 15,000/- it already paid.

20. The applicant submits that its defence raises triable issues particularly in regard to paragraph 24 and prayer (b) of the plaint. It contends that under Section 5(6) (iv) of the *Insurance (Motor Vehicles Third Party Risks)* Cap 405 Laws of Kenya, it is only obligated to pay Kshs. 3,000,000/- and the applicant further submits that it informed the respondent of the same through its letter dated 10th August 2008. On the issue raised by the respondent on seeking an order for cancellation of its insurance licence by the 2nd defendant, the applicant relies on Part II of the *Insurance Act* and submits that the respondent has not laid out a foundation for cancellation of the licence.

21. The applicant further submits that the respondent has raised issues of solvency to which it intends to raise a preliminary objection to the sustainability of the suit as if it were issues of solvency. The applicant states that there is a well detailed procedure for the same under Part XII of the *Insurance Act* and the *Companies Act* and not through a plaint as the one before the court seeking to cancel its licence.

22. To support its submissions, the applicant relies on the cases of *Thorn PLC vs MacDonald* [1999] CPLR; *Rahman vs Rahman* (1999) LTL 26/11/9; *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede* (1982-1988) KAR; *James Kanyita Nderitu vs Manes Philitoas Gluka & Another* (2016) eKLR; *Sebei District Administration vs Gasyali & Others* EA 300 and *Tree Shade Motor Limited vs DT Dobie Co Ltd* CA 38/98 and submits that it has demonstrated that it is deserving of the discretionary powers of the court in setting aside the interlocutory judgment.

The Respondent's Submissions

23. The respondent relies on Order 10 Rule 11 of the *Civil Procedure Rules* and the case of *David Kiptanui Yego & 134 Others vs Benjamin Rono & 3 Others* [2021] eKLR and submits that the court has unfettered discretion to set aside ex parte judgment. The respondent further relied on the case of *Mwala vs Kenya Bureau of Standards* EALR (2001) and submits that the judgment entered herein is a regular one as the applicant confirmed being served with the pleadings, summons, hearing notices and the order of this court where interlocutory judgment was entered. Furthermore, the respondent states that he filed an affidavit of service by the process server to confirm service upon the applicant. Since the *ex parte* judgment was regular, the respondent submits that the court ought to look at the draft defence to see if it contains a reasonable defence.

24. The respondent relies on the case of *Board of Management St. Augustine Secondary School vs Chambalili Trading Co. Ltd* [2021] eKLR and submits that the applicant's defence raises no triable issues. It has no merit as it only contains mere denials. Moreover, the respondent argues that the applicant in its sworn affidavit admitted that it misfiled the notice served upon them and failed to follow

up on the matter. The respondent argues that, that amounts to negligence on the part of the applicant which is not a legitimate reason for the delay in filing the response to his detriment. Moreover, the respondent argues that it has been more than 11 months since he filed the instant suit.

25. The respondent contends that he stands to suffer great prejudice if the court sets aside the judgment as there is no just reason provided by the applicant to warrant setting aside of the interlocutory judgment and the decree in Nyeri CMCC No. 454 of 2016 continues to accrue interest. As such, the respondent prays that the application be dismissed with costs.

The Interested Party's Submissions

26. The interested party relies on the case of *Netplan East Africa Limited vs Investment and Mortgages Bank Limited* [2013] eKLR and submits that the respondent has not given any plausible reasons as to why it delayed in bringing the instant application for over one (1) year from when it was served with the plaint.

27. The interested party submits that pursuant to Order 5 of the *Civil Procedure Rules*, the interlocutory judgment was lawfully entered and thus should not be set aside. The interested party argues that he initially filed a suit being Civil Suit No. 454 of 2016 following an accident that occurred where the plaintiff was held liable. Judgment was entered in his favour in the sum of Kshs. 20,656,260/-The 1st defendant failed to compensate him despite the fact that the plaintiff was fully insured by the 1st defendant and thus under a duty to compensate him. The interested party further argues that he filed a declaratory suit in which the 1st defendant failed to defend and the same proceeded *ex parte* whereby the court ordered the 1st defendant to compensate the interested party.

28. The interested party submits that he has never being compensated despite the accident leaving him incapacitated and yet judgment has been rendered in his favour. As such, the interested party urges the court to do justice to the parties and dismiss the said application. The interested party contends that the application is meant to frustrate his efforts to recover the judgment sum. Moreover, the interested party contends that there was inordinate delay in filing the application and the respondent has not given any reasonable explanation for the inordinate delay and therefore the same is inexcusable and is not deserving of any leniency from the court.

The Law

Whether the application is merited.

29. Under Order 10 Rule 11 of the *Civil Procedure Rules* the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides 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.

30. Notably, the above provision shows that a court has the discretion to set aside a default judgment. This principle was enunciated in the case of *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75, where 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 ay rule of procedure."

31. Similarly in *Shah vs Mbogo & Another* [1967] EA it was held that:-

The court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.

32. Thus the principle that emerges from the above cited cases is that the discretion of the court to set aside or vary *ex parte* judgment entered in default of appearance or defence is a free one. Further, it 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.

33. The Court of Appeal in the case of *Thorn PLC vs MacDonald* [1999] CPLR 660 stipulated the following guiding principles to consider when setting aside an ex parte judgment;-

a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

b. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

c. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

d. Prejudice (or the absence of it) to the claimant also has to be taken into account.

34. In *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* [2016] eKLR the Court of Appeal stated:-

> " From the outset, it cannot be gain said 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 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others....."

35. It is not in dispute that the applicant was served with the plaint and summons to enter appearance on 2nd November 2020. It is further not disputed that the applicant did not enter appearance or file a defence within the stipulated period thereby invoking the respondent's request for default judgment dated 31st March 2021 which judgment was entered on 15th June 2021. Therefore, the judgment entered on 15th June 2021 in favour of the respondent is valid and regular.

36. The reasons advanced by the applicant for not entering appearance and filing a defence is that of an inordinate mistake on its part as its legal officer discovered the matter when she was served with a

hearing notice for formal proof in mid April 2022. The applicant further explained that upon tracing the misplaced file in its offices, she discovered that they had earlier been served but the officer who received the pleadings and orders of the court did not bother to follow up or bring up the matter. The applicant admitted that the mistake was on their part but the mistake was inadvertent and not deliberate. The applicant further explained that since it traced the file on 22nd April 2022, it immediately instructed its advocates and filed the instant application on 26th April 2022.

37. From the chronology of the events leading to the entry of judgment, the applicant took about 1 year 5 months from the date of service of the pleadings to file the instant application. However, due to a mistake on its part, the applicant has deposed that it was not aware of the said suit and only came to know about it when it was served in mid April 2022 and immediately instructed its advocates to file the current application which was filed on 26th April 2022. It is trite law that no party ought to be penalized just because of a blunder or mistake. Indeed, in the case of *Republic vs Speaker Nairobi City County Assembly & Another ex parte* [2017] eKLR it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

38. It is my considered view that although the delay of 1 year 5 months after service is inordinate delay, the reasons for the explanation brought forth by the applicant is plausible. In the interests of justice, it would be fair to give the applicant the benefit of doubt and a chance to ventilate its case. Moreover, the prejudice that the respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of costs.

39. Another key factor to consider when setting aside an *ex parte* judgment is whether the defendant has a defence on merit. In the case of *Sebei District Administration vs Gasyali & Others* (1968) EA 300 Sheridan J observed that:-

    The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort.

    Similarly in the cases of *Patel vs E.A Handling Services Ltd* (1974) EZ 75; Tree

40. Similarly in the cases of *Patel vs E.A Handling Services Ltd* (1974) EZ 75; *Tree Shade Motor Ltd vs D.T. Dobie Co. Ltd* CA 38 of 1998 and *Thayu Kamau Mukigi vs Francis Kibaru Karanja* (2013) eKLR the court stated as follows:-

    > "On the second prayer of the defendant that he be granted to file his defence and counter claim, I will be guided by the principles elucidated in the case of *Tree Shade Limited vs D.T Dobie Co. Ltd* CA 38/98 where the court held that when an ex parte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence.

41. I have perused the draft defence dated 23/04/202 and noted that the applicant has raised triable issues to the effect that the minimum claim to which the 1st defendant is liable is limited to Kshs.3,000,000/=. the decretal amount awarded in CMCC No. 454 of 2020 is over Kshs.20,000,000/=. I am aware that the defendant limitation which may require to be interrogated by hearing both parties on the nature of the claim involved herein.

42. The issue of the sustainability of the claim with regard to some prayers in the plaint has been addressed by the defendant. This is also a triable issue that would require that the parties be given a chance to ventilate.

43. It is trite law that even where the interlocutory judgement was lawfully entered, the court ought to determine whether the draft defence contains a valid and reasonable defence. In my considered view the draft defence is valid and reasonable and ought to be considered in a hearing between the parties. Article 50 of the *Constitution* calls for parties in a case to be given a right to be heard.

44. I find this application merited and allow it on the following terms:-

    a. That the defendant is hereby granted leave to file and serve his defence within ten (10) days.

    b. That the Applicant will pay Kshs.30,000/= to the Respondent as throw-away costs within twenty one (21) days failure to which these orders will be vacated.

    c. That the costs of this application shall abide in the suit.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 9th day of March, 2023