



Kinuthia (Suing as the legal administrator of the Estate of the Late Mercy Muthoni Ngugi) v Plainsview Nursing Home Ltd & another (Civil Suit 1 of 2022) [2023] KEHC 18723 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT 1 OF 2022
PM MULWA, J
JUNE 20, 2023**

BETWEEN

TITUS NGUGI KINUTHIA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE MERCY MUTHONI NGUGI) PLAINTIFF

AND

PLAINSVIEW NURSING HOME LTD 1ST DEFENDANT

STEPHEN KIMANI NGIGI 2ND DEFENDANT

RULING

1. Titus Ngugi Kinuthia, acting as a legal representative of the Estate of the late Mercy Muthoni filed a suit against the defendants by a plaint dated February 4, 2022, seeking compensation for loss and damages incurred as a result of death occasioned by medical negligence of the defendants. The summons to enter appearance together with the plaint were served upon the defendants. The 1st defendant entered appearance and filed its defence. The 2nd defendant failed to enter appearance or file defence within the requisite timelines, thus prompting the plaintiff to file a request for interlocutory judgment against him which was entered on July 20, 2022.
2. The 2nd defendant has filed the instant Notice of Motion Application dated December 6, 2022 seeking to set aside the interlocutory judgment.
3. The gist of the application is that interlocutory judgment was obtained against the defendant for failure to enter appearance or file a defence within the stipulated period. It has been averred that the failure was occasioned by the failure by Britam Insurance to act as instructed and defend the suit. The 2nd defendant is keen to defend the suit and the application is brought timely and the annexed defence raises triable issues. Further no prejudice will be occasioned to the plaintiff.



4. The supporting affidavit of Dr Stephen Kimani Ngigi sworn on December 6, 2022 mirrors the grounds of the application.
5. In response to the application the plaintiff filed a Replying Affidavit sworn by Titus Ngugi Kinuthia on February 15, 2023 wherein he depones that the application is grossly inept, redundant and an abuse of the court's process. It is contended that the 2nd defendant was duly served with the plaint and summons to enter appearance at his place of work in Maragua but did not bother to enter appearance or file a defence. That the 2nd defendant acknowledges service but failed act as required is guilty of laches as he failed to follow up on his matter after forwarding the same to his insurance agent.
6. By the court's direction the application was disposed of by way of written submissions. The plaintiff filed written submissions on February 20, 2023 while the 2nd defendant/applicant filed submissions on April 14, 2023.

2nd Defendant/Applicant's Submissions

7. Counsel submits that the courts are vested with the power to set aside ex-parte judgment under order 10 rule 11 of the *Civil Procedure Rules*. The delay in filing the defence and/or appearance was occasioned by the 2nd defendant insurer who failed to act within the stipulated timelines. The discretion of the court to set aside or vary ex-parte judgment is to be exercised to avoid injustice or hardship but not to assist guilty or deliberate conduct intended to obstruct or delay the cause of justice.
8. According to counsel, the draft defence raises triable issues and the 2nd defendant should be given a chance to present his case. The application is brought without any delay and that the 2nd defendant became aware of the interlocutory judgment upon perusal of the court file on November 28, 2022.
9. Counsel submits there was no notice of entry of judgment served upon the 2nd defendant as per Order 22 rule 6 of the Civil Procedure Rules. There is no prejudice to be suffered by the plaintiff if the ex-parte judgment is set aside.

Plaintiff's Submissions

10. Counsel submits for the plaintiff that a party who is guilty of delay should not be allowed to sit on the seat of justice at the expense of the other party. That service of summons is not disputed by the 2nd defendant and therefore the ex-parte judgment is proper. The defence raises no triable issues within the meaning of the law and the same ought to be dismissed. It is submitted that the 2nd defendant's defence is incompetent and contains mere denials and contradictions. That though the 2nd defendant denies being an agent of the 1st defendant, that fact is alleged by the 1st defendant who contended that the 2nd defendant was its agent.
11. Further counsel submits that no plausible reasons have been advanced by the 2nd defendant for the 9 months delay in filing the current application. That the ex-parte judgment was regular and does not warrant setting aside as Order 10 rule 11 provides for setting aside the irregular judgment.
12. Counsel pleaded with the court that in the event the application is allowed the 2nd defendant be condemned to pay throw away costs of kshs 200,000/= as a summons to enter appearance was properly served and the 2nd defendant failed to enter appearance.
13. In conclusion counsel urged the court to find the instant application has failed to meet the threshold for setting aside the ex-parte judgment and pleaded with the court to dismiss the 2nd defendant's application.



Analysis and Determination

14. The 2nd defendant seeks to set aside the interlocutory judgment of November 17, 2022, but from the record the interlocutory judgment sought to be aside was entered by the court on 20th July 2022. Parties are bound by their own pleadings and I do not find there are orders made on 17th November that warrant the court to set aside.
15. However, Article 159(2) of the *Constitution of Kenya* permits the court to dispense justice without undue regard to procedural technicalities. The court has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides: “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
16. This court is vested with the discretionary power to set aside an ex-parte judgment for the sole purpose of ensuring that justice prevails. In doing so the court should look at the reasons advanced by the 2nd defendant/applicant and whether the issues averred in the draft defence raise triable issues before exercising its discretion.
17. The 2nd defendant faults his insurer for the delay in filing the defence. He states he forwarded the pleadings to the Insurance Company for them to act on his behalf but they failed to act as per his instructions.
18. The general principle is that an applicant should not suffer due to a mistake of his counsel. This was the position in *Lee G Muthoga -v- Habib Zurich Finance (K) Ltd & Another*, Civil Application No Nairobi 236 of 2009 where it was held that: “it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”
19. Under Order 10 Rule 11 of the *Civil Procedure Rules* ex-parte interlocutory judgment in default of appearance or defence may be set aside. It provides: “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.”
20. I have perused the draft defence and note that it raises triable issues, it would thus be in the interest of justice if this court would allow the parties to be heard on merit. I further note that the hearing of the suit has not started and therefore the plaintiff will not suffer prejudice which cannot be compensated by way of costs.
21. In the circumstances this court makes the following findings:
 - i. The interlocutory judgment entered on July 20, 2022 be and is hereby set aside.
 - ii. The 2nd defendant’s draft defence is deemed as properly filed upon payment of the requisite court filing fees.
 - iii. The 2nd defendant shall serve the said statement of defence within 14 days from the date herein.
 - iv. The 2nd defendant to pay throw-away costs of Kshs 20,000/= to the plaintiff within 14 days.
 - v. In default of compliance with orders (ii) and (iii) then the order vacating the interlocutory judgment shall lapse automatically.
22. Orders accordingly



RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU ON THIS 20TH DAY OF JUNE 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua – court assistant

Mr. Mburu - for the plaintiff

Mr. Kiplagat - for the 1st defendant

Ms. Njanja b/b for Mr. Nderitu - for 2nd defendant/applicant

