Bhogals Garage Limited v National Bank of Kenya (Civil Case E4 of 2020) [2023] KEHC 19663 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19663 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE E4 OF 2020

HK CHEMITEI, J

JULY 4, 2023

BETWEEN

BHOGALS GARAGE LIMITED ..... PLAINTIFF

AND

NATIONAL BANK OF KENYA ..... DEFENDANT

RULING

1. In its Notice of Motion dated April 4, 2022 the applicant prays for the following orders, that;

   (a) This court be pleased to set aside and or vary its interlocutory judgement entered on the December 1, 2020 for the plaintiff against the defendant together with any consequential orders of the court in default of filing a defence.

   (b) The court be pleased to grant the defendant leave to file defence and any documents out of time.

   (c) Costs be provided for.

2. The application is based on the grounds on the face thereof and the affidavits of Samuel Mundia its legal officer as well as the company secretary sworn on even date and a supplementary affidavit sworn on September 19, 2022.

3. The deponent does admit in his affidavit that the defendant/applicant was served with the plaint and summons on October 29, 2020 and it instructed its advocates on record to enter appearance which they did no November 30, 2020.

4. He went on to state that by the time they were going to file the defence the respondent had already applied for interlocutory judgement against the applicant and thus they were unable to file the same. He said that the delay was caused by the applicant assembling the documents in respect to the case.

5. The applicant on December 1, 2020 applied for striking out the suit for exhibiting no reasonable cause of action against it. That application for some reasons was not argued or has never been determined.

6. The applicant prays that it ought to be allowed to defend the suit as it believes it has a strong defence against it as per the draft deference on board.

7. The respondent vide the replying affidavit of B K Chhabra sworn on July 13, 2022 has vehemently opposed the application arguing among others that the application is bereft of any truth for the simple reason that the applicant has not demonstrated any reason why it failed to file its defence within a reasonable or the requisite time. That the judgement so entered *Exparte* was totally regular and not irregular as advanced by the applicant.

8. He went on to state that the fact that the applicant intended to file its defence clearly demonstrated that it subjected itself to the jurisdiction of this court and cannot be heard to challenge it.

9. The respondent further deponed that the application is made in bad faith as it was brought over one year after the entry of the judgement. In essence it was the respondents case that no plausible reason has been advanced by the applicant to warrant the setting aside of the default judgement and that it ought to be allowed to enjoy the fruits of the judgement.

10. The court directed the parties to file written submissions which they have done. For the interest of time and space this court does not intent to reproduce the same here.

11. The applicant however contents that its explanation on the failure to file its defence within the time frame was excusable and that the application to strike out the plaint contained its draft defence and it ought to have been heard first.

12. The court has also perused the authorities cited by the applicant.

13. The respondent's submissions clearly attacked the lack of seriousness by the applicant in filing its defence within the stipulated time and further that it took over one year to file this application. It went on to state that the issue of this court lacking jurisdiction to determine the case was not a sufficient reason not to file the defence.

14. The court as well has perused and understood several authorities relied on by the respondent.

15. Order 10 Rule 1 of the *Civil Procedure rules* clearly sets out when Exparte judgement can be set aside.

16. In the famous case of *Shah v Mbogo & Others* the court explicitly set out the grounds for setting aside such judgement. It went onto state that;

> " The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

17. Looking at the facts raised herein, it appears that the exparte or interlocutory judgement entered herein was legitimate. There is sufficient evidence including admission by the applicant that it was served with the plaint and the summons. The only delay was in "assembling its evidence" before filing the defence.

18. Secondly it is also evident that the applicant filed an application which is still pending praying for the suit to be struck out. The same is pending and in a supplementary affidavit the applicant has claimed that the deputy registrar was yet to fixed it for hearing. That the said application contains a draft defence.

19. Looking wholesomely at the issues surrounding this case, I find that the delay in filing the defence was not inordinate considering the activities that took place just before and after the judgment was entered. The applicant at least showed some efforts in defending the case including the filing of the application to strike out the suit.

20. It is not entirely true as advanced by the respondent that the applicant has brought itself within the jurisdiction of the court by filing the defence hence it is estopped from pleading this issue. This is for the reason that the defence in any case had not been admitted. It was still held as an annexure to the application to strike out the suit. It was simply a draft.

21. The court however agrees with the respondent that the reason for not filing the defence within time was not plausible. It is not for the plaintiff to wait for the defendant to "assemble its evidence" before filing the defence. This is an adversarial regime and time is of essence. The entering of the exparte judgement was in any case very lawful.

22. Taking the totality of this case i find that the draft defence is meritorious having the intention of raising insolvency issues and another pending suit *inter alia*. There would not be much prejudice suffered by the respondent considering that the amount being demanded is colossal and the court needs to hear both parties to its logical conclusion.

23. I belief this is a case where the costs can ameliorate the respondent's loss. Already it had requested or suggested so in its replying affidavit.

24. The spirit and the letter of Article 159 of our progressive Constitution demands that all parties be reasonably given opportunity to be heard.

25. The application is therefore allowed, the *exparte* interlocutory judgement dated December 1, 2020 is set aside and the applicant granted leave to file and serve its defence within 14 days from the date herein and in default the exparte judgement shall remain valid.

26. The respondent shall have the costs of this application taxed at kshs, 50,000 considering the reasons stated above. The same shall be paid within 30 days from the date herein and in default the respondent may execute.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF JULY, 2023.

H. K. CHEMITEI.

JUDGE