



Hall Equatorial Limited v Titus Makhanu t/a Titus Makhanu & Associates Advocate (Civil Case E829 of 2021) [2023] KEHC 20109 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E829 OF 2021
JWW MONG'ARE, J
JULY 17, 2023**

BETWEEN

HALL EQUATORIAL LIMITED PLAINTIFF

AND

**TITUS MAKHANU T/A TITUS MAKHANU & ASSOCIATES
ADVOCATE DEFENDANT**

RULING

1. Before the court is the Defendant's application brought inter alia under Order 52 Rule 10(1) and 10(2) of the *Civil Procedure Rules 2010*. The Defendant seeks an order to set aside the ex-parte judgement dated January 28, 2022 and all consequential orders arising therefrom. Further, the Defendant is seeking leave to file and serve a Replying Affidavit to the Plaintiff's Originating Summons.
2. The grounds of the application were that on September 27, 2021, the Plaintiff served upon the Defendant Originating Summons (OS) dated September 10, 2021, however it did not indicate on its face the date on which it was returnable before a judge in chambers and which date the Applicant would be required to attend court for hearing and/or to take directions on the OS as required by Order 52 Rule 10 of the Civil Procedure Rules.
3. The Defendant averred that the Plaintiff did not at any point serve him with a 7 days' notice of the return date to the OS and neither was the OS ever placed before a judge in chambers for hearing; that even after failing to list the OS before a judge for hearing and/or issuance of directions, the Plaintiff obtained an ex-parte judgement against the Defendant based on the wrong assumption that the Defendant failed to enter appearance or file a reply thereto.
4. The Applicant herein avers that the Deputy Registrar in entering the ex-parte judgement proceeded on the wrong assumption since under the applicable law being Order 52 Rule 10 of the Civil Procedure



Rules, 2010, a Defendant is allowed to proceed with a matter without necessarily entering appearance or filing any reply thereto.

5. The Defendant averred that about a week before filing of the instant application, he learnt that an ex-parte judgement against him had been entered on January 28, 2022 and a decree had been extracted. The Applicant argues that he has a very good defence against the OS and that he was waiting for the proper procedure to be followed in order to file the same. The Applicant further contends that he had obtained judgement of the taxed costs against and enforceable against the Plaintiff in the sum of Kshs 11,881,599/- and Kshs 3,801,856/- arising from taxation proceedings.
6. The Defendant further claimed he was entitled from to be paid by the Plaintiff the sum of Kshs 1,131,360/-, being his unpaid fees, for having represented the Plaintiff in various cases and urged the court to protect its lien as stipulated under Order 52 of the Civil Procedure Rules. The Defendant further averred that if the orders sought herein are not granted, it would be tantamount to condemning him unheard.
7. The Plaintiff opposed the application through Replying Affidavit sworn on December 20, 2022 by Abdulahi Kurji, its director and shareholder. In the said affidavit it was averred that the Defendant was the Plaintiff's advocate in Nairobi ELRC Cause No 1332 of 2013 whereby the Plaintiff was ordered to pay the Claimant a total sum of Kshs 4,629,955/- together with costs and interest. That the Plaintiff appealed against the said Award to the Court of Appeal and applied for a stay of execution of the orders issued. The Court of Appeal issued the stay orders on condition that one half of the decretal sum be deposited in a joint interest earning account in the names of the advocates on record.
8. The Plaintiff averred that, it complied with the court orders and transferred to the Defendant's account the sum of Kshs 3,352,525.88/- on January 19, 2022, however the Defendant later ceased to act for it and stated that the amount transferred had not been deposited into the joint account in compliance with the court orders.
9. The Plaintiff's case is that it filed a suit vide the OS dated September 10, 2021 to claim the amount withheld by the Defendant, however the Defendant failed to respond to the OS and an interlocutory judgment was correctly entered against it on January 28, 2022. That the application herein has been made almost 11 months after the impugned interlocutory judgment which was unexplained delay of over 330 days and that the right of setting aside judgment being an equitable remedy, a party seeking the same must demonstrate that it was not indolent, since equity does not aid the indolent.
10. The Defendant responded to the Plaintiff's Replying Affidavit through a Supplementary Affidavit sworn by himself on January 23, 2023. He reiterated the contents of his application that he was never required to enter appearance after being served with the OS and that he would only be required to file a reply and/or defence thereto after the OS had been placed before a judge in chambers and directions issued by the judge. That the Deputy Registrar lacked the requisite jurisdiction to entertain OS as that jurisdiction is an exclusive preserve of a judge in chambers.

Analysis and Determination:-

11. I have considered the pleadings and submissions filed by both of the parties herein. This is an application to set aside an ex parte judgement.
12. The Plaintiff instituted this suit against the Defendant through an OS dated September 10, 2021 which was filed pursuant to Order 52 Rule 4(1) and 4(2) of the Civil Procedure Rules. The OS was served upon the Plaintiff on September 27, 2021. The Plaintiff's case was that it sought an interlocutory judgment in default, as the Defendant failed to enter appearance and to defend the OS against him.



The court, through the Deputy Registrar, went ahead to grant an ex-parte judgement in the Plaintiff's favour on January 28, 2022.

13. The Defendant's counter argument was that under Order 52 (10) of the Civil Procedure Rules, he was not required to enter appearance after being served with the OS and would only be required to file a reply and/or defence thereto after the OS had been placed before a judge in chambers and directions to that effect issued by a judge.
14. Order 52 Rule 4 (1) and (2) of the Civil Procedure Rules provides:-
 - ' Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
 - (a) The delivery by the advocate of a cash account;
 - (b) The payment or delivery up by the advocate of money or securities;
 - (c) The delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
 - (d) The payment into or lodging in court of any such money or securities;
 - (e) The delivery of papers and documents to which the client is entitled.
 - (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.'
15. Order 52 Rule 10(1) and (2) of the Civil Procedure Rules states:-
 - ' (1) (1) An originating summons under this Order shall be made returnable for a fixed date before a judge in chambers and, unless otherwise directed, shall be served on all parties at least seven clear days before the return date.
 - (2) No appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.'
16. My understanding of the provisions above is that the OS ought to be presented before a judge in chambers where both parties would be present. A party may be heard even they have not entered an appearance or filed a reply to the OS.
17. In this case, the Defendant although served with the OS did not enter an appearance nor file a reply to the OS which is not necessary as stated in the provisions above. The necessary first step after filing the OS was to have it placed before a judge in chambers who would issue directions on its disposal. The Plaintiff was required to indicate the return date on the face of the OS and place the matter before a judge in chambers whereby both parties would be heard.
18. There is no proof that the Plaintiff took steps to have the OS placed before a judge for directions nor was there a date given to the Defendant to make such an appearance. Instead the Plaintiff filed a request for judgement before the Deputy Registrar on November 11, 2021, less than two months after serving the OS on the Defendant on September 27, 2021.
19. In my view it was erroneous for the Deputy Registrar to enter judgment in default as she did not consider the provisions of Order 52 Rule 10(1) and (2) of the Civil Procedure Rules.



20. Based on the contemplations above, I find that it would be in the interest of justice to set aside the ex parte judgement entered on January 28, 2022 and to allow the Defendant to file a response to the OS.
21. From the foregoing I find and hold that the application herein has merit and the same is allowed in terms of prayers 3, 4 and 5. I direct the Defendant to file a reply to the O.S within 7 days from the date of delivery of this ruling in order to have this suit determined expeditiously.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Wainaina for the Plaintiff/Applicant.

Mr. Makhanu for the Defendant/Respondent.

Sylvia- Court Assistant

