



**Nguta p/a Archetype Architects v Shady Acres Limited (Commercial Case E842 of 2021)
[2023] KEHC 22278 (KLR) (Commercial and Tax) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E842 OF 2021
JWW MONG'ARE, J
SEPTEMBER 18, 2023**

BETWEEN

VICTOR M NGUTA P/A ARCHETYPE ARCHITECTS PLAINTIFF

AND

SHADY ACRES LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 1/2/2023 the Applicant has moved this Honourable Court seeking orders that the interlocutory judgment entered against the Defendant be set aside. The application is brought under Order 10 Rules 4(1)(2) and (11) of the Civil Procedure Rules. The Application is supported by the grounds set on its face and a supporting affidavit sworn by David Mambo, a director of the Defendant. The application is opposed and the Plaintiff/Respondent has filed a Replying affidavit sworn by Christopher Chengecha Advocate, sworn on 14/2/2023.
2. By a plaint dated October 4, 2021, the Plaintiff filed the suit herein and served the same on the Defendant. Subsequently, the Defendant entered appearance but did not file any defence to the suit. Instead, the Defendant filed a Notice of Preliminary Objection to the suit on November 19, 2021. On November 29, 2021 the Plaintiff filed a request for interlocutory judgment and the same was entered by the Deputy Registrar and the suit fixed for formal proof on 4/2/2022, prompting the Defendant to file the current application, seeking to set aside the said interlocutory judgment.
3. The Applicant argues that the entry of interlocutory judgment was done in error as the court should have heard and determined the Preliminary Objection filed by the Defendant challenging the suit instead. That the Deputy Registrar, upon receipt of the request for judgment should have first interrogated the same before allowing the said application, and that the Defendant has a good defence that raises triable issues to the suit and that the preliminary objection goes to the root of the jurisdiction of the court, and should have been given precedence before the matter proceeds further.



4. The Plaintiff has opposed the application. In the Replying Affidavit Sworn by Christopher Chengecha Advocate, the Plaintiff argues that there are no good grounds advanced by the Defendant to warrant a grant of the prayers sought. The Plaintiff further submitted that the Defendant was properly served with Summons to Enter Appearance, which he did but failed to enter a defence in the manner prescribed by the law and that the Defendant has not placed before the court sufficient material to explain why it chose not to defend the suit.
5. The Plaintiff further submits that the Defendant has annexed a draft defence which, upon examination, is a mere denial and raises no defence to the Plaintiff's claim in the suit and that if the Defendant was minded to file a preliminary objection to the suit as filed, then the said preliminary objection should have been pleaded within the defence and raised at the earliest instance, as is the norm. The Plaintiff urged the court to dismiss the application and allow the matter to proceed to formal proof of the Plaintiff's claim.

Analysis and Determination: -

6. I have carefully considered the pleadings by both parties and the submissions filed by the Applicant and the Respondents. To my mind, there is only one issue for determination, to wit; "Whether the Defendant has made a case for setting aside of the interlocutory judgment entered in favour of the Plaintiff".
7. It is not in dispute that upon filing of the suit the Defendant was properly served with summons to enter appearance and defence. This is as evidenced by the fact that indeed the Defendant entered appearance and also filed a Notice of Preliminary objection to the suit.
8. From a perusal of the record, the Memorandum of Appearance was filed on November 11, 2021 and the interlocutory judgment was entered on November 29, 2021. Order 7 Rule 1 of the [Civil Procedure Rules](#) provides as follows:-

"where a Defendant has been served with summons to appear he shall, unless some other order or further orders be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."
9. The above provisions envision a party having been served with Summons to Enter Appearance and file a defence, swiftly moving to do so, like the Defendant did in this case, and subsequently filing its defence within fourteen days. To my mind, the above order does not envision a party who has entered Appearance filing a Notice of Preliminary Objection before filing its defence. It is trite law that parties are bound by their pleadings in a suit, and that the court can only decide a matter after considering the pleadings put in by the party. In my view, the Defendant having been invited by service of summons to put in a defence to the suit and upon filing its Memorandum of Appearance opted not to do so and therefore by its own conduct chose not to defend the suit. I find therefore the interlocutory judgment was properly entered as no defence had been filed after the expiry of the statutory fourteen days.
10. In conclusion I hold and find the application as filed lacks merit and I shall dismiss the same with costs awarded to the Plaintiff. The matter may now be set down for the formal proof of the Plaintiffs claim in the normal cause of events.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Chengecha for the Plaintiff/Respondent.

Mr. Onduso for the Defendant/Applicant.

Amos - Court Assistant

