



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 18 OF 2020

DAVID KIPTANUI YEGO & 134 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

BENJAMIN RONO.....1ST DEFENDANT/APPLICANT

FRANCIS SITIENEI2ND DEFENDANT/APPLICANT

WILSON KOSACHEI3RD DEFENDANT/APPLICANT

SIRIKWA SQUATTERS SELF HELP GROUP.....4TH DEFENDANT

RULING

1. This is a ruling emanating from an application for setting aside the ruling of this Court. **BENJAMIN RONO, FRANCIS SITIENEI, WILSON KOSACHEI and SIRIKWA SQUATTERS SELF HELP GROUP** the 1st, 2nd and 3rd Defendants are seeking to set aside the ruling of this court entered against the 1st, 2nd and 3rd Defendants on the 18th day of September, 2020 in default of appearance, pursuant to **Order 51 Rule 1, Order 10, rule 4,5,6,9 and 11 of the Civil Procedure Rules, 2010** on the principal ground that the entry of the said ruling was irregular as the suit before this Court is neither for liquidated damages neither is it one for pecuniary damages; The applicants state that they have a defence which discloses triable issues which ought to be heard on the merits and consequently, they seek this court to grant them leave to file their defence.

The application seeks the following orders:

- i) **THAT** the court be pleased to certify this application as urgent and be heard ex-parte in the first instance.
- ii) **THAT** the court be pleased to grant a stay of proceedings in this matter and for avoidance of doubt that the formal proof in the matter be stayed pending the hearing and determination of this application.
- iii) **THAT** the interlocutory judgment entered against the 1st, 2nd and 3rd Defendants on the 18th September, 2020 together with all the consequential orders and the 1st, 2nd and 3rd defendants be set aside and leave be granted to them to defend the suit.
- iv) That upon the grant of prayer 3 above, leave be granted to the 1st, 2nd, and 3rd defendants to file their defence together with the list of documents, list of witnesses and the witness statements within 14days from the date of the order.
- v) **THAT** the costs of the application be in the cause.

2. This application is premised on 21 grounds among them being that this suit is not one for liquidated damages, neither is it one for pecuniary damages and therefore no Interlocutory judgment could lawfully be requested and entered in default of appearance and defence. That the 1st, 2nd and 3rd Defendants have attached a draft defence on merit raising triable issues; that where the defendant shows a reasonable defence on merits, the court should set the ex-parte judgment aside;

It is also stated that the Defendants/Applicants' Advocate admitted that they did not enter appearance/file a defence within the time frame required; they however stated that the same was not intentional as the Applicants did forward the said pleadings to the Advocate now on record but due to an inadvertent mistake the defence and replying affidavit to an application by the plaintiff dated the 11th day of June 2020 was not filed;

3. It is contended that the Defendants have not deliberately sought, whether by evasion or otherwise to obstruct or delay the course of

justice; that the mistake/inadvertence is excusable and is highly regretted and was not deliberate as the same was due to the closure of the office of the Advocate on record due to the COVID-19 pandemic; That the Plaintiff will not suffer any prejudice should the 1st, 2nd and 3rd Defendants be allowed to defend the suit as they will have their remedy in thrown away costs; that this will give this Court the chance to hear both sides and make an informed decision on merit.

Issue for determination

4. The issue for determination before this court is: **Whether this court should set aside the interlocutory judgment delivered on 18th September, 2021 and grant the 1st, 2nd, and 3rd Defendants leave to file their defence?**

The Plaintiffs/Respondents' Submission

The Plaintiffs/Respondents' submit that the provision of **Order 10, of the Civil Procedure Rules, 2010**, specifically **rules 9,10 and 11** are very clear on setting aside interlocutory orders or judgment. That before an interlocutory judgment is entered by a court, the plaintiff must prove that the defendant(s) was/were duly served, and an Affidavit of Service filed in Court, as proof of such service.

5. Further, that in the instant case the defendants were served on 30/6/2020, and particularly the 1st Defendant (**Benjamin Rono**), who received the pleadings and signed on the return copy at 4pm, by appending his signature and writing his name. They submitted further that this is prove of proper service and that it was on this basis that this Court proceeded, after being satisfied that there was proper service, to fix the suit for formal proof.

The Respondents also argue that whether this was a liquidated claim or not, was not an issue to affect or bar the suit from proceeding to formal proof. They contend that whether there was an entry of the interlocutory judgement does not change the same position. They maintain that what is in issue, and what the court should be more concerned about is the fact that the Defendants did not enter appearance and neither did they file the defence within the stipulated time under the law, and have not given this Court a satisfactory reason for this failure.

6. They point out that the Defendants entered appearance, filed this application, defence and counter claim on 2/10/2020, a period of three (3) months from the time they acknowledged service. That the Defendants/Applicants have not explained to this court what prevented them from filing the papers within the stipulated time, merely stating that they that they will suffer prejudice if the court rejects this application, yet they have not specified the kind of prejudice they will suffer. They state that immediately after receiving the court documents on 30/6/2020, the 1stApplicant started sending insulting messages to the 1st Respondent through his phone.

7. They submitted that the Defendants/Applicants filed this application as an afterthought, stating that the conduct of the Defendants/Applicants is that of parties who do not deserve the orders herein sought, and that the delay is inexcusable. They also submitted that the COVID-19 pandemic cannot be used as an excuse for not filing appearance and defence to the suit.

8. They further submitted that to set aside or not to set aside an interlocutory judgment is a matter of Court's discretion, and in any case, the court must be given satisfactory reasons or grounds explaining why the party or parties were unable to file their papers within the stipulated time. This court is urged to hold that the excuse by the counsel that the delay was caused by **COVID-19** does not hold water, as this court and others have been working since June to date. Further, that the courts have been working virtually, and no explanation has been given by the Defendants/Applicants for not filling their papers virtually, albeit late.

The respondents lament that they have suffered a lot of prejudice due to the actions of the Applicants. They submitted that Applicants have been in the office of **Sirikwa Squatter group** illegally; that they have been widespread financial misappropriation, loss, theft, misuse and plundering by the Applicants; that no election has been held since 2007 to ratify the holding of office by the Applicants; that lots of monies have been collected from innocent members of **Sirikwa Help Group**, which monies cannot be accounted for; that the Applicants are deliberately filing this application late as they want to delay the expeditious disposal of this matter.

9. The respondents propose that if this Court is inclined to set aside the interlocutory judgment, then the Applicants should be ordered to pay appropriate costs, which should be exemplary and punitive in the circumstance to teach them a lesson.

In conclusion, they urge this court to find that this application has no merit and should be dismissed with attendant costs.

Analysis

10. The courts are guided by the provisions of **Article 159(2)(d) of the Constitution** and **Section 1A and 1B of the Civil Procedure Act** in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases.

Order 10, of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. **Order 10, rule 4** empowers Courts to enter interlocutory judgment in cases where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, **rule 9** gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. **Order 10, rule 10** provides that in cases where a defendant has failed to file a defence, **rules 4 to 9** shall apply with any necessary modification. While **Rule 11** empowers the court to set a side or vary a judgment that has been entered under **Order 10**.

11. Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, although the applicant has a defence to the counter-claim which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft defence to the plaint and accompanying witness

statements before proceeding to give its ruling as to whether the applicant's defence raises triable issues. In *Patel -v- E.A. Handling Services Ltd (1974) EZ 75* and *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd CA 38 of 1998* and *Mania -v-Muriuki (1984) KLR 407* the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 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.”

In the case *Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited Civil Case No. 222 of 2010* the Court held that:

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”

In the case *Mohamed & Another -v- Shoka (1990) KLR 463* the Court set out the tenets a court should consider in entering interlocutory judgment to include:

- i) Whether there is a regular judgment;
- ii) Whether there is a defence on merit;
- iii) Whether there is a reasonable explanation for any delay;
- iv) Whether there would be any prejudice.

12. The issue of regular judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards EA LR (2001) 1 EA 148*, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

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

“on the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Limited -v- DT 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.”

13. I note that the Applicants Advocate admits that the failure to enter appearance/file a defence was on their part, citing inadvertent mistake. It is a general law that Advocate's failure to execute his client's instructions amounts to professional negligence. This was the position in *Water Painters International -v- Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR*, where the Court stated that;

“...in the words of justice Ringera in Omwoyo vs African Highlands & Produce Co. Ltd (2002 J) KLR, time has come for the legal Practitioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the defendant's Advocates. This is a proper case where the Defendant's remedy is against its Advocate, while suing advocates for professional negligence and not setting aside the judgment.”

14. The Court's power to set aside a judgment is exercised with a view of doing justice between the parties. Reliance is placed on the case of, *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR*, where the Court held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

15. In the case of, *Kimani -v- MC Connell (1966) EA 545*, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in *Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) e KLR*, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”

16. In the case of *Patel -v- EA Cargo Handling Services Ltd (1974) EA*, the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

The Court in *Habo Agencies Limited -v- Wilfred Odhiambo Musingo (2015) eKLR* stated that it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. This was the same position held in the case *Ruga Distributors Limited -v- Nairobi Bottlers Limited HCCC 534 of 2011*, where court stated that it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter.”

17. I have considered the Application and the submissions of the parties in total and I find that the relevant law that will govern this court in coming up with its judgment is found under the provisions **of Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010** which provide as follows:

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

However, **Order 10, rule 11** of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads 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.”

From the reading of this provisions, a court has the discretion to set aside a default judgment. In the case of, *Patel -v- EA Cargo Handling Services Ltd (1974) EA 75*, 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 any rule of procedure.”

In the case of, *Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443* Bosire J, (as he then was) held that:

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

18. The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and 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. This was the position in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR*. In the exercise of this discretion the Court will consider inter alia if:

- i) the defendant has a real prospect of successfully defending the claim; or
- ii) it appears to the court that there is some other good reason why;
- iii) the judgment should be set aside or varied; or
- iv) the defendant should be allowed to defend the claim

Similarly, in the case of, *Thorn PLC -v- Macdonald [1999] CPLR 660*, the Court of Appeal stipulated the following guiding principles:

- i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
- ii) 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;
- iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

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

19. The Court in the case of **Rahman -v- Rahman (1999) LTL 26/11/9**, considered the nature of the discretion to set aside a default judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay (i.e., why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR page 1036**, the Court of Appeal held that:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani -v- MC Connell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.”

20. One of the key factors 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 -v- 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 of the court”

21. In the case of, **Tree Shade Motor Limited -v- DT Dobie Co Ltd CA 38/98**, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contained a valid or reasonable defence.

In **International Finance Corporation -v- Uteaxfrica sprl [2001] CLC 1361**, it was stated that the test of a defence having a real prospect of success means that the prospects must be better than merely arguable.

22. The other matter to consider as whether to set aside or vary a judgment entered include whether the person seeking to set aside the judgment made an application to do so promptly and the reasons advanced for the setting aside the default judgment. In the case of, **Law -v- St Margarets Insurance Ltd [2001] EWCA Civ 30, LTL**, the Court of Appeal allowed judgment in default to be set aside despite the defendant’s solicitors’ procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person. The overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined.

23. In the case of **Rayat Trading Co. Limited -v- Bank of Baroda & Tetezi House Ltd [2018] eKLR** the Court held that:

“If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.”

In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the defendant indicating a risk of dissipation of assets see, **Creasey -v- Breachwood Motors Ltd [1993] BCLC 480**. As to the amount, this is in the court’s discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, **M. V. Yorke Motors v Edwards [1982] 1 WLR 444 and Training in Compliance Ltd v Dewse (2000) LTL 2/10/2000**.

24. In the instant case, there is no dispute that the Applicants were properly served with the application dated 11th June 2020, and that at the time the ruling was entered, the Defendants had not filed a reply and/or a defence thereto. Therefore, the ruling entered on 18th, September 2020, in favour of the Plaintiff is valid and regular. The reason advanced by the Applicants’ counsel is that there was an inadvertent mistake on his part that was due to the closure of his office due to the **COVID-19 pandemic**. In my considered opinion, this reason is flimsy and has no merit, in view of the fact that the court sessions have been going on virtually, and by the fact that we now have e-filing.

25. I note that this application together with defence were file on the 2nd October, 2020, a period of 3 months after service of the application by the Plaintiffs. Though they applicants delayed filing their defence and/or response, three months is not too much a time, having in mind that the ruling was delivered on the 18th of September, 2020.

In **Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR**, the Court held that:

“It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the Civil Procedure Act obligates the parties to assist the Court in the expeditious disposal of cases.”

26. However, I note that this suit is not one of liquidated damages neither is it one for pecuniary damages hence no interlocutory judgment

could be lawfully entered. I also note that the Court in its ruling of 18th September, 2020, at paragraph1 declined to enter interlocutory judgment for reason that it did not find any evidence of service of the plaint.

27. I have also had the benefit of reading through the draft defence, and in my opinion they raise triable issues. In this scenario it would be in the interest of justice, if the parties were heard fully on the merit of their respective claims. I however suggest that the matter should be heard expeditiously in order that justice is seen to be done. None of the Advocates should further delay the matter unnecessarily. In order to achieve this expediency and in the interest of justice and the parties, it is my considered opinion that the Court's ruling delivered on 18th September, 2020 be set aside on the following conditions:

- i) The 1st 2nd and 3rd Defendants statement of defence and counter claim shall be deemed to be properly filed and served upon payment of the prerequisite Court filing fees;
- ii) The Applicant shall serve the said statement of defence and counter claim within 2days of this order;
- iii) In default of compliance with order given in (i) and (ii) then the order vacating the interlocutory judgment shall automatically lapse without further reference to the to Court;
- iv) In view of the fact that this Application arose out of the professional negligence of the Advocate representing the Applicant, it is only fair that they bear the consequences thereof; in that regard, I order that the Firm of William Kipkorir Arusei & Company Advocates to pay Plaintiffs/Respondents costs of this Application.
- v) The matter be set down for case management conference on priority basis.

E-delivered and dated this 9th day of March 2021 at Eldoret

H. A. OMONDI

JUDGE