



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E029 OF 2019**

**NONIKO HOLDINGS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ARNOLD KIPKURUI .....2<sup>ND</sup> PLAINTIFF**

**RHODAH KITTANY .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ATTICON LIMITED.....1<sup>ST</sup> DEFENDANT**

**FRANKLINE MITHIKA LINTURI .....2<sup>ND</sup> DEFENDANT**

**EMILY NKIROTE BUANTAI .....3<sup>RD</sup> DEFENDANT**

**FAMILY BANK LIMITED .....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF LANDS .....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling relates to a notice of motion application dated 10<sup>th</sup> July 2019, brought under the provisions of; Articles 50 and 159(2)(2) of the Constitution of Kenya, 2010; Sections 1A, 1B, 3A of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.

2. The Applicants are seeking for orders that;

(a) *The interlocutory ex parte judgment entered against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and all resultant decrees/orders (if any) be set aside;*

(b) *The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants be and are hereby granted leave to file their statement of defence out of time;*

(c) *The statement of defence dated 1<sup>st</sup> May 2019 be and is hereby deemed duly filed and served;*

(d) *The costs of and incidental to the application shall abide in the outcome of the main suit; and*

(e) *Such other, further, additional, alternative and/or incidental orders as the Honourable court may deem appropriate, just and expedient.*

3. The application is premised on the grounds on the face of it and an affidavit dated 29<sup>th</sup> July 2019, sworn by Vincent Odhiambo an Advocate who has conduct of this matter on behalf of the applicants. He deposed that, on 16<sup>th</sup> April 2019, the Applicants entered appearance by filing a memorandum of appearance dated 9<sup>th</sup> April 2019. However, they failed to file their defence by 30<sup>th</sup> April 2019, being within fourteen (14) days of entering appearance.

4. On 20<sup>th</sup> May 2019, the Plaintiffs filed a request for judgment against the Applicants due to the default in filing a defence. Judgment was entered accordingly. Subsequently, on 5<sup>th</sup> July 2019, the Plaintiffs served the Applicants Advocates with a notice of judgment dated 1<sup>st</sup> July 2019.

5. However, the Applicants aver that, they have a good explanation for the delay which is attributable to their Advocates and which ought not to be attributed to them. That they have a bona fide defence to the Plaintiffs' suit. Further, the application to set aside the judgment has been brought timeously.

6. That, the Honourable court has unfettered discretion to set aside the judgment and extend time for filing the statement of defence. The Plaintiffs will not suffer undue prejudice if the judgment is set aside. Further, the overriding objective and the interests of justice favour a grant of the orders in the application.

7. However, the application was opposed by the Plaintiffs through a replying affidavit sworn by Rhoda Kittany on 5<sup>th</sup> March 2020. She averred that, the Applicants have admitted failure to file their statement of defence within the stipulated statutory timelines. That, as a result of that failure the Plaintiffs requested for judgement against the Applicants and the judgment was entered accordingly.

8. Further the reply filed was in relation to the issues raised by the 4<sup>th</sup> Defendant only. If the application herein is allowed it will make the record untidy because the Plaintiffs will either have two replies to the defences, which are not contemplated in the Civil Procedure Rules, 2020 or we will be forced to withdraw the reply filed dated 17<sup>th</sup> May, 2020 and file a consolidated reply to all the Defendants' defences on record.

9. Further, the Applicants draft statement of defence contains mere denials and does not disclose any cause of action. It is a sham and intended to waste the precious judicial time. It does not raise any any triable issues. Additionally, no "producible ground and/or reason" has been adduced to explain the inordinate delay.

10. Similarly, the Applicants have not annexed all the necessary documents to the draft statement of defence pursuant to Order 11 of the Civil Procedure Rules 2010, a further delaying tactic to the hearing and determination of this matter. However, the Plaintiff averred that, out of abundance of caution, they filed in a reply to the annexed statement of defence strictly on a without prejudice basis.

11. The application was disposed of through the filing of submissions. The Applicants submitted that, the defence has merit as the Applicants are refuting the allegations that the charge was procured fraudulently. They relied on the case of;

*Tree Shade Motors Ltd vs. DT Dobie & Anor [1995-1998]1 EA 324.*

12. That the Plaintiffs have already filed a reply to the statement of defence. Further, the suit is still in the early stages of trial as it is still to be set down for hearing. To the contrary, the Applicants will suffer prejudice if the Plaintiffs obtain reliefs sought against them and be punished for oversight on the part of their lawyers.

13. The Applicants relied on the case of; *CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR* where the Court of Appeal held that, failure by a litigant to enter appearance and file a defence in good time, due to a mistake of counsel, could not be visited upon the litigant.

14. The Plaintiffs invited the court to consider; whether the reason(s) given for setting aside the ex-parte judgment are ascertainable and or believable and whether it is in the interest of justice to dismiss their application for setting aside ex-parte judgment.

15. It was submitted that, the defence was filed on 10<sup>th</sup> July, 2019, more than 70 days after the lapse statutory time as stipulated under Order 7 Rule 1 of the Civil Procedure Rules 2010. Thus the filing of the defence is an afterthought. To allow the application would be repugnant to good practice and timely administration of justice.

16. Further, the excuse of "forgetting to print the defence and to give instructions for filing" of the same is not a sufficient reason as to why a professional should not adhere to clearly stipulated statutory guidelines regarding conducts of a matter.

17. Reference was made to the Tanzania Court of Appeal case of; *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* where the court stated:-

*"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellants"*

18. Further reference was made to the case of; *Wachira Karani v Bildad Wachira [2016] eKLR* where the court stated that,

*"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man"*

19. It was submitted that, the Oxygen Principles as clearly set out in Section 1A of the Civil Procedure Act calls for expeditious resolution of

disputes. Further Article 159 (2) (b) of the Constitution provides inter alia that, in exercising judicial authority, the courts and tribunal shall be guided by the principle that, justice shall be done to all, irrespective of status and justice shall not be delayed.

20. I have considered the arguments advanced and I find that, indeed the provisions of; Order 7 Rule 1 of the Civil Procedure Rules 2010, provides that: -

*“Where a defendant has been served with a summons to appear he shall, unless some other or further order 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”*

21. Further, the provisions of Order 10 Rule 11 of the said Rules states that; where judgment has been entered under the Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

22. In the same vein, the legal principles on setting aside interlocutory or default judgment are settled. In that regard the Honourable court has jurisdiction and unfettered discretion in considering an application to set aside default judgment. However, the court should exercise that discretion judiciously, as observed in the case of; *Patel vs E. A. Cargo Handling Services Ltd (1974) E A 75*, that the discretion to set aside an *ex-parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake.

23. Further, the court will consider inter alia whether, the draft defence has merits and/or raises triable issues, whether the Respondent will suffer any prejudice, if any, and whether there is sufficient reasons for the delay.

24. In the instant matter, it is a fact that, the Applicants did not file the defence within the stipulated time. The Advocate appearing for the Applicants has taken full responsibility for the same. However, the Plaintiff are right in arguing that, the reasons advanced are not “sufficient” in that to forget to file a defence on behalf of the client is not good at all, for any party in the matter.

25. Further, it does not resonate with the provisions of; Article 159 of the Constitution and section 1A and 1B of the Civil Procedure Act, which call for expeditious resolution of dispute. Similarly, the reasons advanced for the delay puts the Advocate’s office and profession into issue.

26. However, be that as it were, the key question is whether, the Applicants should be denied their constitutional right of access to justice as enshrined under 48 of the Constitution, of Kenya. The right to be heard cannot, be compensated by damages. However, delay in expeditious disposal though not condoned, can be compensated by damages.

27. In addition, I have considered the pleadings and I find that, the main issue raised by the Plaintiff is whether the charge created in favour of the 4<sup>th</sup> Defendant is valid. It is averred at paragraph 12 of the plaint that, the charge was created without involvement of the owner of the suit property, thus creating an unlawful encumbrance over the property to the detriment of the Plaintiffs.

It is further averred that, the charge is tainted and/or vitiated by fraud, forgeries, illegality and therefore it is null and void and incapable of conferring any rights.

28. However, the Applicants avers in the draft defence at paragraph 4 thereof that, the securities were sanctioned and executed in accordance with the 1<sup>st</sup> Plaintiff’s memorandum and articles of association. Further, there are so many suits between the parties as listed in the draft defence which are related to the matter herein. That, in any case, the Plaintiffs have filed a reply to the defence.

29. Having considered all the arguments herein, I hold the view that, it is in the interest of justice that, the Applicants be allowed to file their defence out of time to enable the matter to be decided on merit.

30. I therefore allow the application in terms of prayers (a) to (c) herein. To compensate the Plaintiffs for any prejudice suffered, I award the Plaintiffs all-inclusive costs of; Kenya shillings thirty thousand only (Kshs 30,000.00) to be paid within seven (7) days from the date of this order.

31. In default thereof the defence filed be struck out at the expiry of the subject period and without recourse to court. I further grant the Plaintiffs the right to file a reply to the defence within the stipulated time under the law.

32. Those then are the orders of the court

**Dated, delivered virtually and signed on this 9<sup>th</sup> day of September 2020**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of

Ms. Gathurima holding brief for Mogaka for the plaintiffs/respondents

Mr. Karanja for the 1<sup>st</sup> to 3<sup>rd</sup> defendants/applicants

Mr. Wena for the 4<sup>th</sup> defendant/respondent

Robert -----Court Assistant