



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E029 OF 2019

NONIKO HOLDINGS LIMITED.....1ST PLAINTIFF

ARNOLD KIPKURUI2ND PLAINTIFF

RHODAH KITTANY.....3RD PLAINTIFF

VERSUS

ATTICON LIMITED.....1ST DEFENDANT

FRANKLINE MITHIKA LINTURI.....2ND DEFENDANT

EMILY NKIROTE BUANTAI3RD DEFENDANT

FAMILY BANK LIMITED.....4TH DEFENDANT

REGISTRAR OF LANDS.....5TH DEFENDANT

THE ATTORNEY GENERAL6TH DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 10th 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 1st, 2nd and 3rd defendants and all resultant decrees/orders (if any) be set aside;*

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

(c) *The statement of defence dated 1st 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 29th July 2019, sworn by Vincent Odhiambo an Advocate in conduct of this matter on behalf of the applicants who deposed that, on 16th April 2019, the applicants entered appearance by filing a memorandum of appearance dated 9th April 2019. However, they failed to file their defence by 30th April 2019, being within fourteen (14) days of entering appearance.

4. On 20th May 2019, the Plaintiffs filed a request for judgment in default of filing a defence against the applicants and judgment was entered. Subsequently, on 5th July 2019, the Plaintiffs served Applicants advocates with a notice of judgment dated 1st July 2019.

5. The Applicants aver that, they have a good explanation for the delay 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. The Applicants averred 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 of the Honourable court and the interests of justice favour a grant of the application.

7. However, the application was opposed by the Plaintiffs cum respondents, through a replying affidavit sworn by Rhoda Kittany sworn on 5th March 2020, she averred that, the Applicants have admitted failure to file their statement of defence within the stipulated statutory timelines. Hence the right of the Plaintiffs' to file a reply to the statement of defence of the 4th Defendant, request for judgement against the Applicants and subsequent entry of thereof.

8. That, the reply filed is in relation to the issues raised by the 4th Defendant/Respondent 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 rules or we will be forced to withdraw the 4th Defendant's reply dated 17th May, 2020 and file a consolidated reply to all the Defendants defences on record.

9. Further, the draft statement of defence contains mere denials and does not disclose any cause of action, is a sham and intended to waste the precious judicial time. It does not raise any triable issues.

10. That no producible ground and/or reason has been adduced to explain the inordinate delay. The Applicants have not annexed all the necessary documents, that is, complied with order 11 of the Civil Procedure Rules 2010 which is a further delaying tactic to the hearing and determination of this matter.

11. The Respondents averred that out of abundance of caution, they filed in a reply to the annexed statement of defence strictly on a without prejudice basis.

12. 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. The Applicants relied on the case of;

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

13. The Plaintiffs have already filed a reply to the statement of defence and the suit is still in the early stages of trial and is yet to be set down for hearing. To the contrary, the Applicants will suffer prejudice if the Plaintiffs obtain relief against unfairly be punished for oversight on the part of their lawyers.

14. 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 was a mistake of counsel, which could not be visited upon the litigant.

15. The Plaintiffs invited the court to consider; whether the reason(s) given for setting aside the ex-parte judgement are ascertainable and or believable and it is in the interest of justice to dismiss Applicants' application for setting aside ex-parte judgement of the Honourable Court.

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

17. 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.

18. 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 appellant"

19. Further reference was made to the case of; *Wachira Karani v Bildad Wachira [2016] eKLR* where the court stated that, 'Sufficient Cause' in the following terms: "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. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

20. The Respondent submitted that the Oxygen Principles as clearly set out in the 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.

21. 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’

22. Further Order 10 Rule 11 of the 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.

23. In the same vein, the legal principles on setting aside interlocutory or default judgment are settled and include the fact that, 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 held in the case of; *Patel vs E. A. Cargo Handling Services Ltd (1974) E A 75*, 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.

24. 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, likely to be suffered by the respective parties and whether there is sufficient reasons for the delay.

25. In the instant matter, it is a fact the Applicants did not file the defence within the stipulated time. The Advocate appearing for the Applicants has taken full responsibility for the same. The Respondents are right to argue that, the reasons advanced are not “sufficient” To forget to file a defence on behalf of the client is not good at all for any party in the matter, It does not resonate with the provisions of; Article 159 of the Constitution and section 1A and 1B of the Civil Procedure Act, calling for expeditious resolution of dispute. Further the reasons advance for the delay puts the subject counsel’s profession into issue.

26. However, the key question is whether, the Applicants should be denied their constitutional right of access to justice provided for 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. 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 4th Defendant is valid. It is averred that, 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.

28. 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.

29. However, the Defendant avers in the draft defence at paragraph 4 thereof that the securities were sanctioned and executed in accordance with the 1st 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.

30. 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 be decided on merit. I therefore allow the application in terms of prayers (a) to (c) herein and to compensate the Plaintiffs for any prejudice suffered I award the Plaintiffs an all-inclusive costs of Kenya shillings thirty thousand only (Kshs 30,000) to be paid within seven (7) days from the date of this order. In default thereof the defence filed be struck out without at the expiry of the subject period and without recourse to court. I hereby grant the Plaintiffs the right to file a reply to the defence once filed within the stipulated time under the law.

31. Those then are the orders of the court

Dated, delivered virtually and signed on this 9th 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 1st to 3rd defendants/applicants

Mr. Wena for the 4th defendant/respondent

