



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCA NO. 26 OF 2016

THE HON.ATTORNEY GENERAL.....1ST APPELLANT

CPL JOSEPH MUTHEE.....2ND APPELLANT

MISHECK MEEME.....3RD APPELLANT

P.C.KIMIE.....4TH APPELLANT

CICILY MURANGI.....5TH APPELLANT

VERSUS

ABRAHAM KITHINJI IRERI.....RESPONDENT

RULING

1. The application is dated 14/04/2016 and is premised under the provisions of Article 159(2)(d) of the Constitution 2010, Section 21 of the Government Proceedings Act, Sections 1A,1B,2,3A and 80 of the Civil Procedure Act, Order 10 Rule 8, Rule 11, Order 29 and Order 51 Rule 1 of the Civil Procedure Rules; the applicants sought and prayed for the following Orders;

- a) That this Honourable Court sets aside its interlocutory judgment delivered on the 27/09/2013 and all consequential orders/decrees issued thereto;
- b) That this Honourable Court do allow the defendants/applicants to defend this suit and the same be determined on merit;
- c) That the defence attached to the application be allowed to be filed and the same be deemed as properly filed.
- d) The costs of this application be provided for;
- e) That costs of the application be awarded to the applicants;

2. The applicants relied on the grounds on the face of the application and on a Supporting Affidavit made by Justin M. Kiongo and dated 14/04/2016;

3. At the hearing hereof the applicants were unrepresented as their counsel was absent whereas the respondent was represented by learned counsel Miss Muthoni holding brief for Mr. Guantai; the parties were directed to canvas the application by way of filing and exchanging written submissions; hereunder are the applicants' submissions;

APPLICANTS' SUBMISSIONS

4. Counsel submitted that the 2nd to 5th appellants are Government Officers and the 1st appellant was the Hon. Attorney General; the provisions of Order 10 Rule 8 of the Civil Procedure Rules provides as follows;

“No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven (7) days before the return day.”

5. The order is very clear on the procedure to be followed when entering judgment against the Government; therefore, the interlocutory judgment entered against the appellants on the 27/09/2013 was irregular and void ab initio; thereby making all consequential orders and decree issued also irregular;

6. Counsel prayed that this court be guided by the provisions of Order 10 Rule 8 of the Civil Procedure Rules and set aside the interlocutory judgment that was irregularly entered against the appellants.

RESPONDENT'S SUBMISSIONS

7. The respondent's counsel submitted that the applicants took approximately 2 years and 2 months to bring the present application and offered no reasons for the delay hence their application must fail because equity aids the vigilant and not the indolent;

8. On the applicants' allegation that the respondent obtained interlocutory judgement by way of a letter and that he ought to have filed a formal application, the respondent's counsel submitted that this allegation was watered down by the provisions of Order 10 Rule 9 which provides " where any party served does not appear the plaintiff may set the suit down for hearing";

9. Counsel submitted that the applicants were duly served with the requisite processes, but exhibited a kind of treating the case with impunity because they are police officers;

10. The respondent's counsel submitted that apart from the S.K Mutai ruling of 12/4/16, the present application challenging the ruling was filed on 23/11/16 6 months after the date of the ruling, again no reason for the delay was advanced; therefore, in all fairness the appellants/ applicants have no interest in pursuing their defenses; they are just using the court as a blockade to bar the plaintiff/ respondent from executing the judgement of Hon. R.O Oigara PM;

11. Counsel prayed that the appellants' application be dismissed with costs to the respondent as it is delaying the cause of justice.

ISSUES FOR DETERMINATION

12. This court has read the written submissions made by both parties and has framed only one issue for determination;

(i) Whether the interlocutory judgment entered on the 27/09/2013 was irregular and whether it should be set aside;

ANALYSIS

13. The appellant herein being the Hon. Attorney General seeks the setting aside of the interlocutory judgment entered on the 27/09/2013 and all consequential orders and/or issued; it contends that the interlocutory judgment was irregularly obtained and that the trial court failed to take into consideration the applicable law on default or interlocutory judgment for non-appearance by the government;

14. The applicable law is found under the provisions of Order 10 Rule 8 and it reads as follows;

"No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven (7) days before the return day."

15. Firstly, the party requesting for the interlocutory judgment must file an application and then effect service of the same upon the Attorney General; in this instance the court record reflects that the respondent requested for judgment vide a letter dated 14th February, 2013 and the court record bears no application seeking the leave of the court to enter judgment against the government as provided by the law;

16. Secondly leave can only be granted if it is established that the plaintiff's claim was for a liquidated demand or pecuniary damages or for the detention of goods; in this instance the respondent is seeking damages for unlawful arrest and confinement; therefore, it is the finding of this court that the respondent's claim is one in which a default judgment is not available and that the interlocutory judgment was obtained un-procedurally;

17. The respondent had submitted that the application had not been brought in a timely manner; the application in the lower court was filed approximately two (2) years and two (2) months after the judgment was entered; no explanation was given by the appellants for the delay; the delay notwithstanding there is need to ensure that substantive justice is done and that the case is heard and determined on its merits; and only for this reason the court will overlook the delay and will allow the application.

FINDINGS AND DETERMINATION

18. For the foregoing reasons this court makes the following findings and determinations;

i) The application which substantially deals with the appeal is found to have merit and it is hereby allowed;

ii) This court hereby finds the interlocutory judgment dated the 27/09/2013 to have been entered irregularly; the interlocutory judgment and all consequential orders/decrees are hereby set aside;

iii) The file to be transferred back to the subordinate court for hearing and determination; the appellants are hereby granted leave to

file their defences within thirty (30) days from the date hereof;

iv) Costs shall be in the cause.

Orders accordingly.

Dated. Signed and Delivered Electronically at Nyeri this 5th day of November, 2020.

HON.A.MSHILA

JUDGE