



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 249 OF 2014**

**ROLAND DENZ.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**KEWAL KRISHAN KHOSLA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KIRAN KHOSLA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**SALMA KHOSLA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The defendants/applicants have brought a Notice of Motion dated 17<sup>th</sup> October, 2018 supported by the grounds set out on its face and the facts stated in the affidavit sworn by the 2<sup>nd</sup> defendant/applicant. The following orders are sought therein:

***(i) THAT the interlocutory judgment entered on 12<sup>th</sup> July, 2017 and all consequential orders be set aside.***

***(ii) THAT the matter be heard in the normal manner.***

***(iii) THAT the amended plaint filed on 30<sup>th</sup> March, 2017 be struck out.***

***(iv) THAT the costs of the application be provided for.***

2. The 2<sup>nd</sup> applicant asserted in her affidavit that upon filing the plaint on 14<sup>th</sup> August, 2014, the respondent failed to serve the applicants with summons to enter appearance. This notwithstanding, the applicants entered appearance, filed and served their respective statements of defence and counterclaim together with the accompanying documents.

3. It is the 2<sup>nd</sup> applicant's averment that the respondent thereafter filed a reply to the defence and later on filed his amended plaint without leave of the court, adding that the same raises no substantial amendments.

4. The 2<sup>nd</sup> applicant further stated that notwithstanding the fact that the applicants' pleadings were on the court record, an interlocutory judgment was entered in favour of the respondent for failure by the applicants to enter appearance and/or file a defence.

5. In his reply, the respondent stated inter alia that despite being served with summons, the applicants did not file their statements of defence. On the subject of the amended plaint, it is the respondent's position that the statutory timelines for amending pleadings had not lapsed hence there was no need for him to seek leave of the court prior to filing the same, adding that the amendments were necessary to correct errors on the plaint and clearly bring out the real issues in controversy.

6. The respondent further stated that the Motion is a mere afterthought and intended to delay the conclusion of the suit, which has been set for formal proof.

7. The 2<sup>nd</sup> applicant filed a supplementary affidavit by and large reiterating the averments made in her supporting affidavit, save to add that the respondent has not denied the existence of the applicants' memorandum of appearance and pleadings filed in 2014 and that the said documents have not been withdrawn.

8. The 2<sup>nd</sup> applicant also stated that the applicants are in no way guilty of laches since they only discovered that the interlocutory judgment had been entered a few days prior to the date on which the matter was scheduled for formal proof.
9. The parties agreed to dispose of the application through oral arguments. *Mr. Mwaura* counsel for the applicants began by restating inter alia that the applicants had filed and served their defences, with the 1<sup>st</sup> applicant further including a counterclaim to his statement of defence. It is thus the advocate's submission that at the time the interlocutory judgment was entered, the applicants' defence was on record and hence, there was no basis for its entry.
10. *Mr. Mwaura* added that the amended plaintiff only seeks to substitute the previous firm of advocates acting for the respondent with the current firm of advocates, and that the verifying affidavit filed with the said amended plaintiff makes no reference to the amended plaintiff.
11. In his counter arguments, *Mr. Mugo* advocate for the respondent admitted that the plaintiff was filed in 2014 together with an application under a Certificate of Urgency. That thereafter, the applicants filed a Notice of Preliminary Objection arguing that the suit has abated and that vide its ruling of 27<sup>th</sup> January, 2017, the court directed that summons be issued and served.
12. The advocate further submitted that the respondent duly complied with the abovementioned orders of the court and in turn filed an amended plaintiff but that the applicants failed to enter appearance and/or file their defence, hence the request for an interlocutory judgment by the respondent and the eventual entry of the same.
13. That consequently, the matter was scheduled for formal proof and the applicants were served with a hearing notice to that effect, though the matter did not proceed as scheduled. It is *Mr. Mugo's* contention that all this while, the applicants did not protest to the same, at least not until the Motion presently before this court was filed.
14. On the subject of amendment, the counsel's argument is that there was need to amend the case number of the suit as well as substitute the firm of advocates on record.
15. In his response, *Mr. Mwaura* emphatically submitted that the applicants' pleadings are on record and that the respondent has nothing substantial to amend in his plaintiff.
16. I have carefully considered the facts stated in the Motion and supporting affidavit, together with the replying and supplementary affidavits coupled with the rival arguments offered by the respective counsels. That being the case, the issues requiring my determination are two-fold: the regularity or otherwise of the interlocutory judgment and whether or not the amended plaintiff is properly on record.
17. On the first limb, the law encompassing the granting of an interlocutory judgment is catered for under *Order 10, Rule 6* of the *Civil Procedure Rules (hereinafter referred to as "the Rules")*, whereas the setting aside of an interlocutory judgment lies purely within the court's discretion as expressed in *Order 10, Rule 11* of the Rules and reinforced in the Court of Appeal decision of **Philip Keiptoo Chemwolo & another v Augustine Kubende [1986] eKLR.**
18. Having said so, I am guided by the court's reasoning as offered in **Prime Bank Limited v Paul Otieno Nyamodi [2014] eKLR** as follows:
- "Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that the defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and Defence within the prescribed period under the Civil Procedure Rules, 2010 before such judgment can be set aside and/or varied."***
19. I have taken the time to peruse the court record and established that the original plaintiff was filed on 15<sup>th</sup> August, 2014 before the Commercial and Admiralty Division under the heading 'Civil Suit No. 351 of 2014.' The record also shows that the file was later transferred to the Civil Division and given the case number currently applied.
20. The applicants subsequently raised a Preliminary Objection dated 9<sup>th</sup> October, 2014 to the effect that the respondent's suit has abated on the basis that the summons to enter appearance were not signed by court or collected by the respondent within the statutory timelines from the date of filing the suit. Nevertheless, the applicants acknowledged that the summons were later served upon them.
21. On his part, the respondent indicated that he was not to blame for the delay in the signing of the said summons.
22. In his ruling on the same, the Honourable *Mr. Justice Sergon* found the respondent's explanation to be reasonable and in dismissing the Preliminary Objection, agreed to extend the time for obtainment and service of the summons and further held that the summons as served were deemed to have been obtained and served with leave of the court.
23. From the foregoing and more so, my understanding of the above ruling, service of the summons was deemed proper by virtue of the enlargement of time by the court. There was thus no requirement for the respondent to take out fresh summons as he did.
24. I am also able to confirm from the record that the applicants entered appearance on 12<sup>th</sup> November, 2014 and thereafter, 1<sup>st</sup> applicant filed his statement of defence and counterclaim on 25<sup>th</sup> November, 2014, while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their joint statement of defence on the same date. It is also clear from the same record that the respondent filed a reply to the respective defences and a defence to the 1<sup>st</sup> applicant's counterclaim.

25. I therefore find it unusual that the respondent went ahead to request for an interlocutory judgment to be entered yet the applicants had entered appearance and filed their pleadings. It is even more peculiar that the deputy registrar proceeded to enter the said judgment. In my reasoned view, there is a likelihood the deputy registrar overlooked the applicants' pleadings already on record.

26. In the premises, I am satisfied that the interlocutory judgment as entered is irregular and the same ought to be set aside. In finding so, I am guided by *Kenya Broadcasting Corporation v National Authority for The Campaign Against Alcohol and Drug Abuse (NACADA) [2015] eKLR* with reference to the Court of Appeal's rendition in *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal (2014) eKLR CA 217/2009* that the court's unlimited discretion in considering whether or not to set aside an interlocutory judgment should be aimed at avoiding an injustice or hardship resulting from accident, inadvertence or excusable error as opposed to assisting a person deliberately obstructing or delaying the cause of justice.

27. I shall now address the remaining limb on whether or not the amended plaint should have been filed with leave of the court.

28. *Order 8 of the Civil Procedure Rules* generally provides for the amendment of pleadings. On the one hand, *Rule 1* of the said Rules stipulates that pleadings may be amended at any time prior to the close of pleadings without leave of the court while on the other hand, *Rule 3* necessitates leave prior to filing an amended pleading.

29. In the present instance and as set out earlier on in this ruling, the original plaint was filed on 15<sup>th</sup> August, 2014 whereas the amended plaint was filed on 30<sup>th</sup> March 2017. Time would therefore have begun to run from the date of filing the original plaint and not the date of the ruling of Justice Serگون, which as I have already stated, in no way directed the respondent to obtain and serve fresh summons. Resultantly, the time for filing pleadings had long closed and the respondent required leave of the court before amending his plaint; it is not in dispute that no such leave was sought.

30. In the circumstances, I am inclined to agree with the applicants that the amended plaint was improperly filed as it were. That being the case, I see no need to delve into the arguments as to whether the amendments sought are necessary or not.

31. In the end, the application is hereby allowed as prayed and the following orders made:

- a) The interlocutory judgment entered on 12<sup>th</sup> July, 2017 and consequent orders are hereby set aside.
- b) The amended plaint filed on 30<sup>th</sup> March, 2017 is hereby struck out.
- c) Costs shall abide the outcome of the suit.

**Dated, signed and delivered at NAIROBI this 3<sup>rd</sup> day of April, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendants/Applicants