



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 136 OF 2017

DOMINIC OOKO.....PLAINTIFF/RESPONDENT

VERSUS

STANDARD GROUP LIMITED.....1ST DEFENDANT

RADIO AFRICA LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. The application dated 22nd March, 2018 seeks orders that this Honourable Court be pleased to set aside the interlocutory judgment entered against the 2nd Defendant on 6th October, 2017.
2. It is stated in the grounds and the affidavit in support of the application that the 2nd Defendant had filed a Preliminary Objection which had been fixed for hearing but in the meantime the interlocutory judgment was entered against the 2nd Defendant without compliance with the rules of procedure in respect of requests for judgment.
3. The application is opposed. It is stated in the replying affidavit sworn on 2nd May, 2018 that the Applicant was served with Summons to Enter Appearance on 5th July, 2017. That the Applicant entered appearance on 11th July, 2017 and on 19th July, 2017 the Applicant filed a notice of Preliminary Objection. That thereafter the Applicant went silent and no defence was filed herein, hence the request for judgment. It is further contended that the failure to file a defence was deliberate and inexcusable and was designed to obstruct the cause of justice.
4. The Applicant in response to the replying affidavit filed a further affidavit which explains the delay in the hearing of the Preliminary Objection. It is stated that the Preliminary Objection challenges the parties to the suit. That the gist of the Preliminary Objection is whether the 2nd Defendant is the correct party before the court.
5. When the hearing of the application commenced, the parties opted to make oral arguments. Parties were directed to file their authorities but ended up filing both written submissions and authorities. I have considered the submissions made and the authorities cited.
6. A perusal of the court record reveals that the Applicant was served with the plaint dated 21st June, 2017 and filed a Memorandum of Appearance on 11th July, 2017. On 19th July, 2017 the 2nd Defendant filed the notice of Preliminary Objection dated 17th July, 2017. The essence of the Preliminary Objection was that the 2nd Defendant is non suited as sued i.e **“Radio Africa Group Ltd”**.
7. On 17th August, 2017, the Plaintiff filed an amended plaint which describes the 2nd Defendant/Applicant as **“Radio Africa Limited”**. Under Order 8 rule 1 Civil Procedure Rules, a party may without the leave of the court amend a pleading once before the pleadings are closed. Under Order 2 rule 13, Civil Procedure Rules, pleadings are closed fourteen days after service of the reply or the defence to counterclaim, or, if neither is served, fourteen days after service of the defence. In the case at hand, no defence had been served. The Respondent was therefore at liberty to amend the plaint.
8. On 26th September, 2017 the Plaintiff proceeded to request for judgment against the 2nd Defendant, **Radio Africa Ltd**, for failure to file a defence. An affidavit of service of the Amended Plaint on 17th August, 2017 by a process server, Benson Igunzi sworn on 6th April, 2018 was filed on 10th April, 2018.
9. No defence has been filed herein by the 2nd Defendant/ Applicant. On 26th September, 2017, the Respondent vide a letter dated 26th

September, 2017 made a request for interlocutory judgment against the Respondent **“Radio Africa Ltd”**. On 6th October, 2016, the Deputy Registrar entered interlocutory judgment against the Applicant. It is this judgment which is the subject of the application at hand.

10. The request for judgment is in accordance with Order 10 Civil Procedure Rules which provides for such a request to be in form No. 13 Appendix A, with any necessary modifications.

11. The Applicant’s contention is that the interlocutory judgment should not have been entered while the Preliminary Objection was still pending. It is noted that the Preliminary Objection was filed before the amendment of the plaint. The 2nd Defendant in the amended plaint is **“Radio Africa Ltd”** while the Preliminary Objection is in respect of **“Radio Africa Group Ltd”**. There is no Preliminary Objection raised against the 2nd Defendant named in the amended plaint, **Radio Africa Ltd**.

12. On whether interlocutory judgment can be entered before the Preliminary Objection is determined, I agree with the Applicant’s submissions that the Preliminary Objection ought to be given priority. See for example:

- **Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others [2015] eKLR**
- **Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 others[2014] eKLR**

However, the filing of a Preliminary Objection does not mean the Applicant should have neglected filing a defence.

13. Order 7 rule 1 Civil Procedure Rules 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.”

In the case at hand, no order or any directions had been given by the court. The Applicant’s ought to have filed their defence.

14. In the premises, I find the instant case is distinguishable from the persuasive case this court was referred to. That is **Kenya Broadcasting Corporation v National Authority for the Campaign Against alcohol and Drug abuse (NACADA) [2015] eKLR** wherein an application for stay of suit was filed and referral to arbitration sought. I am not persuaded by the cited case of **Langata Gardens Co. Ltd v June Kathini & 2 others [2013] eKLR** where it was held that a Preliminary Objection ought to be disposed of first before an interlocutory judgment could be entered despite the failure to file a defence.

15. With the foregoing, this courts view is that the interlocutory judgment is regularly on the record.

16. The principles upon which a judgment can be set aside were considered by the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** where it was held as follows:

“a) Firstly, 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 conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93.***

17. In the case at hand, the record reflects that the Preliminary Objection was fixed for hearing on 23rd November, 2017. Thus the conduct of the parties shows the intent to proceed with the Preliminary Objection. It cannot therefore be said that the Applicant’s intention was to cause delay or obstruct the course of justice. The failure to file a defence appears to be an excusable mistake. The Respondent can be compensated by way of costs. This court is therefore inclined to give the case a chance to be heard on merits.

18. With the foregoing, I allow the application with costs to the Respondent. The Applicant to pay the Respondent Ksh.20,000/= thrown away costs. The Defence to be filed and served within 14 days from the date hereof.

Date, signed and delivered at Nairobi this 3rd day of June, 2019

B. THURANIRA JADEN

JUDGE