



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 438 OF 2013

SHOBNABEN PANKAJKUMAR PATANI.....PLAINTIFF/RESPONDENT

VERSUS

PRADEEP HARAKCHAND PATANI.....1ST DEFENDANT/APPLICANT

MAHENDRAKUMAR

HARAKCHAND PATANI.....2ND DEFENDANT/APPLICANT

DROP IN LIMITED.....3RD DEFENDANT/APPLICANT

REGISTRAR OF COMPANIES.....4TH DEFENDANT

RULING

1. The application dated 15th September, 2016 and the application dated 27th October, 2016 were heard contemporaneously. This ruling is therefore in respect of both applications.

2. The application dated 15th September, 2016 was filed by the 1st -3rd Defendants and seeks orders that:

“1. That time for filing the Defences of the 1st, 2nd and 3rd Defendants be enlarged.

2. That the draft defences of the 1st, 2nd and 3rd Defendants annexed to the supporting affidavit of the applicants herein be deemed duly filed.

3. That the interlocutory judgment entered for the Plaintiff by the Deputy Registrar on the 11th August, 2014 be vacated and/or set aside

4. That this Honourable court do make such further or other orders as it deems appropriate in all the circumstances.”

3. It is stated in the grounds and the affidavits in support of the application that the Summons to Enter Appearance and the plaint and the Notice of Motion dated 23rd September, 2013 were delivered to the 1st – 3rd Defendants offices and they gave instructions to their Advocates to take necessary action. That a Memorandum of Appearance was filed and served. That the 1st and 2nd Defendants who were out of the country in Australia inadvertently lost sight of the case and Interlocutory Judgment was entered. The 1st – 3rd Defendants’ counsel also blamed the failure to file a defence on inadvertence and due to the filing of documents in the wrong file, that is HCCC 661/13 which was in respect of Drop in Ltd, the 3rd Defendant. That there was apparent lack of urgency in the matter as the application dated 23rd September, 2013 was served on 23rd May, 2014 and parties were exchanging the audited accounts and no documents were served on the 1st – 3rd Defendants’ Advocate until when the application dated 29th June 2016 was served by the Plaintiff’s counsel.

4. The application dated 27th October, 2016 was filed by the 1st – 3rd Defendants and seeks the following orders:

“1. That the orders made on the 17th October, 2014 be vacated.

2. That the application dated the 17th October, 2013 be struck out.”

5. The application is premised on the grounds stated therein and is supported by the affidavit sworn by the 2nd Defendant Mahendra Harakachand Patani sworn on 27th October, 2016. It is stated that the 1st and 2nd Defendants were in Australia when on or about 9th May, 2014 the documents pertaining to this case which included an application dated 17th October, 2013 which had a hearing date reflected as 23rd September, 2013 were delivered to their office and then their advocate filed a Memorandum of Appearance and served the same on the Plaintiff's counsel. That the application was served long after the hearing date reflected therein. That there was no invitation to fix a hearing date and nor was a Hearing Notice served.

6. In a replying affidavit and a further affidavit filed by the Plaintiff, Shobhanaben Pankajkumar Patani, it is stated that proper service was effected herein, including service of the Notice of Motion dated 17th October, 2013 wherein the hearing date was inadvertently due to typographic error reflected as the year 2013 instead of the year 2014. That at the time of the hearing of the application dated 17th October, 2013, the Defendants' Advocates had not yet filed a Memorandum of Appearance and could therefore not be served with the Hearing Notice.

7. It is further averred that Interlocutory Judgment was entered after the Defendants failed to file their respective statements of Defence. That the explanation for failure to file statements of Defence are not plausible and the Plaintiff is not aware of HCCC 661/13. That the Plaintiff is aware of HCCC 661/09 which was fully determined. That the exchange of audited accounts in respect of the suit herein reflect awareness of the matters herein on the 1st – 3rd Defendants part.

8. It is further deponed that the 1st - 3rd Defendants have been mischievously attempting to sell the company's property Land Reference No. 209/4394Nairobi for the sum of Ksh.130,000,000/= without involving the Plaintiff and without any resolution of the Board of Directors. The Plaintiff saw the applications herein as an afterthought and stated that the same have been brought after undue delay

9. I have considered the applications, the response to the same and the submissions made by counsel for the respective parties.

10. The principles applicable in determining whether to set aside an ex parte judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** 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*.

11. Interlocutory judgment was entered herein after the 1st – 3rd Defendants who had entered appearance failed to file their Statements of Defence within time. Although it is stated in the affidavit of service by the process server that service was effected on 10th April, 2014 on the 1st – 3rd Defendants at their offices at Mlana Road off 5th Parklands Junction, the uncontroverted evidence by the 2nd Defendant as per the copies of the passport exhibited herein is that the 2nd Defendant was out of the country in Australia on the said date. There was therefore no personal service on the 2nd Defendant. Be as it may, the 1st – 3rd Defendants became aware of the served documents and entered appearance.

12. As stated in the case of **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR**:

I agree with the approach adopted by Serгон, J. in the Hussein Mohamed Awadh Case (supra), that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless there it is demonstrated that the defendant suffered some prejudice occasioned by the invalidity of the summons...the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice.”

13. The reasons for the failure to file the defence have been explained as due to inadvertence. This explanation coupled with the confusion caused by the dates in the application dated 17th October, 2013 has persuaded this court that the delay on the 1st – 3rd Defendants' side may not have been deliberate. It is noted that formal proof has not yet been conducted.

14. The orders dated 17th October, 2014 emanated from the application dated 17th October, 2013. The copy of the said application which is exhibited herein reflects the hearing date as 23rd September, 2013, yet the application is dated 17th October, 2013. Although it's been pointed out by the Plaintiff's side that there was a typographical error regarding the said dates, in the absence of any correction of the said errors, the same may have caused confusion on the 1st – 3rd Defendants side.

15. I have perused the copies of the Draft defence exhibited herein. The same raises triable issues which include whether the Plaintiff was at all material times a Director of the 3rd Defendant company and whether the cause of action herein is separate and distinct from the cause of action in Civil Cases 661 and 662 of 2009.

16. With the foregoing, I allow the application dated 15th September, 2016. The statement of Defence annexed to the supporting affidavit is hereby deemed as duly filed upon payment of the requisite court fees within 7 days from the date hereof.

17. The orders given on 14th October, 2019 and dated 17th October, 2014 are hereby vacated. The application dated 17th October, 2013 to be responded to and served within 14 days from the date hereof. Pending the interpartes hearing and determination of the application dated 17th October, 2013, interim orders to remain in force in terms of prayer No. 2 and 3 of the application. Costs in cause.

Date, signed and delivered at Nairobi this 4th day of Dec., 2019

B. THURANIRA JADEN

JUDGE