



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 307 OF 2014

ZIPPORAH WANGECI NJOROGE.....PLAINTIFF/RESPONDENT

C N K (Suing thro'

Zipporah Wangeci Njoroje as Guardian).....PLAINTIFF/RESPONDENT

VERSUS

PAUL KIBERA.....1ST DEFENDANT/APPLICANT

DOMINIC IBUGA NJUGUNA.....2ND DEFENDANT

RULING

1. The application dated 10th April, 2017 principally seeks orders that the interlocutory/ex-parte judgment entered herein against the Defendant and the *ex parte* proceedings herein be set aside.
2. Secondly, that the Defendant be granted leave to file and serve the defence out of time.
3. Thirdly, that the annexed draft defence be considered as duly filed and served upon payment of the requisite fees.
4. The application is predicated on the grounds stated therein and is supported by the two affidavits sworn by counsels for the Applicants.
5. The suit herein proceeded *ex parte* following the entry of interlocutory judgment. The failure to enter appearance and file a defence is blamed on the filing of the said documents in the wrong file, CMCC Milimani 307/14. This error is blamed on the inadvertent mistake of the defence counsel. It is argued that the Defendants have a good defence which raises substantial triable issues.
6. The application is opposed. It is stated in the replying affidavit that even the alleged erroneous filing took place long after the entry of the interlocutory judgment. It is further stated that the delay is inordinately long, unreasonable and prejudicial to the Respondents.
7. I have considered the application, the reply to the same and the submissions made by the respective counsels for the parties herein.
8. It is not denied that service of summons was effected. The question therefore is whether the court ought to exercise its discretion in favour of the Applicant.
9. 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.*

10. In the instant case, the delay was for about 2 years. The delay is inordinate. However, there is no evidence to show the delay was deliberate or was meant to delay the case. The delay has been explained. Final judgment is yet to be entered herein. The mistake made does not mean that the Applicant should suffer the fate of not having his case heard on merits. The Respondents can also be compensated by way of costs.

11. I have considered the annexed draft statement of defence. The same raises triable issues which include the question of ownership, authorization of the driver, occurrence of the accident, negligence, and contributory negligence.

12. With the foregoing, I allow the application with costs and throw away costs to the Respondents. The case to be given a hearing date in the registry on priority basis. Court fees to be paid within 7 days.

Dated, signed and delivered at Nairobi this 16th day of May, 2018

B. THURANIRA JADEN

JUDGE