



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 201 OF 2009

BETWEEN

JEREMIAH O. SAMBA AND BENSON M. MOGAKA trading as

MERVE COMMERCIAL AND INSURANCE AGENCY.....PLAINTIFFS

AND

KENINDIA ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The defendant seeks to set aside judgment entered against it in default of filing its statement of defence. Before I deal with that application, it is important to outline the events leading to this decision.

2. By a plaint dated 29th August 2009 and filed on 6th October 2009, the plaintiffs claim Kshs. 7,508,629.00 being the net amount due on unpaid commissions earned by them for the years 1998 to 2007. After the plaint and summons were served, the defendant through the firm of *Mose, Mose and Millimo Advocates* entered appearance on 14th October 2009. On 20th October 2009, the plaintiffs requested for judgment in default of filing defence. On 30th October 2009, the Deputy Registrar entered judgment on the principal sum with costs but without interest. It is this judgment that precipitated a series of events over the last 9 years.

3. The defendant's chamber summons is dated 10th November 2009 made under the provisions of **Order 39 rules 1, 2, 3(i)** of the **Civil Procedure Rules** and **section 3, 3A and 63(e)** of the **Civil Procedure Act** and seeks orders that:

[1] THAT interlocutory judgment entered herein be set aside and the draft defence annexed thereto be deemed as duly filed.

[2] THAT the costs of this application be provided for.

4. The grounds in support of the application are set out on the face of the application and the supporting affidavits sworn on 10th November 2009 by the defendant's advocate in the matter, Lazarus Mose and his clerk, Charles Bundi. The thrust of their depositions is that Mr Mose confirmed that his firm received instructions enter appearance and file defence on behalf of the defendant. He then instructed Mr Bundi to file the memorandum of appearance on 14th October 2009. Mr Bundi deponed that he proceeded to file the documents in the registry with other documents. However, when Mr Mose requested him for the documents he had filed, he discovered that he had not filed the defence. He further deponed that failure to file the defence was due to an oversight on his part because he had many documents including other defences to file on the particular day. The defendant urges that failure to file the defence was an oversight and that it should not be penalized for inadvertent mistake of the advocates. It also avers that it had a good defence which ought to be considered by the court.

5. Before the plaintiffs could respond to the application, the defendant filed and other Chamber Summons dated 21st January 2010 seeking to set aside the interlocutory judgement on the same grounds that were raised in the earlier application. According to the supporting affidavit of Mr Mose, it was necessary to file the application because counsel for the plaintiffs had promised to set aside the judgment by consent but went ahead to proceed with taxation of costs hence it was necessary to file another application in order to seek an order for stay.

6. In response to the second application, Benson Mogaka filed a replying affidavit sworn on 12th February 2010 opposing both applications and another replying affidavit sworn on 24th February 2010 specifically in response to first application. Both affidavits raised similar grounds in opposition. Mr Mogaka contended that that the latter application ought to be struck out as it was an abuse of the court process as it sought

the same orders as the earlier application. He also deponed that the defendant was truly indebted to the plaintiffs and did not have any defence to their claim. He pointed out that the draft defence contained mere denials that did not raise any triable issues. Mr Mogaka further deponed that the defendant's failure to file the defence was deliberate and intended to deny the plaintiffs the fruits of the judgment in view of the fact that they did not have any defence to the claim.

7. Before the court could hear the defendant's applications, the plaintiffs proceeded with taxation of costs and execution. The defendant moved the court on 17th February 2012 to stay execution. Makhandia J., certified the application as urgent and fixed it for hearing on 25th February 2010. When the matter came up for hearing on that day, counsel for the defendant applied to withdraw the second and the court marked it as withdrawn with costs to the plaintiffs. The parties also recorded a consent that

1. Accounts be taken on commission earned by the plaintiff upto 31/12/07 together with particulars of any payment made by the defendant to the plaintiff in settlement of the commissions earned to date.

2. There be a reconciliation meeting on 19/3/10 at the offices of the defence counsel.

3. The reconciliation report be filed in court on or before 22/3/10 when the matter shall be mentioned for further orders and or directions.

4. Costs in the cause.

8. As the parties were unable to do the reconciliation, the stay order was extended for a further two weeks. The order of stay lapsed and to forestall execution of the decree, the defendant filed another application dated 14th April 2010 seeking orders to or stay of execution and that the Notice of Motion dated 10th November 2009 be heard interparties. On 14th May 2010, Musinga J., granted an order of stay and fixed the application for interparties hearing on 25th May 2010. When the matter came up before Makhandia J., he deferred it to 28th June 2010 but declined to extend the interim orders of stay.

9. The defendant moved the court once again by a Notice of Motion dated 2nd June 2010 seeking, amongst others, an order of stay of execution pending the hearing of the application dated 10th November 2009, an order that Makhandia J., do disqualify himself and that the court make a finding that the intended settlement between the parties was frustrated and an order that the application dated 10th November 2009 be heard and determined. The Notice of Motion dated 2nd June 2010 and the Chamber summons dated 10th November 2009 were fixed for hearing on 12th July 2010. At the hearing of the application, counsel for the plaintiff raised a preliminary objection that the application had been compromised by consent. Makhandia J., dismissed the preliminary objection by a ruling delivered on 16th September 2010.

10. Unfortunately, the applications were adjourned from time to time for various reasons including the fact that Makhandia J., was transferred. The plaintiff then filed an application dated 14th March 2013 seeking to dismiss all the pending applications filed by the defendant for want of prosecution. In due course the Notice of Motion dated 14th March 2013 was withdrawn by consent and the parties agreed to undertake joint account/stock reconciliation with regard to the application. On 15th October 2013, the parties filed a consent letter where they agreed as follows;

That the parties herein have agreed that each party to file and serve own statement of accounts within 20 days from this date.

The court to make reconciliation based on the filed statement of account.

Parties mention the matter for further orders.

11. Nothing came of the aforesaid consent and the proceedings were sidelined by an application by the plaintiffs seeking to act in person. On 7th October 2014, the application dated 10th November 2009 was heard *ex parte* by Nagillah J., who reserved the ruling for 30th December 2012. Before delivery of the ruling, the plaintiffs filed an application to set aside the *ex parte* proceedings. The application was allowed by consent of the parties on 3rd November 2014. The parties filed submissions and the matter came up for directions on 13th October 2015 before Okwany J. On that date the learned judge reserved ruling for 11th November 2015. The ruling was not delivered as the learned judge requested for typed proceedings to enable her understand the tenor of the proceedings. Before she could give further directions, she was transferred.

12. I am now called upon to determine the defendant's application dated 10th November 2009. It is not disputed that the judgment entered in default of filing defence is regular as the defendant admits that it failed to file the defence within the time prescribed. Both parties have filed written submissions to support their respective arguments. They have cited several decisions dealing with the exercise of discretion. It is common ground that the court has discretion to set aside judgment.

13. The principles of setting aside for setting aside default judgement have been echoed in several cases. In **Shah v Mbogo [1967] EA 166**, the Court of Appeal for East Africa stated that:

[T]his discretion to set aside an ex-parte judgement is intended 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 cause of justice.

14. The same court in **Patel v East Africa Cargo Handling Services [1974] EA 75** stated as follows:

There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.

15. The Court of Appeal in **Tree Shade Motors Ltd v DT Dobie & Another [1995-1998] 1EA 324** held that:

Even if service of summons is valid, the judgement will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgement aside.

16. In summary, the factors the court may consider in setting aside judgment are the explanation for the delay, the prejudice or injustice that may be caused to either party and whether the applicant has a reasonable defence. In **Jesse Kimani v McConnell [1966] EA 547** Harris J., summarized the issues that the court ought to consider which included the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been *ex-parte* and whether or not it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. With these principles in mind, I now turn to consider the circumstances of the application.

17. According to Mr Mose and Mr Bunde, the failure to file the defence was inadvertence on the part of Mr Bunde. I have noted that the memorandum of appearance was filed on 14th October 2009. The filing of the memorandum evinces the intent of the defendant to defend the suit. The reason for failing to file the defence was plausible and cannot be attributed to a deliberate effort on the part of the defendant or its advocate to defeat justice. I accept the reason and hold that this is a case where the defendant should not be punished for the mistakes or inadvertence of its counsel.

18. The plaintiffs urged that the defendant's defence was a bare denial and did not raise any reasonable defence. In considering this aspect of the case, I note that the claim was for outstanding commissions. During the course of the proceedings the parties recorded two consents; on 25th February 2010 and on 15th October 2013 where they agreed to reconcile accounts. This was an implicit admission by the plaintiffs there was an issue on accounts to be taken. I therefore find that the defendant's defence raised triable issues.

19. Finally, I do not think that the plaintiffs will suffer prejudice if judgment is set aside because the defendant paid the plaintiffs Kshs. 3 million in the course of proceedings. What now remains is to determine whether the plaintiffs are owed the amount claimed in the plaint or the balance of Kshs. 4,508,629.00. Any other prejudice will be salved by an award of costs.

20. For the reasons I have set out, I allow the application dated 10th November 2009 and make the following orders:

- (a) The ex-parte judgment entered against the defendant on 30th October 2009 be and is hereby set aside.
- (b) The defendant shall file and serve its statement of defence within **seven (7) days** from the date hereof.
- (c) The defendant shall pay the costs of the application assessed at **Kshs. 10,000/-** within **seven (7) days**.

DATED and DELIVERED at KISII this 11th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Samba, 1st plaintiff, in person.

Mr Mose instructed by Mose and Mose Advocates for the defendant.