



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO 7 OF 2017

NEW TONER CATRIDGES LTDPLAINTIFF

VERSUS

NAROK COUNTY GOVERNMENT.....DEFENDANT

RULING

The case for the defendant

1. The defendant through its notice of motion dated 24/5/2018 has applied to this court seeking the following orders:

1.

2.

3. A grant of a temporary order of stay of delivery of the ruling on the taxation of costs herein scheduled for 31/5/2018 and all other consequential orders pending the hearing and determination of this application

4. A grant of an order to set aside all proceedings and consequential orders culminating from the default judgement arising from the plaintiff's request for judgement in default of appearance dated 24/4/2017 and entered against the defendant herein.

5. A grant of leave to the defendant to file its defence on such terms as the court may deem necessary.

6. An order directing costs to be in cause.

2. The said application is filed pursuant to articles 25 (c), 50(1) and 159 of the 2010 Constitution of Kenya, sections 1A and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 10 rules 8 and 11, Order 51 rules 1, 3 and 13 of the 2010 the Civil Procedure Rules and all other enabling provisions of the law.

3. The application is supported by five grounds that are set out on the face of the notice of motion dated 24/5/2018 and a 17 paragraphs affidavit of Elizabeth Sanangoi Lolchoki and her further 12 paragraphs affidavit dated 26/7/2018.

In addition to the foregoing, counsel for the defendant (M/S Kemboy Law) filed written submissions dated 27/7/2018 in support of the application.

4. The defendant's application is grounded on five grounds. The first ground is that the plaintiff did not effect proper service of summons upon the defendant and as a result the plaintiff obtained a judgement, which required the defendant to pay general and special damages in the sum of Ksh.23,307,200/= plus interest. Second, the defendant only became aware of the proceedings when it was served with the plaintiff's party and party bill of costs.

5. Thirdly, by virtue of the plaintiff's ineffective service, the defendant was not accorded the opportunity to enter appearance and file a defence to the claim, a matter in regard to which the defendant states that it has a formidable defence that raises trial issues.

6. Fourth and fifth, the case raises issues of public importance, which warrant a determination on the merits and that the plaintiff will not suffer prejudice by the setting aside of the default judgement.

7. Elizabeth Sanangoi Lolchoki, the acting secretary of the defendant has deposed to the following major matters in her 17 paragraphs supporting affidavit. She has averred that the defendant only became aware that a suit had been filed against it, when it was served with both a

party to party bill of costs and a hearing notice dated 3/5/2018.

8. As a result, the defendant carried out investigations and as a result it appointed counsel on record to defend the suit. The defendant has further averred that the plaintiff wrongfully sought and obtained leave of this court to enter judgement against it. The leave was granted and as a result, the plaintiff obtained judgement against the defendant in the sum of Shs.23,307,200/= plus interest, by virtue of this court's ruling dated 31/3/2017, being annex marked "ESL-2" to her affidavit.

9. Furthermore, the defendant's major averments are a replica of the grounds in support of its application.

10. In addition to the foregoing, counsel for the defendant has filed written submissions in support of the application. Counsel has in particular attacked the plaintiff's replying affidavit sworn by Mukinyi Mwakavi of 27/6/2018, which he contends contains certain contrived facts for the following major reasons.

Issue No. 1

1. First, counsel has urged the court to "take judicial notice that it is only the office of the County Secretary that is vested with the mandate to receive all court documents served upon the defendant."

2. Second, counsel has submitted that no proper service was effected on the defendant and that the documents "served the county Secretary's office only bear the general Narok County Stamp with no indication as to the office upon which the said documents were served."

3. Counsel further contends that the plaintiff was aware that the office to be served was that of the County Secretary. As a result of the plaintiff's failure, the defendant was wrongfully denied the opportunity both to enter appearance and to file its defence.

11. It is counsel's submission that the default judgement was not obtained regularly, since its obtainment contravened the peremptory procedure as set out in Order 10 rules of the 2010 Civil Procedure Rule. Order 10 Rule 8 requires leave of the court to be obtained before judgement is entered.

12. Counsel further contends that the plaintiff did not serve the application on the defendant for leave not less than seven days before the return day. Second, the said application was heard and the defendant was informed by the Deputy Registrar of the High Court at Naivasha, that the case and its application had been transferred to the High Court to Narok vide that court's order dated 14/2/2017.

13. It is also counsel's submission that the order of transfer was never served upon the defendant and that the plaintiff ought to have served the said order upon his client.

14. In relation to the affidavit of service dated 13/3/2017, counsel for the defendant submitted that the plaintiff did not serve a hearing notice to demonstrate either that it existed and/or that it was actually served upon the defendant.

15. Finally, counsel for the defendant submitted that the affidavit of service in which it is deposed that hearing notices were served upon the county secretary's office and were received therein "by tendering the official stamp by the receptionist at 8.45 p.m" is not correct.

Authorities cited by the defendant

16. Counsel for the defendant cited *James Kanyiita Nderitu & Another v. Marios Philotas Ghikas & Another* (2016) eKLR in which the Court of Appeal, considered the issue of setting aside of a default judgement. The court therein in *Obita dicta* pointed out that the distinction which has always existed between a default judgement that is regularly entered and one, which is irregularly entered. The court observed that in a regular default judgement, the defendant will have been served with summons to enter appearance but for one reason or another, failed to enter appearance.

17. In such a scenario, the court has unfettered discretion in determining whether or not to set it aside. In doing so, the court will consider the reasons for the failure of the defendant to file his memorandum of appearance.

18. That court went further to state that in such a scenario it is bound to take into account such factors as whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, amongst other factors, citing *Mbogo & Another v. Shah Patel v. E. A. Cargo Handling services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* (1986) KLR 492 and *CMC Holdings v. Nzioki* (2004) 1 KLR 173.

19. Furthermore, the Court of Appeal stated that "in an irregular default judgement, on the other hand, judgement will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgement is irregular; it can set aside the default judgement on its own motion.."

20. Based on the foregoing *obiter dicta*, counsel for the applicant has urged the court to set aside that judgement, because leave of its entry was procured illegally and is null and void. Stated differently, the resulting judgement should be set aside as of right, that is, *ex debito justitiae*.

21. Counsel has also urged the court to consider the defendant's draft defence, which in his view raises triable issues. Additionally, he urged

the court to note that the intention to exhibit the draft defence has been done, because the case “involves public funds and is one that raises issues of great public importance thereby necessitating that it be heard and determined on its merit.”

22. In this regard, counsel has submitted that the court should be guided by the principle that costs follow the event.

The case for the plaintiff

23. In his 22 paragraphs replying affidavit, the director of the plaintiff has filed a replying affidavit in which he has deponed to the following major matters.

1. He has deponed that the defendant was served with summons to enter appearance and plaint dated 21/10/2018 and receipt thereof was acknowledged by stamping on the face of the plaintiff’s copies which are evidenced by annexes marked “MM3”.
2. He has deponed that leave was sought to request for judgement against the respondent in default of appearance.
3. As a result, the plaintiff’s advocate filed a notice of motion dated 21/11/2016 in which leave of the court was sought to request for judgement against the defendant in default of her appearance which was premised on the basis that service of summons to enter appearance was properly served.
4. The plaintiff has also averred that the defendant’s application is bad in law, grossly defective, lacks merit and is intended to deny the plaintiff the fruits of the judgement.
5. Finally, the plaintiff has averred that the defendant was properly served and for that reason the defendant’s application dated 24/5/2018 should be dismissed with costs.

24. In addition to the replying affidavit, counsel for the plaintiff has filed written submissions in opposition to the defendant’s application. According to counsel, there are only 3 issues for determination in this application. And those issues are as follows:

- a) Whether the defendant/applicant was properly served with the pleadings
- b) Whether the *ex-parte* interlocutory judgement was regular
- c) Whether the defendant/applicant deserves the orders sought.

25. In this regard, counsel for the plaintiff has submitted that the defendant was properly served with the pleadings. He has submitted that as a matter of practice, where a party claims that it has not been properly served, it is their right to summon the process server for cross-examination in respect of the manner of service, that is challenged. Counsel has further submitted that the defendant failed to summon the plaintiff’s process server for cross-examination. Counsel has cited *AMAYI, Okumu Kasiaka & 2 Others V. Moses Okware Opari & Another Kisumu Court Of Appeal CA No. 15 of 2010*, “where the court so held that where service is disputed the defendant ought to have called and cross-examined the process server.” Counsel has urged the court to find that service upon the defendant was proper.

26. In respect of whether the *ex-parte* interlocutory judgement was regular or not, counsel has submitted that this was a regular judgement. He has submitted that the challenge presented to the judgement is an abuse of the court process and is only meant to deny the plaintiff to enjoy the fruits of its judgement. In support of his submission, counsel has cited a number of authorities. He has cited *Kyengo Mbai V. Kimanthi (2012) Eklr Machakos HCC No. 136 of 2004*. In that case, the court ruled that if a judgement has been entered irregularly, the court has no discretion in the matter. It must give the defendant/applicant a chance to defend *ex debito justitiae*, citing *Mwala v. Kenya Bureau of Standards (2001)1 EA 148* in support thereof. Secondly, the court therein also stated that if the judgement is entered regularly it must proceed to consider if the proposed defence raises any triable issues. If it does, the defendant/applicant should be given leave to enter appearance and defend the suit.

27. Furthermore, the court stated that in exercising its discretion, it must act judiciously. It pointed out that refusing a defendant/applicant an opportunity to put up a defence is a draconian measure. It went further and pointed out that the discretion to set aside must not be used to aid a party to delay the course of justice for one of its litigants.

28. As regards the proposed defence of the defendant, counsel has submitted that the same does not raise triable issues warranting its admission by the court. Counsel has submitted that the proposed defence only constitutes denials. And for that reason, leave to defend ought not to be granted to the defendant.

29. As regards whether the defendant/applicant deserves the orders sought, counsel has submitted that the defendant/applicant was properly served in respect of which he supports the ruling of this court dated 31/3/2018. Counsel has therefore submitted that the application of the defendant should be dismissed with costs to the plaintiff.

30. In the light of the foregoing affidavit evidence of the parties, the submission of their counsel and the applicable law, I find the following to be the issues for determination.

1. Whether or not service of summons to enter appearance was proper
2. Whether or not the default judgement was regular.

3. Whether or not the defence raises triable issues

4. Who bears the costs of this application?

Issue No. 1

31. I find as credible the affidavit evidence of the process server that the defendant was served with summons to enter appearance. The fact that the process server did not serve the County Secretary is an irrelevant consideration. Service of summons to enter appearance upon the defendant was regular. The submission of counsel for the defendant that the court takes judicial notice that service can only in law be served upon its secretary is in law a submission without merit. Counsel for the defendant did not cite any authority whether case law or statutory law to support his submission. In the circumstances, I find that the service of summons to enter appearance was proper. This is particularly so when it is clear that the defendant/applicant did not summon the process server for cross examination as required by law.

Issue No. 2

32. The issue as to whether the default judgement was regular or not depends on the procedural requirements. The law in this regard is that the plaintiff/respondent was required to seek leave of the court before judgment was entered. The plaintiff/applicant sought leave of the court in order to request for judgement. It was granted. The submission of counsel that *obita dicta* of the Court of Appeal are binding is not correct. What is binding in any judgement of the court is the *ratio decidendi* (the reason for the decision).

33. I accept the submission of counsel for the defendant that his client is entrusted with the usage of public funds and must be used carefully, in the public interest. It is also in the public interest that the litigation process should be expedited and concluded within a reasonable period. This will save judicial resources in terms of time, money and personnel. In the circumstances, the court is called upon to strike a balance between these conflicting interests. After considering all these matters, I find that the default judgement was regularly obtained.

Issue 3

34. Furthermore, the only issue that now falls for consideration is whether the proposed defence raises triable issues. I have carefully examined the proposed defence and I find that it raises triable issues. For instance, the amount of money claimed is disputed. Additionally, I also find the issue as to whether the defendant has paid the sum claimed is also disputed. In the circumstances, I find that this is a proper case for the defendant to be granted leave to defend.

35. It therefore follows that the *ex-parte* judgement is hereby set aside. The defence is hereby granted leave to defend on the following conditions.

The defendant has to deposit in this court shillings two million (2 million) within 45 days, failing which this order will automatically lapse.

Ruling delivered in open court this 18th day of October, 2018 in the absence of the plaintiff and in the presence of Mr. Kambo holding brief for M/S Kembo for the defendant.

J. M. Bwonwonga

Judge

18/10/2018