

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 260 OF 2016

HELLEN MUGO WANJIKU.....PLAINTIFF/APPLICANT

VERSUS

DR. HASSAN WARIO ARORO.....1ST DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

1. The application dated 21st November, 2016 seeks orders that this honourable court do grant leave to the Plaintiff to enter default judgment against the 1st and 2nd Respondents/ Defendants in default of appearance.

2. It is stated in the grounds in support of the application that the Defendants were served with the plaint, verifying affidavit, list of witnesses, witness statements and the list of documents on 7th October, 2016 but 30 days lapsed before the Defendants entered appearance.

3. The application is supported by the affidavit of service which states that the Defendants were served on 7th October, 2016.

4. The application is opposed. It is stated in the replying affidavit that service of the application herein was effected on 2nd December, 2016 when the statement of defence had already been filed on 2nd November, 2016, and before the entry of the interlocutory judgment. That the defence was served on 27th January, 2017 and a reply to the defence filed on 6th March, 2017. It is contended that the defence is properly on record and the parties have embarked on pre-trial procedures. It is further stated that the instant application has been overtaken by events and that the Applicant is not even entitled to throw away costs.

5. The application was canvassed by way of written submissions which I have considered.

6. It is not disputed that the service of summons was effected on 7th October, 2016. The summons dated 3rd October, 2016 required entry of appearance within 15 days of service. The Respondents have dealt with the issue of the the service of the application at hand, the filing of the defence and even preparations carried out to prepare the suit for hearing. This however does not explain why no appearance and defence were filed until the 28th November, 2016.

7. It is conceded in paragraph No. 7 of the replying affidavit that the defence was served on the Applicant on 27th January, 2017. This was after the application at hand had already been filed on 29th November, 2016. Thus the Applicant was at liberty to exercise her right to file the application at hand.

8. The defence and the reply to the defence are now on record. The parties have embarked on pre-trial procedures. It would serve the wide interests of justice to hear the case on the merits. Consequently, I deem the defence as duly filed.

9. As stated in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per Duffus P who held that:

“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 what where it is a regular judgement as is the case here the court will not usually set aside the judgment 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.”

10. With the foregoing, I dismiss the application with costs to the Applicant.

Date, signed and delivered at Nairobi this 5th day of Nov., 2018

B. THURANIRA JADEN

JUDGE