



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 38 OF 2017

DAVID KHAYO KOKOKO.....1ST PLAINTIFF

CHRISTINE KARUMBA (Suing as

Administrators of the Estate of

Edwin Lawrence Khayo (Deceased).....2ND PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 5th March 2018 and filed on 8th March 2018 was brought pursuant to the provisions of Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 10 Rule 11 and Order 51 Rules 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. Prayer Nos (1), (2), (3), (4) and (5) were spent. It sought the following remaining prayers:-

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. Spent.

6. THAT the Honourable Court be pleased to grant the Defendant/Applicant herein leave to file their defence out of the prescribed time and granted opportunity to be heard.

7. THAT upon perusal of the Court file and pleadings filed by the Plaintiff, the Defendant/Applicant herein had a water tight defence to prove that they are not indebted to the Plaintiff/Respondent at all.

8. THAT the Defendant/Applicant had an arguable case which raised triable issues on both law and tact.

9. THAT the Respondents will not suffer prejudice if the prayers sought herein are granted.

10. THAT it was just and equitable that this Honourable Court allows the Defendants/Applicants herein an opportunity to ventilate their case and consequently have justice served on their part.

11. THAT cost of the application be provided for.

2. The Defendant's filed its Written Submissions dated 18th June 2018 and filed on 27th June 2018. The Plaintiff's Written Submissions were dated 25th July 2018 and filed on 26th July 2018.

3. When the matter came before the court on 30th July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANT'S CASE

4. The Defendant's application supported by the Affidavit of Dinah Ogula that was sworn on 5th March 2018.

5. Its case was that it had a watertight case to demonstrate that it was not indebted to the Plaintiff and consequently, being shut out from defending its case herein would greatly prejudice it.

6. It pointed out that it failed to enter appearance and/or file a defence within the prescribed time because copies of pleadings of this matter had been misfiled. It also stated that it was ready to abide by any conditions once the interlocutory judgment was set aside.

7. It therefore urged this court to allow its application as prayed.

THE PLAINTIFFS' CASE

8. In response to the Defendant's present application, the Plaintiffs filed Grounds of Opposition dated 30th May 2018 on even date.

9. They argued that the Defendant had not given any excusable reason to warrant the setting aside of the interlocutory judgment that had been entered against it. It stated that the Defendant had been indolent and did not merit equity, it had unclean hands, its defence was fraught with denials, it was an abuse of the court process and that it would cause them prejudice because they had already readied themselves for formal proof.

10. They therefore urged this court to dismiss the Defendant's application with costs to them.

LEGAL ANALYSIS

11. It is important to point out right at the outset that the manner of drafting of the Defendant's application left a lot to be desired. The orders sought were ambiguous in nature and Prayers Nos (7), (8), (9) and (10) appeared to this court to have been grounds in support of the said application. However, bearing in mind the provisions of Article 159 (2) (d) of Constitution of Kenya that mandates courts to administer justice without having regard to procedural technicalities, this court felt that it was in the interest of justice to consider the application on its merits.

12. To support its submissions, the Defendant relied on several cases amongst them **John Peter Kiria & Another vs Pauline Kagwiria [2013] eKLR**, **Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR** amongst others where their gist was that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party has a reasonable defence and that at all possible times, cases should be heard on merit.

13. On their part, the Plaintiffs pointed out that courts should exercise discretion but the same should not be exercised to assist a party who had "**deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice**". In this regard they relied on the case of **Shah vs Mbogo [1967] EA 166** at page 123B.

14. They also placed reliance on the case of **Kenya Pipeline Co Ltd vs Mafuta Products Limited [2014] eKLR** where this very court held that a court must be satisfied that there was a plausible explanation before it could set aside an interlocutory judgment.

15. They were emphatic that the misfiling of the Summons by the Defendant's insurer was not immediately after service of the same but rather it was way after lapse of time to enter appearance and file a defence.

16. They added that the ingredients to be considered before an interlocutory judgment can be set aside are whether the purported defence had any merit, whether a Plaintiff would suffer prejudice if the interlocutory judgment was set aside and whether there was a plausible explanation for the delay as was held in the case of **Mohamed & Another vs Shoka [1990] KLR 463**

17. It was their argument that the Defendant's election to investigate the claim as opposed to entering appearance and filing a defence had consequences and that the same was not a good explanation why it failed to enter appearance and file its defence. They termed the Defendant's inaction as indolence.

18. They stated that they would suffer prejudice because they had lost a child and setting aside the interlocutory judgment would make them relieve the contest of the last moments of their deceased child.

19. They had also raised several issues on the merits of the Defendant's defences and urged this court not to exercise its discretion in favour of the Defendant as equity does not aid the indolent.

20. As was rightly pointed out by the Plaintiffs, Order 7 Rule 1 of the Civil Procedure Rules provides that a defendant who has been served

with Summons must file his defence after entering his appearance unless there is a contrary order from the court.

21. Order 7 Rule 1 of the Civil Procedure Rules stipulates as follows:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing in the defence and file an affidavit of service”.

22. The Civil Procedure Rules has a provision detailing what would happen in the event a defendant fails to enter appearance. Failure to enter appearance and/or file a defence may lead to entry of interlocutory judgment upon application by a plaintiff as has been clearly captured in Order 10 Rule 4(1) of the Civil Procedure Rules. It is provided that:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

23. The Plaintiffs had sought the following orders in their Complaint dated and filed on 22nd February 2017:-

a. Damages under the fatal accident act for the benefit of the dependants of the Deceased.

b. Special General Damages as per paragraph 8 above.

c. General damages.

d. Cost of this suit.

e. Interest on (a), (b) and (c) above.

f. Any other relief that this Honourable Court may deem fit to grant.

24. Having failed to enter Appearance and/or file his Defence within the stipulated period, the Plaintiffs were entitled to request for judgment against the Defendants herein and for the court to enter the same accordingly. This is what is provided in Order 10 Rule 6 of the Civil Procedure Rules that states as follows:-

“Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be”.

25. Be that as it may, the entry of interlocutory judgment is not cast in stone as the court has discretionary powers under Order 10 Rule 11 of the Civil Procedure Rules to set aside and/or vary such judgment and consequential decree or order upon such terms as are just.

26. Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back a plaintiff's progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that a defendant has offered a very plausible explanation as to why it failed to enter memorandum of appearance and file its defence within the prescribed period under the Civil Procedure Rules before such judgment can be set aside and/or varied. This court made the same finding in Kenya Pipeline Co Ltd vs Mafuta Products Ltd (Supra) that was relied upon by the Plaintiffs herein.

27. In this case, the Defendant stated that it was served with Summons in December 2017 and initiated investigations to ascertain the veracity of the Plaintiffs' claim. It pointed out failure to enter appearance and file defence would have been against its insurer's interests and that it was only fair that it be given an opportunity to be heard and not be condemned unheard.

28. The Plaintiffs were right when they stated that the Defendant acted negligently in not having entered an appearance or filing a defence. However, there was a pertinent issue that the Defendant had raised in its draft defence. This was that it was not the registered owner, insured or beneficial owner of Motor Vehicle Registration No KAV 437E (hereinafter referred to as "Subject Motor Vehicle"). It would be unfair to condemn the Defendant unheard on this issue as the same would determine its liability if all, for the death of Edwin Lawrence Khayo (hereinafter referred to as the "deceased").

29. It was therefore in the interests of justice that the Defendant ought to be given an opportunity to demonstrate that it was not the registered owner of Motor Vehicle Registration No KAV 437E that was said to have hit the deceased thus occasioning him fatal injuries.

30. The matter had been listed for formal proof on 9th November 2017 but the hearing did not proceed as the Plaintiffs were granted leave to file a Supplementary list of documents. They took no further action to list the matter for Formal Proof and on 5th March 2018, the Defendant's filed the present application.

31. The Plaintiffs' assertion that reliving the last moments of their deceased child would be traumatic if the matter proceeded for hearing was

not a sufficient reason to deny the Defendant an opportunity to be heard. The prejudice that they would suffer if the case was heard on merit was one that could be compensated by way of costs.

32. Accordingly, having carefully considered the parties' respective pleadings, written and oral submissions and all the case law in support of their respective cases, this court came to the conclusion that it would be fair, equitable and just for the Defendant to be given an opportunity to present its case. In this regard, this court will exercise its discretion in favour of the Defendant and set aside and/or vary the interlocutory judgment that was entered against it on 5th April 2017 for failing to enter appearance and to file its defence within the stipulated period.

DISPOSITION

33. For the reasons foregoing, the upshot of this court's Ruling was that the Defendant's Notice of Motion application dated 5th March 2018 and filed on 8th March 2018 was allowed in the following terms:-

- 1. THAT the interlocutory judgment that was entered against the Defendant for failure to enter appearance and/or enter defence on 5th April 2017 be and is hereby set aside.**
- 2. THAT the Defendant shall file and serve its Statement of Defence within twenty one (21) days from the date of this Ruling.**
- 3. THAT all subsequent pleadings shall be filed in accordance with Order 7 of Civil Procedure Rules.**
- 4. THAT the Defendant shall pay to the Plaintiffs thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from the date of this Ruling.**
- 5. THAT in the event the Defendant shall not pay to the Plaintiffs the thrown away costs ordered in Paragraph 33 (4) hereinabove and shall not have filed and served their Statements of Defence as aforesaid, the Plaintiffs shall be at liberty to apply for striking out of the Statement of Defence that shall have been filed.**
- 6. Costs shall be in the cause.**

34. It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of November 2018

J. KAMAU

JUDGE