



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**  
**CIVIL APPEAL NO. 43 of 2016**

**FLORA DELIGHT LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**IRENE KEMUNTOOSUMO.....RESPONDENT**

**JUDGMENT**

1. The issue presented in this appeal is a relatively straightforward one: can a Plaintiff obtain an interlocutory judgment on a plaint where a Defendant who has timeously filed and been supplied with a request for further information timeously requested by the Defendant under Order 2 Rule 1(2) of the Civil Procedure Rules is dissatisfied with the information supplied by the Plaintiff and has, therefore, not filed a Statement of Defence?
2. The facts are equally straightforward. The Respondent was the Plaintiff in Limuru Magistrates Civil Suit No. 137 of 2015. They served the Appellant, who was the Defendant in the suit, with summons to enter appearance on a Plaint on 27/05/2015. On 08/06/2015, the Appellant's advocates, Mwenda&Tanui Advocates, filed a Notice of Appointment. On 03/06/2015, the Appellant served the Respondent's advocates with the Notice of Appointment as well as a Request for Further and Better Particulars. An Affidavit of Service to that effect was filed in Court on 18/06/2015.
3. On 23/07/2015, the Respondent supplied the Appellant with the requested Further and Better Particulars.
4. Meanwhile, on 04/08/2015, the Respondent's Advocates filed a Request for Interlocutory Judgment under Order 10 Rules 6, 9 and 10. The request stated that the Defendant had been served but had failed to file a Defence. One day later, the Hon. Tanchu entered interlocutory judgment against the Appellants.
5. Five days later, on 11/08/2015, the Appellants proceeded to enter appearance and file a Defence. Unfortunately, by that time, interlocutory judgment had been entered.
6. As soon as the Appellant learnt of the entry of interlocutory judgment, its advocates promptly filed an application to set it aside vide a Notice of Motion dated 04/09/2015. That Application was contested and was canvassed by way of written submissions. The Learned Godfrey Oduor, Senior Principal Magistrate (as he then was), gave a short ruling whose pertinent part is the singular sentence thus:

I allow the application in the wider interests of justice subject to payment by the Defendant [Appellant] to the Plaintiff of throw away costs of Kshs. 40,000 within the next twenty one (21) days.

7. The Appellant is aggrieved by the award of costs hence this appeal. Its argument is simple and is the

same one pursued before the Learned Trial Magistrate. It argues that it was premature and un-procedural for interlocutory judgment to be requested for and entered when the Request for Further and Better Particulars had not lasted its natural life. The argument is based on the provisions of Order 2 Rule 1. Mr. Tanui who argued the appeal before me on behalf of the Appellant argued that once a Defendant has requested for Further and Better Particulars under Order 2 Rule 1, time for entering appearance is deferred until after four days after the Defendant has indicated to the Plaintiff that it is satisfied with the better and further particulars supplied or until four days after the Court rules that no further particulars can reasonably be required from the Plaintiff.

8. In this case, Mr. Tanui argued, the Appellant duly notified the Plaintiff that it needed Further and Better Particulars and the Plaintiff supplied them. However, the Appellant was dissatisfied with the information supplied and did not, therefore, serve the Respondent with the requisite notice under Order 2 Rule 1(3) that they were satisfied. However, instead of the Respondent moving the Court for an order that no further information could reasonably be asked from the Plaintiff, the Respondent proceeded to request for an interlocutory judgment. Mr. Tanui therefore argued that it was improper for the Court to have entered interlocutory judgment in those circumstances. If that is true, then it follows that the Appellant were entitled to set aside the interlocutory judgment as a matter of right. Consequently, it was unfair for the Learned Trial Magistrate to saddle them with the costs of their Application to set aside the interlocutory judgment.

9. The Respondent's attack on the grounds of appeal is two-pronged. First, Mr. Ondieki, who argued the appeal on behalf of the Respondent, cited Order 7 Rule 1. That Rule stipulates thus:

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 the defence and file an affidavit of service.

10. Mr. Ondieki argued forcefully that that this rule is couched in mandatory terms meaning that a Defendant must file its Defence no later than fourteen days after it has entered appearance. In his view, this Rule takes precedence over Order 2 Rule 1 relied on by the Appellant. The Appellant was required to file its Defence within 14 days and, as such, the failure to do so made it liable for the entry of the interlocutory judgment against it. Consequently, the entry of interlocutory judgment was proper and regular. It was, therefore, fair and proper for the Learned Trial Magistrate to order the Appellant to pay the costs when the Court exercised its discretion to set aside its interlocutory judgment "in the wider interests of justice."

11. Secondly, and mutually reinforcing this argument, Mr. Ondieki pointed out that the Civil Procedure Rules have now included Order 11 which has elaborate pre-trial procedures. It is here that a Defendant who is dissatisfied with the particulars included in a Plaintiff is expected to request and get further and better particulars. This, Mr. Ondieki submitted, was in the interest of expediting trials.

12. As stated in the preambular paragraph, the singular question here is what the impact of Order 2 Rule 1 is and whether it defers the time for entering appearance and filing a Defence as the Appellant argues or whether the provisions of Order 7 Rule 1 trump the apparent allowance in Order 2 Rule 1 by mandatorily requiring the Defendant to file its Defence within 14 days. If Order 2 Rule 1 defers the time for entering appearance as the Appellant argues, then, the interlocutory judgment was prematurely entered. Consequently, the Appellant would have been entitled to set it aside making the order for throw away costs against it improper.

13. In my view, the answer is as straightforward as the question and requires little analysis. Order 2 Rule 1 reads as follows:

(1) Every pleading in civil proceedings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and officers concerned.

(2) In such proceedings if the defendant considers that the pleading does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the summons for appearance has expired, by notice in writing to the plaintiff, request further information as specified in the notice.

(3) Where such a notice has been given, the time for appearance shall expire four days after the defendant has notified the plaintiff in writing that the defendant is satisfied or four days after the court has, on the application of the plaintiff by chamber summons served on the defendant not less than seven days before the return day, decided that no further information is reasonably required.

14. Under Order 2 Rule 1(2), the Defendant is entitled to request for more information when it feels that the information supplied in the Plaintiff is insufficient for it to craft its Defence to the Plaintiff's claims. The Defendant does this by providing a Notice in writing to the Plaintiff. The Appellant complied with the terms of this Rule.

15. Under Order 2 Rule 1(3) if the Plaintiff supplies the requested information, the Defendant has a further four days from the date they confirm to the Plaintiff that they are satisfied with the information supplied pursuant to the request, to enter appearance and, subsequently, file a defence. The Plaintiff is given protection from obnoxious requests for information under the self-same Order 2 Rule 1(3) by permitting a Plaintiff who considers that they have filed sufficient information to approach the Court to request it to so order. Again, where that happens, the Defendant would have four days from the date of the Court order to enter their appearance.

16. In the instant case, the Defendant notified the Plaintiff of their request and the Plaintiff filed the further and better particulars requested. However, the Defendant was not satisfied with the particulars provided. Therefore, the Defendant did not file the Notice of Satisfaction which would have triggered the four day period for entering appearance. This, then, meant that the only option open to the Plaintiff would have been to move the Court by motion to order that the information supplied was reasonably sufficient, and thereby re-start the four day period for the Defendant to enter appearance.

17. Rather than proceed as provided under Order 2 Rule 1(3), the Plaintiff requested for an interlocutory injunction. In doing so, they relied on Order 7 Rule 1 which, the Respondent says, is mandatory. I have cited the Rule *in extenso* above. The Respondent is wrong to rely on that Rule and it is my finding that that Rule does not conflict with Order 2 Rule 1. This is because Order 7 Rule 1 talks of the Defendant filing "his defence within fourteen days after he has entered an appearance in the suit..."

18. It seems clear to me that Order 2 Rule 1 is designed in a way that accounts for Order 7 Rule 1: Order 7 Rule 1 mandatorily requires a Defendant to file its Defence within 14 days of entering the Memorandum of Appearance (not within 14 days of filing Notice of Appointment of Advocates). This allows a party to file a Notice of Appointment of Advocates and then proceed to request for more information under Order 2 Rule 1(2). Order 7 Rule 1 does not kick in until the alternative paths to re-starting the timeline for entering appearance under Order 2 Rule 1(3) is triggered either by passage of four days after Notice of Satisfaction of information supplied or by a Court order given after the Court is so moved by the Plaintiff.

19. This, then, effectively disposes this appeal. It was improper and irregular for the Plaintiff to request and obtain an interlocutory judgment in the Trial Court in the absence of either a Notice of Satisfaction of the Information Supplied by the Plaintiff or a Court Order to the effect that the information supplied by the Plaintiff was sufficiently reasonable plus the passage of four days after either events.

20. Since the interlocutory judgment was irregularly entered, it follows that the Defendant was entitled to have it set aside as a matter of right. In that case, it was right for the Learned Trial Magistrate to set aside the interlocutory judgment, but it was not proper for the Learned Trial Magistrate to saddle the Defendant with the costs of the Application to set aside the interlocutory judgment. This is because I have found that the interlocutory judgment was improperly entered.

21. Consequently, the outcome of this appeal is that the Appeal is allowed. The part of the ruling and

order of the Honourable Magistrate ordering the Appellant to pay the Respondent thrown away costs assessed at Kshs. 40,000 is hereby set aside. The result is that the Appellant is awarded the costs of this appeal and the Application dated 04/09/2016 in the Trial Court.

22. The lower Court file to wit Limuru SPM Civil Suit No. 137 of 2015 to be sent back to Limuru Law Courts for due hearing and disposal.

23. Orders accordingly.

**Dated and delivered at Kiambu this 9<sup>th</sup> day of January, 2017.**

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**JOEL NGUGI**

**JUDGE**