



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 195 OF 2016

ROSEMARY WANJIRU KUNGU.....PLAINTIFF/RESPONDENT

VERSUS

DIRECTLINE ASSURANCE COMPANY LIMITED.....DEFENDANT/APPLICANT

RULING

1. The plaintiff filed a declaratory suit against the defendant on 26th July, 2016. On 25th August, 2016 she filed a request for judgment which led to the entry of interlocutory judgment against the defendant on 31st August, 2016.

2. It is that entry of the interlocutory judgment that has occasioned the defendant to file a notice of motion dated 12th October, 2016. The defendant seeks that the said judgment be set aside and that it be granted leave to file its statement of defence. The motion is brought under Order 10 rule 11 of the Civil Procedure Rules, section 1A, 1B & 3A of the Civil Procedure Act, Article 48, 50 and 159 (2) (d) & (e) and 159 (3) of the Constitution. It is premised on the grounds listed on the body of the motion and the supporting affidavits of Joan Oburu, the defendant's Claims Manager and Donald Okonda a process server. Ms. Oburu stated that at the time of filing the memorandum of appearance, the court file had been taken to the Deputy Registrar's chambers following a request for interlocutory judgment by the plaintiff. That the interlocutory judgment was entered after the defendant had entered appearance. That having been so entered, the judgment was irregular and unenforceable. That although the defendant had its defence ready, it could not file the same since the file was pending entry of interlocutory judgment in the Deputy Registrar's chambers. She stated that the defendant's defence raises triable issues and the matter should go for full hearing. That the plaintiff shall not suffer prejudice if the judgment is set aside since the defendant is a reputable insurance company and is capable of honouring the award that this court may ultimately find to be binding upon it.

3. Mr. Okonda stated that he was on 26th August, 2016 instructed by the defendant's advocates to file a memorandum of appearance of even date. That he on the same day proceeded to the High Court at Milimani Law Courts, Civil Division to effect the instructions and upon requesting for the court file he was informed that the same was not available in the registry. That he was therefore unable to file and only managed to do so on 30th August, 2016. That on 5th September, 2016 the defendant's advocates received a notice of entry of judgment of even date from the plaintiff's advocates notifying them that interlocutory judgment had been entered against the defendant. That he was instructed to peruse the file and found out that indeed interlocutory judgment had been entered against the defendant.

4. The plaintiff filed a replying affidavit on 1st November, 2016 in response to the application. She

contended that the defendant was served with the summons on 8th August, 2016 but the defendant refused to acknowledge service. That interlocutory judgment was entered 22 days after the date of service of summons but that the defendant has not stated why it took more than 22 days to file appearance. That the interlocutory judgment was entered regularly after the trial magistrate satisfied herself that the provisions of the law had been met. That judgment in the substantive suit was entered on 2nd July, 2014 and the defendant has neither appealed nor sought to pay the decretal amount of KShs. 3,000,000/=. That the plaintiff has written several letters to the defendant proposing a mode of settlement but the defendant has not heeded to any of the letters. That the defendant has not explained the 75 days delay (from the date of entry of interlocutory judgment) and the filing of this application which is an indication that the defendant is motivated by reasons other than justice and the merits of the case. She stated that the accident subject of this suit, left her paralyzed waist downwards and that she has spent over KShs. 10,000,000/= on treatment and continue to spend more. That the defence raises no triable issues. That she be paid half the suit amount (KShs. 7,521,028/=) and the other half be deposited in a joint interest earning account for the judgment to be set aside. That the defendant should pay KShs. 15,042,157.32 since the accident took place when the law capping the amount to KShs. 3,000,000/= was not in force and the insurance cover provided for full compensation for the amount awarded. That the defendant ought to have enjoined the insured in the substantive suit or even this suit as 3rd parties, since he is a stranger to the plaintiff but known to defendant.

5. Learned counsel Mr. Kuria submitted that the judgment was irregular since by the time the judgment was entered, the memorandum of appearance had been filed and served. Counsel relied on **Lal Chand Shah & Another v. Kenindia Assurance Company Limited (2004) eKLR** where the court held that if the memorandum of appearance is overlooked, the court should set aside the judgment. That interlocutory judgment should only be entered if the matter is seeking pecuniary or liquidated damages. He argued that the orders sought did not warrant entry of interlocutory judgment. On this aspect counsel further referred court to Order 10 rule 9 of the Civil Procedure Rules. He also referred to **Julia Mukami Kanyoko & 2 others v. Samuel Mukua Kamere & another (2013) eKLR** and **Ruth Gathoni Ngotho v. William Mwangi Wambugu (2012) eKLR**. He submitted that given that the judgment was irregular, it needs to be set aside as of right. He referred to **James Kanyiita Nderitu & another v. Marios Philotas Ghikas & another (2016) e KLR**. That even when the judgment is regular, leave to defend should be granted if the defendant can show that the defence raises triable issues. He cited **Irene Njoka v. Kenya Re-insurance Corporation Limited (2016)eKLR**. He stated that it is the defendant's case that if the plaintiff is entitled to the orders sought even that should be subjected to the statutory safeguard including section 10 (2) (c) of the Insurance (motor vehicle third party risks Act) as well as the binding terms between the defendant and its insured. That, that can only be proved through a hearing. He stated that there is no prejudice that will be occasioned to the plaintiff. That to the contrary, it is the defendant who stands to suffer as it had not been informed of the formal proof despite a requirement that if a party has filed an appearance they are supposed to be served. He stated that the application was filed six weeks after entry of interlocutory judgment and it was not filed with a view to delay the proceedings and that the delay has been explained.

6. Mr. Labasa learned counsel for the plaintiff on the other hand submitted that it was clear that the defendant filed the memorandum of appearance 22 days late after they were served with summons to enter appearance. That order 6 (1) prescribed the filing of appearance within 15 days and that was not done and it's a mandatory requirement. That if the appearance was on record the Deputy Registrar would have seen it. That even after filing appearance and learning of the interlocutory judgment the defendant took too long to file this application and, that it is meant to delay justice. He stated that the authorities cited are with regard to situations where there were irregular judgments unlike in this case. He stated that the defendant is to pay KShs. 3 Million but it is not willing to do so. That the defendant was given time to appeal but it did not. It was contended that the defence does not raise triable issues. That they have attempted to show that the counsel on record did not have legal capacity. It was stated that the plaintiff will be prejudiced since she has been paralyzed forever. He contended that no explanation has been given for the delay.

7. In response thereto Mr. Kuria submitted that it was the duty of the court registry to ensure that all documents are in the file and that the defendant should not suffer for such failure.

8. This court has considered the application, the affidavits and the submissions by the parties. Order 10 Rule 11 of Civil Procedure Rules provide that:-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The Court of Appeal when dealing with the issue of setting aside an interlocutory judgment in the case of **Philip Chemwolo and Mumias Sugar Co. Ltd v. Augustine Kubende (1982-1988)1 KAR 1036** had this to say:

“1. The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the case (Kimani v McConnell (1966) EA 547).

2. Where a regular judgment has been entered the court would not usually set aside the judgment unless it is satisfied there is a triable issue.”

9. At this point it is important to first consider whether or not the interlocutory judgment was regular. A perusal of the court record; (affidavit of service of Willis Agayi sworn on 9th August, 2016), reveals that the defendant was served with the summons but refused to acknowledge receipt. Service of summons, however, has not been denied by the defendant. The plaintiff then filed a request for interlocutory judgment on 25th August, 2016. That was after the lapse of the prescribed period of fifteen (15) days within which a defendant is required to enter appearance. Interlocutory judgment was entered 31st August, 2016 a day after the defendant filed its memorandum of appearance.

10. Order 10 rule 4 (1) of the Civil Procedure Rules, 2010 provides for judgment upon a liquidated claim where the defendant fails to appear or on before the day fixed in the summons or all the defendants fails to appear. It specifically provides:-

“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 of judgment 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.”

The application for request of judgment by the plaintiff was made under order 10 rule 10 of the Civil Procedure Rules 2010. The said rule provides;

“The provisions of rules 4 and 9 inclusive shall apply with any necessary modification where any defendant has failed to file defence”.....

Rule 4 (2)

“Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail to appear as aforesaid, the court shall on request in form No. 13 of appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

Order 10, rule 9 provides;

“Subject to rule 4, in all suits not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set down the suit for hearing”.

11. In the wordings of order 10 rule 4 (1) and (2) judgment can only be entered if the whole claim is liquidated or if part of the claim is liquidated.

A quick perusal of the plaintiff's claim herein reveals that it is not liquidated and none of its part is liquidated in which event, he ought not to have applied for judgment under order 10 Rule 10. In fact his claim lies under the provisions of order 10 rule 9 which does not provide for entry of judgment. He ought to have set down the case for hearing. His liquidated claim is pegged on a prayer for a declaration, such that for the court to grant the prayer, it must first make a declaration that the plaintiff is entitled to the said sum. In the premises, I find and hold that the interlocutory judgment was irregular.

See **Mint Holdings Ltd & Another v. Trust Bank Ltd [2000] eKLR** and **Felix Mathenge v. Kenya Power & Lighting Company Limited Civil Appeal No. 215 of 2002** where the Court of Appeal held as follows respectively:-

Mint Holdings Ltd & Another v. Trust Bank Ltd [2000] eKLR

"The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof"

Felix Mathenge v. Kenya Power & Lighting Company Limited Civil Appeal No. 215 of 2002

"The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."

12. The defendant has also averred that it has a defence that raises triable issues and that it should be given a chance to defend the suit. Even without going into the merits of the defence, I have perused the same and in my humble view, it raises some triable issues which ought to go for full trial. One of such triable issues is whether the defendant's liability arising from any accident involving motor vehicle KAW 625U was limited to a maximum of Kshs.2,000,000/- (2Million) in respect of third party bodily injuries. This issue can only be determined at full hearing.

13. In the premises aforesaid, I find and hold that the application dated 12th October, 2016 has merits and the same is granted as prayed.

14. The interlocutory judgment entered on 21st August, 2016 is hereby set aside and the defendant is granted leave to file a defence and defend the suit.

15. The defence to be filed and served within 7 days from the date of this ruling.

Dated, Delivered and Signed at Nairobi this 9th day of March, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of

..... ***For the Plaintiff/Respondent.***

.....***For the Defendant/Applicant***