



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 309 OF 2018

JOHNSON GACAU KIBERA..... PLAINTIFF

VERSUS

LAWRENCE MAINA MWANGI.....DEFENDANT

RULING

1. By Notice of Motion dated 6th June 2019, the defendant seek the following orders:

1. Spent.

2. Spent

3. That the interlocutory judgement against the defendant/applicant and/or the ex parte proceedings taken herein be set aside and the defendants/applicants be granted leave to defend this suit.

4. That the judgement in default of defence entered in favour of the plaintiff/respondent delivered on 24/12/2018 and the decree arising therefrom be set aside.

5. That the defendants/applicants be granted leave to file defence out of time and the Draft Statement of Defence annexed hereto be deemed as duly filed and served save for payment of filing fees.

6. That costs of this application be provided for.

2. The application is supported by an affidavit sworn by Lawrence Macharia Karanja, counsel then having conduct of the matter on behalf of the defendant/applicant. He deposed that after entering appearance, the advocate who was handling the matter failed to follow up filing of defence and later left the law firm. He added that failure to file defence was an honest and unintended mistake and that the applicant should not be punished for mistakes of his advocates. He further pointed out that the sum involved in the judgment is colossal and that the applicant has a defence that raises triable issues.

3. The plaintiff responded to the application through his replying affidavit sworn on 24th June 2019. He deposed that the advocates' failure should not be used as a defence and that the applicant has not demonstrated that he will suffer any substantial loss. He added that he is entitled to the fruits of the judgment.

4. The application was canvassed through written submissions. Both parties duly filed and exchanged submissions. I have considered the application, the affidavits and the submissions.

5. The plaintiff filed this suit on 8th November 2018 seeking judgment against the defendant for KShs 24,500,000 being the current open market value of L.R. Nakuru/Municipality Block 18/159 plus interest at court rates, general damages for non-disclosure, misrepresentation and fraud, costs and interest at court rates. The record shows that the defendant entered appearance on 29th November 2018 through the firm of Mirugi Kariuki & Company. There was however no statement of defence forthcoming and the plaintiff filed request for judgment for KShs 24,500,000 with interest in default of defence. The deputy Registrar duly entered judgment as prayed in the request on 24th December 2018.

6. The defendant's advocates were duly aware of the matter and the need to file defence. When dealing with an application seeking to set aside an order made in such circumstances, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**:

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), 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.

7. Counsel for the applicant has deposed that failure to file defence was due to an oversight on the part of the defendant's advocates owing to the fact that the advocate who was previously handling the matter left the firm. Owing to the circumstances in which the judgment was entered, I have unfettered discretion on whether or not to grant the orders of setting aside. From the material placed on record I am persuaded that the reason given for the failure to file defence is a valid one. There are many authorities to the effect that a litigant ought not to be made to suffer for the mistake of his counsel. See for example **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**. Interlocutory judgment was entered only as regards the liquidated aspect of the claim. The other aspects relating to general damages for non-disclosure, misrepresentation and fraud have to proceed to trial. In the circumstances, any prejudice that the plaintiff may suffer by having to wait for determination of the liquidated aspect of the claim can be compensated by an award of costs. Overall, justice will be better served by giving both parties an opportunity to prove their cases.

8. In the result, I am satisfied that Notice of Motion dated 6th June 2019 has merit. I make the following orders:

- a) **The interlocutory judgement that was entered against the defendant on 24th December 2018 and the decree arising therefrom are hereby set aside and the defendant is granted leave to defend this suit.**
- b) **The defendant to file and serve Statement of Defence within 14 (fourteen) days from the date of delivery of this ruling.**
- c) **The plaintiff shall have costs of the application.**

9. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 4th day of June 2020.

D. O. OHUNGO

JUDGE