



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. 2 OF 2017

RILEY FACON SECURITY SERVICES LIMITED.....PLAINTIFF

VERSUS

SAMUEL MICHAEL ONYANGO.....1ST DEFENDANT

SAMUEL OKELO DEYA.....2ND DEFENDANT

MAURICE ODUOR.....3RD DEFENDANT

DANIEL O. AJULU.....4TH DEFENDANT

PAUL OTIENO.....5TH DEFENDANT

GEOFFREY OBWON.....6TH DEFENDANT

RULING

By a notice of motion dated 20.4.15; brought under Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules, 2010 and Section 1A and 1B of the Civil Procedure Act Cap 21, Article 50(1) of the Constitution of Kenya and all enabling provisions of the law, the 4th defendant/applicant prays for orders that

1. The application be certified urgent and service thereof be dispensed with in the first instance
2. There be a temporary stay of proceedings and further movement in this matter pending the hearing and determination of this application *interpartes*
3. The *ex parte* judgment entered herein on 28.3.17 together with all consequential proceedings and orders be set aside
4. Leave be granted to the 4th defendant to file his defence out of time
5. Costs of this application be provided for

The application is based on the grounds among others that:-

- a. The applicant and his advocate had been under a mistaken belief that all pleadings had been filed and served as required by the law

b. The applicant has a good defence that raises triable issues

The application is also supported by two affidavits. The first was sworn on 20.4.17 by the 4th defendant/applicant's affidavit who reiterates the grounds on the face of the application. He further avers that he instructed the firm of M/S Behan & Okero Advocates and was under a mistaken belief that all pleadings had been filed and served as required by the law. He further avers that the application has been brought without unreasonable delay and that it is in the interest of justice that this case be heard on the merits. Annexed to the affidavit is a memorandum of appearance in this case filed on 1.3.17 marked **DOA-1**.

The second affidavit was sworn on 20.4.17 by Peter Mwesigwa, Advocate for the applicant practicing in the firm of M/S Behan & Okero Advocates. He avers that M/S Behan & Okero Advocates was instructed to represent the applicant in this matter. That he prepared a memorandum of appearance and filed it on 1.3.17 and subsequently prepared a statement of defence dated 23.3.17 annexed and marked **PM-1** which was inadvertently mixed up with other files in the office and was therefore not filed. The applicant also relied on a list of authorities filed on 29.5.17.

The application is opposed on the grounds set out in a replying affidavit sworn by the plaintiff on 2.5.17 in which he avers that the applicant has not tendered an explanation for the one month's delay in filing his defence and that the draft defence does not raise triable issues. The plaintiff filed a further affidavit sworn on 2.5.17 which is in answer to the pleadings in the draft defence. Plaintiff also relies on grounds of opposition filed on 2.5.17 and a list of authorities filed on 25.5.17.

The 1st defendant opposed the application filed grounds of opposition on 28.4.17 but did not attend the hearing of the application.

When the application came up for hearing on 30.5.17, Mr. Gachuba Advocate appeared for the plaintiff and Mr. Mwesigwa Advocate appeared for the 4th defendant/applicant and both made oral submissions.

In further exposition of the grounds in support of the application, Mr. Mwesigwa Advocate for the 4th defendant/applicant urged the court not to punish the applicant for blunders of counsel. He cited **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende [1986] eKLR** and submitted that the fault can be compensated by an award of damages. He further submitted that the draft defence raises triable issues and to this end relied on **Patel v EA Cargo Handling Services Ltd [1974] EA**. He additionally submitted that the plaintiff will not suffer any prejudice if the orders sought are granted and that the applicant is ready and willing to abide by any orders that court may give as a condition for grant of the orders sought.

Mr. Gachuba Advocate opposed the application on the ground that the *ex parte* judgment is a regular one since the applicant was duly served with the plaint. He faulted the applicant for not following up his case with his advocate to ensure that his defence had been filed and for indolence in that this application was filed 2 months after the filing of the memorandum of appearance. He additionally submitted that the draft defence is a mere denial and does not raise triable issues and on this issue relied on the further affidavit sworn on 2.5.17. Respondent relied on various authorities. In **Sameer Africa Limited Vs Aggarwal & Sons Limited (2013) eKLR**; an application to stay execution for stay of *ex parte* judgment was disallowed on the ground that the applicant **deliberately sought to obstruct or delay the course of justice**. In **Grace Wangui Ngenye v Chris Kirubi & another [2015] eKLR**; **Elizabeth Atieno Ayoo v Nairobi Star Publication Limited [2016] eKLR**, **AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR**, **Tom Odhiambo Achillah T/A Achilla T.O & Co Advocates v Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] eKLR**; **J.P Machira T/A Machira & Company Advocates v Wangethi Mwangi & another** relate to striking out of the Statement of Defence; **ICDC Vs Daber Enterprises Ltd. (2000) EA 7** relates to an application for summary Judgment against the defendant; **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR** relates to burden of proof and **Jakoyo Midiwo V Kenya Times Media Trust Ltd & another** relates to striking out of a defence that amounted to an admission of the plaintiff's claim and are therefore not relevant to this application.

I have considered the notice of motion in the light of affidavits, submissions and the lists of authorities. Prayers 1 and 2 have already been spent.

The principles upon which a court exercises its discretionary jurisdiction Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules, 2010 are well settled. The jurisdiction is exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. (See *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd [1996] eKLR*).

The issues for determination are set out as herein under.

i. Is the exparte judgment a regular one?

The applicant concedes that summons to enter appearance were served and the judgment on record is therefore a regular one.

ii. Does applicant have a good defence?

On whether the 4th defendant is entitled to set aside the said regular interlocutory judgment, he has to prove that he has a triable defence. In the case of *Patel v East Africa Cargo Handling Services Ltd (1974) EA. 75*, it was held that a regular judgment will not normally be set aside unless the court is satisfied that there is a defence on its merits. The same principle was restated in the case of *Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende (Supra)* which cited with approval *Evans v Bartlam*; that the applicant must produce evidence that he has a prima facie defence before the court's discretion can be invoked and exercised in his favour.

In the draft defence; the applicant denies the plaintiff's claim and also pleads that the words complained of were justified, true and privileged. Faced with a similar situation; Ogola J. in *Shailesh Patel t/a Energy Co. of Africa vs Kessels Engineering Works Pvt Ltd & 2 Others [2014] eKLR* stated:

I have looked at the proposed defence. It does not appear to me to address the issue in the same way the Defendant has addressed the issues in this application. It does not strike me to be a good defence. However, a good defence does not mean a defence which must succeed. It merely needs to satisfy the concept of a prima facie defence. I will therefore give it the benefit of the doubt.

Similarly; the 4th defendant's defence does not appear to address all the issues in the plaintiff's claim. I however acknowledge the 4th defendant's right under Article 50 of the Constitution to a fair hearing and find that it would be in the interest of justice to give him a chance to be heard.

iii. What conditions should be attached to leave to defend?

The memorandum of appearance was filed on 1.3.17. Mr. Peter Mwesigwa, Advocate for the applicant avers that he prepared a statement of defence dated 23.3.17 which was inadvertently mixed up with other files in the office and was therefore not filed. I have considered the case of *Philip Keipto Chemwolo & another v Augustine Kubende (Supra)* where the court of Appeal stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

Nonetheless, it was held in the case of *Mbogo & Another – Vs – Shah, EALR [1968] P. 13* that a court's discretion to set aside an exparte judgment or order for that matter is intended to avoid injustices or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

The current application was filed on one (1) month after the memorandum of appearance was filed. The delay has been explained and there is no evidence that the applicant deliberately seeks to obstruct the

course of justice (See **Stallion Insurance Company Ltd. Vs Rosemary Olao Civil Appeal NO. 85 OF 1998**). He nonetheless does not qualify for an unconditional leave to defend.

The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of cases, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

In the end; notice of motion dated 20.4.17 is allowed in the following terms:

1. The *ex parte* judgment entered herein on 28.3.17 together with all consequential proceedings and orders be and is hereby set aside
2. Leave be and is hereby granted to the 4th defendant/applicant to file his defence out of time
3. The 4th defendant/applicant has 14 days from today's date to file and serve his defence
4. The 4th defendant/applicant is condemned to pay to the plaintiff thrown away costs in the sum of Kshs. 10,000/- within 7 days from today's date

DATED AND DELIVERED THIS 13th DAY OF July 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Plaintiff/Respondent – Mr. Odongo holding brief for Mr. Gachuba

1st Defendant - Mr. Omuholo

2nd Defendant - Mr. Omukholo

3rd Defendant - Mr. Omukholo

4th Defendant/Applicant - No appearance

5th Defendant - Mr. Omukholo

6th Defendant - Mr. Omukholo