



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 166 OF 2014

AFRICA MANAGEMENT COMMUNICATIONS LIMITED.....PLAINTIFF

VERSUS

AIRTEL KENYA NETWORKS LIMITED.....DEFENDANT

RULING NO.2

1. This Ruling is in relation to 2 applications. The first application was brought by the plaintiff, in the process of executing the Decree against the Defendant.
2. The second application was brought by the defendant, who was asking the court to set aside the judgement which the court had entered in favour of the plaintiff.
3. In a Ruling dated 26th April 2016 this court had made the following observations;
 - “17. In determining this matter, I start by pointing out that the court file which I am using is a reconstituted file. The original court file is missing.*
 - 18. Therefore, the court has been unable to verify from the record of the proceedings whether or not judgement was granted by the court, on 30th June 2014 or at all.*
 - 19. But is also noted that the plaintiff has provided a copy of a Decree which shows that judgement was entered on 30th June 2014, and also that the Decree was issued on 25th July 2014”.*
4. In the light of the contents of the Decree it is presumed that judgement was indeed entered on 30th June 2014.
5. It is also evident from the face of the Decree that the plaintiff had filed an application dated 23rd June 2014, asking the court to enter judgement. That request was premised on the defendant’s failure to enter appearance and/or to file a Defence.
6. There is no dispute about the fact that the defendant had entered appearance on 6th June 2014. Therefore, it can only be presumed that judgement was entered because the defendant failed to file a Defence within 14 days of entering appearance. In effect, the defence ought to have been filed in court by 21st June 2014.

7. However, it is common ground that no defence was filed in court by 21st June 2014. It is not until 17th July 2014 that the Defence was filed.

8. Meanwhile, the plaintiff had requested the court to enter judgement, and the court had acted on that request.

9. As far as the plaintiff was concerned, the defendant cannot blame the court or the plaintiff for the entry of the judgement, because that step was taken after the lapse of the time allowed by law, for the filing of a defence.

10. The defendant did not challenge the fact that judgement was entered after the lapse of time which was available to it, to file its defence. However, the defendant complained that the plaintiff failed to comply with mandatory provisions of Order 36 rule 1 (3) of the Civil Procedure Rules. This is what the rule says;

“1 (1) In all suits where a plaintiffs seeks judgement for –

a liquidated demand with or without interest; or

the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose terms has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser;

Where the defendant has appeared but not filed a defence the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days”.

11. There is no doubt that Order 36 rule 1(3) of the Civil Procedure Rules is couched in mandatory terms.

12. However, it is equally true that Order 36 does not address situations where there are defaults in the filing of a Defence. Order 36 provides the requirements for “*Summary Procedure*”. In other words, a plaintiff need not wait for the lapse of the period which the defendant is allowed by law, to file a defence. Shortly after a defendant enters appearance, the plaintiff may make an application for summary judgement, provided that the claim falls within the scope specified in Order 36 Rule 1 (1).

13. When making such an application the plaintiff would be asserting that there was no defence to the claim.

14. And the defendant would need to satisfy the court that he ought be granted leave to file his Defence.

15. The court could either grant judgement or, in the alternative, the court may grant leave to the defendant to file his defence.

16. If the court decided to grant the defendant leave to defend himself, such leave may or may not be conditional.

17. The difference between the scenario envisaged under Order 36 and that under Order 10 is that the latter is a right to which the defendant is entitled to. In other words, each defendant has a right to file his Defence in answer to the claim lodged against him.

18. It is a right to be exercised within the time specified in the rules i.e within 14 days of filing the memorandum of appearance.
19. If the defendant failed to file his defence within the time specified, the plaintiff may request for judgement.
20. Upon receipt of the request for judgement the Court shall enter judgement, if the claim is for a liquidated demand only, with interest thereon.
21. But if the claim is for a liquidated demand together with some other claim, the court will enter judgement for the liquidated demand, with or without interest. In such an instance, the award for costs of the suit should await the determination of such other claim.
22. The point I am making is that “*Summary Judgement?* as envisioned under Order 36 is completely different from ”*Judgement – in – default of Defence?*”, as provided for under Order 10.
23. In this case, judgement was entered in default of Defence. It was not a summary judgement. Therefore, there was no requirement that the defendant be served with an application for judgement.
24. Indeed, there was no application for judgement, but a request for judgement.
25. Therefore, I find that the judgement as entered was regular and lawful.
26. If the judgement had been irregular or unlawful, it would have been set aside forthwith. However, the court has the discretion to determine whether or not a regular judgement may be set aside.
27. I find that the Defence on record raises serious issues of both fact and law.
28. The defendant also lodged a counter-claim against the plaintiff.
29. In my considered opinion, justice will be best served if the parties were both given an opportunity to canvass their respective cases. In order to enable that to happen, I do now set aside the judgement which was entered on 30th June 2014.
30. As a consequence of setting aside the judgement, the Decree ceases to exist as its foundation has been demolished.
31. Accordingly, the process of execution, which had been commenced, has been brought to a screeching halt. It follows therefore that the application dated 11th May 2016 is disallowed.
32. Nonetheless, the defendant will pay the costs of the application dated 13th June 2016 because it is the delay on its part, which led to the entry of judgement in default of Defence.
33. And because the process of execution flowed from a judgement which was, *prima facie*, regular, the plaintiff cannot be faulted to commencing the said process. Therefore, although the court has now put the execution process to an end, I order that the defendant will pay the costs of the plaintiff’s application dated 11th May 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of July 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Njuguna for Ogembo for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.