



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 614 OF 2012

EQUATORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

ANIMAL HEALTH ADVANTAGE LIMITED.....1ST DEFENDANT

CHARLES ONYANCHA.....2ND DEFENDANT

DR. J K MISOI.....3RD DEFENDANT

HON. CHRISANTHUS B. OKEMO.....4TH DEFENDANT

JOANNE WAMUYU.....5TH DEFENDANT

DAVID OLIWA.....6TH DEFENDANT

RULING

INTRODUCTION

1. The 3rd Defendant's Notice of Motion Application dated 14th February 2014 and filed on 18th February 2014 was brought under the provisions of Sections 1A, 3A, 63 (e) and 95 of the Civil Procedure Act and Order 9 Rule 9, Order 10 Rule 11, Order 42 Rule 6 (2), Order 50 Rule 6 as well as Order 51 Rule 1 of the Civil Procedure Rules. Prayers No 1, 2 and 4 were spent. It sought after Rules the following remaining orders:-

1) Spent.

2) Spent.

3) THAT the *ex-parte* Judgment in default of appearance or Defence entered against the 3rd Defendant/Applicant on the 8th day of November, 2013 and all consequential orders be varied, set aside or stayed pending the hearing and determination of this

Application.

4. **Spent**
5. **THAT the 3rd Defendant/Applicant be granted leave to file his Defence out of time.**
6. **THAT the costs of this Application be in the cause.**

THE 3RD DEFENDANT'S CASE

2. The application was supported by the affidavit of Dr. Joseph K. Misoi, the 3rd Defendant herein. It was sworn on 17th February 2014. His Supplementary Affidavit was sworn on 24th March 2014 and filed on 8th April 2014. His Written Submissions were dated 28th April 2014 and filed on even date. He also filed a List of Authorities dated 5th March 2014 on 24th March 2014.
3. He averred that the matter proceeded *ex-parte* and judgment was entered on 8th November, 2013. He denied ever having been served with Summons To Enter Appearance, Plaint or any pleadings related to the cause herein. His case was that he had no knowledge of this matter and therefore had no legal representation from the time of institution of the suit until interlocutory judgment in default of appearance or defence was entered. He was emphatic that his intended defence was tenable, meritorious and raised serious triable issues which could only be determined at trial.
4. He therefore urged the court to find that it was only fair and just that his application be allowed as prayed.

THE PLAINTIFF'S CASE

5. In opposition to the said Application, the Plaintiff filed its Replying affidavit sworn on 28th March 2014 by Brian Asin. The Plaintiff filed its Written Submissions dated 5th September 2014 on even date.
6. The Plaintiff averred that the 3rd Defendant was personally served with the Summons To Enter Appearance and the Plaint at his private office on 14th June 2013. It referred the court to a copy of the Affidavit of Service that was sworn by one Humphrey Kinyungu evidencing service upon the 3rd Defendant which facts he did not rebut.
7. It was its further contention that judgment in default of appearance was regular and should not be interfered with unless the court was satisfied that there was a Defence on the merits. The Plaintiff therefore urged the court to dismiss the 3rd Defendant's present application.

LEGAL ANALYSIS

8. It was not in dispute that there was an *ex-parte* Judgment in default of appearance and defence that was entered against the 3rd Defendant on 8th November 2013.
9. The Plaintiff submitted that the 3rd Defendant did not apply to cross examine the process server. Notably, the 3rd Defendant did not cross examine the process server on his Affidavit of Service. The presumption was therefore that he was served with the Summons To Enter Appearance and court pleadings- **See Baiywo Vs Bach (1986) KLR**. The interlocutory judgment entered on 8th November 2013 was thus a regular one.
10. The law is that a regular judgment will not normally be set aside unless there was an accident, inadvertence or excusable mistake or error on the part of a party or his counsel as was held in the case of **Shah Vs Mbogo & Another (1967) EA**. The 3rd Defendant had not pleaded any of the foregoing.
11. That notwithstanding, in determining an application for setting aside the court will also consider if a draft defence raises triable issues- **See Sameer Africa Limited Vs Aggarwal & Sons Limited (2013) eKLR**. The 3rd Defendant attached a draft defence in which he denied owing the outstanding amounts as claimed by the Plaintiff. This is a *prima facie* issue that has to be

- determined at trial. As the 2nd to 5th Defendants were all sued as guarantors to the loan granted to the 1st Defendant Company and the case is expected to proceed to trial, it would only be fair and just that the 3rd Defendant be granted his day in court along the other Defendants.
12. The court has wide and unfettered discretion to set aside any interlocutory judgment under Order 10 Rule 11 of the Civil Procedure Rules, 2010. The said Order provides 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.”

13. As was held in the case of **Linear Coach Limited Vs Alhusnain Motors Limited & Another (2013) eKLR** amongst other cases that were relied upon by the 3rd Defendant, a litigant should only be denied an opportunity to be heard in court as a last reason. This court was thus of the view that any prejudice suffered by the Plaintiff by setting aside the interlocutory judgment could be adequately compensated by an award of costs.

DISPOSITION

14. In the circumstances foregoing, the court found that the 3rd Defendant's Notice of Motion application dated 14th February 2014 and filed on 18th February 2014 was merited and the same was hereby allowed as follows:-
- a. **THAT the *ex-parte* Judgment in default of appearance or Defence entered against the 3rd Defendant/Applicant on the 8th day of November, 2013 and all consequential orders be and are hereby set aside.**
 - b. **THAT the 3rd Defendant/Applicant is hereby granted leave to file his Defence out of time within fourteen (14) days from the date of this Ruling.**
 - c. **The Plaintiff shall have leave to file a Reply to Defence, if need be within fourteen (14) days from date of service of the defence.**
 - d. **However, bearing in mind that the interlocutory judgment was a regular one as the 3rd Defendant was deemed to have been duly served with court process, he will bear the costs of this application and pay throw away costs of Kshs 10,000/= to the Plaintiff within fourteen (14) days from the date of this Ruling.**
15. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of July 2015

J. KAMAU

JUDGE