



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 398 OF 2012

WAYUA JAMES and PHILIP MUNYOKI KALUKI

(suing as the administrators of the estate of

JAMES KALUKI MUNYOKIPLAINTIFF/RESPONDENT

VERSUS

DANIEL KIPKORONG TARUS1ST DEFENDANT/ APPLICANT

DAVID KIBET RONO.2ND DEFENDANT/ APPLICANT

RULING

1. Four cases, that is High Court Civil cases numbers 398, 400, 159 and 399 all of 2012 were consolidated for the purpose of hearing the Notice of Motion dated 9th September, 2013 as the cause of action arose from the same set of facts. **Daniel Kipkorong Tarus** and **David Kibet Rono** are the applicants in all the four cases.
2. The Notice of Motion is brought under **Order 10 Rule 11** and **Order 51** of the **Civil Procedure Rules** and **Section 1A, 1B** and **3A** of the **Civil Procedure Act** and **Article 159 (2) (a) (b) and (d)** of the **Constitution of Kenya**. The Applicants are seeking the following orders:

(i) That the application herein be certified urgent and service of the same be dispensed with in the first instance.

(ii) That pending the hearing and determination of this application inter-partes this Honourable Court be pleased to stay execution of the decree herein together with all consequential orders emanating there-from

(iii) That this Honourable Court be pleased to set aside the interlocutory judgment entered herein against the defendants and all other consequential orders emanating there-from;

(iv) That upon prayer 2 and 3 above being granted, leave be granted to the defendants to file their defence out of time and that the filed draft defence be deemed as duly filed and served upon payment of the requisite court fees.

v) That the costs of the application be provided for.

3. The application is based on the grounds that interlocutory judgment was entered against the defendants/applicants as a result of a mistake on the part of their insurer to instruct a firm of advocates to defend the suits on time.
4. The application is supported by an affidavit sworn by **Daniel Kipkirong Tarus** on 9th September 2013. He averred that he is the registered owner of motor vehicle registration number KBG 901/ZD0482 which was insured by Amaco Limited. That on the 7th February 2009, the said motor vehicle was involved in an accident and consequently the deponent was sued and served with the summons to enter appearance. He advised his insurer who instructed the firm of Wambeyi Makomere & Company Advocates to enter appearance. That upon perusal of the court file, the advocates noted that a request for judgment had been entered. They proceeded to negotiate with the respondent to have the judgment set aside but were unsuccessful.
5. The deponent further stated that failure to enter appearance was not as result of negligence or lack of due diligence on his part and therefore requests this court to grant leave to file his defence out of time. That he has a good, solid and meritorious defence and if allowed to proceed to full trial it shall not be prejudicial to the respondents.
6. The Applicant's Notice of Motion is opposed. **Nicholas Kiania Njau**, an advocate of the High Court and having conduct of the case swore a Replying Affidavit on 18th November, 2013 on behalf of the respondents. He deponed that the accident occurred on 24th April, 2011 and not 7th February 2009 as stated in the applicant's Notice of Motion. That the application is sketchy and does not give details when actions were undertaken by the applicants or their advocates; that the Notice of Motion does not clearly state the date the accident was reported to the applicant's insurer and therefore the delay in instructing and filing a Memorandum of Appearance for the defence is not substantiated.
7. Counsel further denied that there were any negotiations for an out of court settlement and that the application is a further attempt by the Respondents to delay the matter. He therefore urged the court to dismiss the same with costs.
8. The application came up for hearing on 4th February, 2014. The learned counsel, **Miss Nasimiyu** submitted on behalf of the applicants. She reiterated the grounds raised in the application and supporting affidavit. She further relied on the decision of **Remco Limited vs Mistry Jadva Parbat Ltd**, (2002) 1 EA 233 (CCK) to submit that the court has discretion to set aside a judgment upon such terms as are just and that in exercising the discretion, the court's concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought to obstruct or delay the course of justice. As such, counsel stated that it was an excusable mistake on the part of the insurer because by the time it instructed counsel to defend the matter, judgment had been entered against the applicants. The learned counsel further submitted that the defence raises triable issues; that ownership of the motor vehicle is being disputed and the issue of negligence has been denied.
9. **Mr. Njau**, learned counsel for the respondents submitted that the omission by the applicant was deliberate as the application was evasive and devoid of dates which would show the sequence and urgency of the efforts by the applicant and the advocates.
10. He further urged the court to find that the defence does not raise triable issues. Contrary to submission of **Miss Nasimiyu**, the applicant had admitted ownership of the motor vehicle and that it was involved in a road accident through his supporting affidavit. He relied on the decision in **Kenya Horticultural Exporters Ltd V. Pape t/a Osirua Estate**, [1986] KLR.
11. Counsel denied there being negotiations between the parties. By a letter dated 28/5/2013, the firm representing the applicants enquired whether the respondents were agreeable to recording a consent to set aside the interlocutory judgment. In response, the Respondents declined the offer and suggested an out of court settlement. However the applicants did not respond and therefore negotiations never took off.

12. Counsel urged the court to be guided by the case of **Maina V. Muriuki**, (1984) KLR in exercise of its discretion where the court held that discretion is to be exercised on injustice but not to assist a party. He prayed the application be dismissed and in the alternative thrown away costs be paid on for the four cases.

ISSUES FOR DETERMINATION

13. After hearing the submissions of both Counsel this court finds the issues for determination;

- i. Whether the defence raises triable issues?
- ii. Whether the interlocutory judgments entered ought to be set aside and the defendant/applicants granted leave to file their defence so that the suit may go for trial?

ANALYSIS

14. This court has perused the applicants proposed defences that are to be filed in the event the interlocutory judgments are set aside. At paragraphs 3 and 4 of the defence the ownership of the motor vehicle registration KBG 901L/ZD 0482 and the occurrence of the accident is denied.

15. This court opines that ownership of the motor vehicle and the occurrence of the accident are both triable issues that constitute a defence. But upon perusal of the Supporting Affidavit of one of the applicants namely **DANIEL KIPKIRONG TARUS** which was made on the 9th September, 2013, therein at paragraph 3 and 4 under oath he admits and categorically states that he is the owner of the motor vehicle registration number KBG 901/ZD 0482 and also admits the occurrence of the accident which he states that he also reported to his insurers.

16. This court makes the observation that these two triable issues do not require to be ventilated at a full hearing as both issues have been admitted by the applicant and on oath.

17. Negligence and liability which are denied in the proposed defence are triable issues constituting a defence. Nevertheless and without going into the merits of the case this court concurs with the submissions of Counsel for the Respondent that the application and supporting affidavit is devoid of dates to show the sequence and the urgency of efforts made by both the applicants and or their advocates in seeking the insurers intervention.

18. The omission or failure to include dates in the application is a pointer to '**laches**' by the applicants in the manner they sought their insurers intervention and this constitutes delay and no convincing reasons or reasonable explanation was advanced by the applicant to satisfy this court that the delay was not intentional and was therefore excusable so as to enable this court exercise its discretion.

19. The applicants have also failed to satisfy the court that they will suffer prejudice in the event the reliefs sought are not granted. There is only an interlocutory judgment entered and no final decree has been issued. Therefore there is no imminent danger of execution of the decree that can befall the applicants. Which then means that the order sought for stay of execution does not wholly obtain.

20. The order sought is discretionary and convincing submissions must be made to satisfy the court that the applicant is deserving of this court's exercise of its discretion.

21. The delay and inaction by the applicant is found to be inexcusable and not justified and courts have never assisted an applicant who was indolent. I am guided by the equitable maxim "**equity aids the vigilant not the indolent**". Even the authority cited by the Applicants, **Remco Limited vs Mistry Jadva Parbat Ltd**, (2002) 1 EA 233 (CCK) is supportive of this maxim and does not act in their favour.

FINDINGS

22. This court finds that there are triable issues but some have been proved by admission. The applicants were indolent and this court finds that they are not deserving of this court's exercise of its discretion.

23. This court finds no reasons to set aside the interlocutory judgments likewise to grant leave to file defences.

CONCLUSION

24.The application is found to be devoid of merit and is hereby dismissed with costs to the Respondents.

25.As agreed this order shall apply to all the other suits namely HCCC Nos.400/2012, 159/2012 and 399/2012.

26.It is so ordered.

Dated, Signed and Delivered at Nakuru this 7th day of March, 2014

A. MSHILA

JUDGE