REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 344 OF 2010

JAMES THIONG'O GITHIRI……..……PLAINTIFF

VERSUS

NDUATI NJUGUNA NGUGI……..……1ST DEFENDANT

SAMWEL MUIGAI……2ND DEFENDANT

PETER MURIUKI MACHARIA……..……..3RD DEFENDANT

RULING

1. By a Notice of Motion dated and filed on 28th June 2012, the Applicants (*First and Second Defendants*) sought two main prayers -

> *(a) a stay of execution of the judgment and decree issued herein pending the hearing and determination of the application inter-partes; and*
>
> *(b) that this Honourable Court be pleased to set aside the ex-parte judgment and all consequential orders against the first and second defendants.*

2. The application was supported by the affidavits of NDUATI NJUGUNA NGUGI and CAROLINE KIBIWOTT, the Manager in-charge of the Legal Department of African Assurance Compay Limited both sworn on 28th June 2012 and was premised on the grounds that-

> *(a) that failure to enter appearance in time was due to inadvertence on the part of the First Defendant's insurer who were seized with this matter and delayed in giving instructions to Counsel to enter appearance on behalf of the defendants,*
>
> *(b) that the Defendants' insurers failure to instruct Counsel to enter appearance or file a defence was not intentional but based on the belief that they were still negotiating with the Plaintiff,*
>
> *(c) that the Plaintiffs Counsel proceeded to request for judgment and proceed with the matter ex-parte despite giving an indication that they would not do so without prior notice to the insurers,*
>
> *(d) that the first and second defendants were not even served with any of the court documents,*
>
> *(e) that the first and second defendants have a meritorious defence which raises triable issues.*

3. In response to the application, the Plaintiff James Thiongo Githiri filed a Replying Affidavit sworn on 9th July 2012. He denied the allegation that the Defendants' were not served and annexed the return of service sworn by Goerge Rasugu who alleges to have effected service of the Plaint and Summons to enter Appearance upon the First and Second Defendants on 18th February 2012. Further in compliance with the provisions of The Insurance *(Motor Vehicle Third Party Risk) Act (Cap 405, Laws of Kenya)* he served upon the first and second Defendants' insurer with statutory notices on 15th December 2010.

4. The Plaintiff acknowledged that the Defendants' insurer invited his Counsel to negotiate the matter out of court but he declined as judgment had already been entered against the Defendants. His Counsel did not give any undertaking not to proceed with the matter without prior notice to the Second Defendants' insurer. In any event, the defence does not raise any triable issues as the drivers of both vehicles were insured by the same insurer who cannot claim indemnity against its own insured.

5. The application was canvassed by way of written submissions. The three issues raised in this application are **firstly** whether the first and second Defendants were properly served, **secondly** whether the defence herein raises triable issues which ought to be canvassed at full hearing and thirdly whether it is in the interest of justice that the judgment entered ex-parte on 4th May 2012 be set aside. I will consider these grounds as well as the Defendants/Applicants' case in the subsequent paragraphs of this Ruling.

6. The thrust of the application is premised upon the provision of Rule 10 of Order IXA which 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."*** In the case of **SHAH vs. MBOGOH [1967] EA. 116**, Harris J. held that the Court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought *(whether by evasion or otherwise)* to obstruct or delay the cause of justice, the motion should be refused.

7. On service, George Rasugu, deponses in his affidavit sworn on 23rd February 2011, that he served the Defendants with Summons to Enter Appearance together with the Plaint on 18th February 2011. He alleges that on that day he went to Nagil Travellers in Olkalou Township where he found a Mr. Kamau, a driver of the Second Defendant's motor vehicle registration number KAV 007J. After introducing himself and informing him of the purpose of his visit, Mr. Kamau called the First Defendant on his mobile phone number 0727 658306. The First and Second Defendants came shortly after being called and they were served with copies of the Summons and Plaint. The process server knew both defendants personally having served them with court documents before.

8. The First Defendant on his part alleges that he was on the material day at Kenyatta University attending his postgraduate studies and that he resides in Gilgil and not in Olkalau where the process server alleges to have served him. He denies that he is the owner of the said phone number or being a resident of Olkalou. He however does not deny that he carries on business at Nagil Travelers in Olkalou where service was effected. There is also evidence that on the same day, the Defendants were served with summons and Plaint for another suit, CMCC NO. 1172 of 2010 which was subsequently settled.

9. Having considered the above, I am satisfied that the Plaintiff has been able to demonstrate, on a balance of probability that the Defendants were duly served with copies of the Plaint and Summons to Enter Appearance. Consequently, the interlocutory judgment entered on 28th July 2011 in default of appearance or defence was proper. In addftion, the Defendants were served with hearing notices for 23rd January 2012 when the matter was coming up for formal proof and a return of service was filed on 28th July 2011. Again they failed to attend court for the said purpose and as a result, the Plaintiffs case was deemed uncontroverted and judgment entered accordingly on 4th May 2012.

10. However, there is evidence that the Plaintiffs Counsel represented other persons who were involved in the same accident the subject of this suit against the three named Defendants herein and were annexed

and marked as **"JTG 8"** letters of settlement. In those matters, the Plaintiffs Counsel negotiated directly with the First Defendant's insurer and they were settled out of court. It appears that it was on this basis that the the Defendants failed to enter appearance or file their defences as they presumed that matter being similar their insurer would take up the matter with the Plaintiffs Counsel as in the other cases.

11. Indeed the First Defendant's insurer by the affidavit sworn by its legal manager, admits to intending to settle the matter out of court. However, they were delayed while conducting investigations as the policy number indicated in the statutory notice, was not that of their insured. Thus by the time they concluded their investigations and wrote the letter inviting the Plaintiffs Counsel to negotiate and further seeking an undertaking that the Plaintiff would not seek nterlocutory judgment in default of appearance or defence without 30 days prior notice, interlocutory judgment had already been entered.

12. In addition, the defence raised by the Defendants is meritorious. The accident subject matter of the suit involved two motor vehicles, and the First and Second Defendants claim indemnity or contribution from the owner of the second motor vehicle. Although it was alleged that both vehicles were insured by the same insurance company it had not, in exercise of its rights of subrogation taken up the matter in its own name. Thus the claim was still against the First and Second Defendants who therefore have a right to challenge the apportionment of liability.

13. For these reasons, I find that the First and Second Defendants or their insurer did not act in bad faith with an intention to defeat the Plaintiff's claim. Despite showing laxity as no steps were taken to set aside the interlocutory judgment or to appear for formal proof, having been notified of the same by the letter dated 6th April 2011, I find that it is in the interest of justice that the Defendants are heard and the suit determined on its merits.

14. The upshot is that the application dated 28th June 2012 is allowed with the following orders-

(a) The Interlocutory judgment entered on 28th July 2011 and ex-parte judgment made on 4th May 2012 be and are hereby set aside,

(b)The Defence annexed to the application be deemed as properly filed upon payment of the requisite fees,

(c) Parties shall take hearing dates for the suit at the registry on priority basis,

(d) The Plaintiff is awarded thrown away costs of the suit,

(e) The Costs of this application shall be in the cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of June 2014

M J ANYARA EMUKULE

JUDGE