



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 221 OF 2012

QAGES INVESTMENT LIMITED.....PLAINTIFF

V E R S U S

AFRICA MERCHANT ASSURANCE CO. LTD.....DEFENDANT

**RULING**

1. Defendant filed a Notice of Motion dated 6th February 2013 on which it effected amendment without leave of the Court. The amended Notice of Motion is dated 13th February 2013. Since leave of the Court was not sought, the Court will only proceed to consider the Notice of Motion dated 6th February 2013. By that application Defendant seeks-

- **the setting aside of interlocutory judgment and consequential order;**
- **that the Defence dated 31st January 2013 filed in Court on 4th February 2013 be deemed as though filed within time.**

2. I have read and considered the parties affidavits, written submissions and their authorities. I shall however proceed to set out what the record shows in the Court file.

3. Plaintiff filed its Complaint on 14th December 2012. According to the affidavit of service of Titus Mbuvi sworn on 30th January 2013 the Defendant was served with the Summons to enter appearance and Complaint on 19th December 2012. The Summons served on the Plaintiff provided that appearance was to be filed by Defendant within eleven (11) days of service. According to my calculation appearance was due on 24th January 2013. That period is determined by Order 50 Rule 4 of the Civil Procedure Rules (**the Rules**) which excludes the period between 21st December to 13th January in computation of time. That order states-

**“4. Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:**

**Provided that this rule shall not apply to any application in respect of a temporary injunction.”**

4. Defendant filed an appearance on 15th January 2013. The Defence, as provided by Order 7 Rule 1 of

the Rules, ought to have been filed within fourteen days after filing of the appearance. The Defence was therefore due on 29th January 2014. Defendant however filed its Defence on 4th February 2013. It was filed six (6) days out of time.

5. What however I find to be irregular is what is recorded in the proceedings. The proceedings show that interlocutory judgment in default of Defence was entered against the Defendant on 4th January 2013 by the Deputy Registrar. Although both Plaintiff and Defendant in their affidavit evidence state that, that interlocutory judgement was entered on 4th February 2013, that is not what the record of the proceedings shows. It follows the interlocutory judgment was entered by the Deputy Registrar before the expiry of time for filing a Defence.

6. The Court is given discretion by Order 10 Rule 11 of the Rules to set aside interlocutory judgment and its consequential orders. The Court in exercising that discretion should be guided by the need to do justice to the parties. The Court of Appeal in the case **PITHON WAWERU MAINA -Vs- THUKA MUGIRIA [1983]eKLR** summarized the guiding principles as follows-

**“Firstly, as was stated by Duffus P in Patel v EA Cargo Handling Services Ltd [1974]EA 75 at 76 C and E:**

**'There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.'** Secondly, as Haris J said in Shah v Mbogo [1967]EA 116 at 123B: **"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."** That judgment was approved by the Court of Appeal in Mbogo v Shah [1968]EA 93. And in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: **'I consider that under Order IX rule 20, the discretion of the Court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the Appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.'**

7. There are two circumstances that the Court is ordinarily called upon to set aside interlocutory judgment. Firstly is where the Defendant has failed to file his pleading within the period set by the rules. The second is where judgment is irregularly entered.

8. The present case in my view fall under the second limb above. Judgment as I stated before was recorded by Deputy Registrar on 4th January 2013. Time for filing Defendant's appearance and Defence had not by then expired. Accordingly Defendant is entitled to the setting aside of that judgment as of right, *ex debito justitiae*. I am persuaded by the case **SHAILESH PATEL T/A ENERGY COMPANY OF AFRICA V KESSELS ENGINEERING WORKS PVT. LIMITED & 2 OTHERS [2014]eKLR** by Justice E. K. O. Ogola where he stated-

**“In the case of CHARLES MWALIA -Vs- KENYA BUREAU OF STANDARD, HCCC NO. 1058 OF 2000 NAIROBI, Justice Ringera set aside a default judgment so that parties can approach the judgment seat with the merits of their respective cases. In that case, the Judge had come to the conclusion that the ex-parte judgment was irregular.”**

9. Over and above that I do find that Plaintiff irregularly executed the interlocutory judgment before the costs were either certified or taxed. The Plaintiff indeed moved with unmatched speed to get the judgment amount from the Defendant.

10. In my perusal of the pleadings I did also find that the Plaintiff failed to pay to the Court the full

amount for its Plaintiff. Plaintiff's claim is for judgment for Kshs. 8,000,000/-. That figure is tucked away in one of the paragraphs of the Plaintiff and only referred to in the prayer part of the Plaintiff as follows-

**“Judgment in terms of paragraph nine (9) hereabove.”**

For that Plaintiff, Plaintiff paid Kshs. 4,775/-. That is clearly an under payment. Accordingly this suit shall be stayed up and until the Plaintiff pays the correct Court fees.

11. In conclusion these are the orders of the Court-

**a. The interlocutory judgment entered on 1st April 2013 is hereby set aside.**

**b. The Defendant's Defence filed on 4th February 2013 is deemed as though filed within time.**

**c. The Plaintiff having under paid to Court for its Plaintiff this suit is hereby stayed until the correct payment is made and once paid the Plaintiff shall move the Court by formal application to vacate that stay.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**