



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL SUIT NO. 229 OF 2011**

**JULIA MUKAMI KANYOKO.....1<sup>ST</sup> PLAINTIFF**

**SIMON NGETA KNAYOKO .....2<sup>ND</sup> PLAINTIFF**

**PERPETUA WANJIRU KANYOKO.....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**SAMUEL MUKUA KAMERE.....1<sup>ST</sup> DEFENDANT**

**ANNE WAMBUI KAMERE.....2<sup>ND</sup> DEFENDANT**

**RULING**

The defendants by a Notice of Motion application dated 6<sup>th</sup> December, 2012 under Order 10 Rule 6, 9, 10 & 11, order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeks the following orders:

1. That the interlocutory judgment entered herein and all consequential orders made thereafter be set aside;
2. That the defendant herein be given leave to file a defence within such time as the court may deem fit.
3. That the costs of the application be provided for.

The application is founded on the grounds set out on the face of the application and on the grounds set out in the annexed affidavit of Zahira Ahmed Sajan Advocate sworn on 6<sup>th</sup> December, 2012 in support of the application.

The brief facts of the matter are that the plaintiffs filed the instant suit on 20<sup>th</sup> May, 2011 and the defendants were served with the summons and entered appearance through the firm of Gachanja & Company Advocates on 29<sup>th</sup> June, 2011. The Defendants did not file a defence within the prescribed period and the plaintiffs on 29<sup>th</sup> July, 2011 filed a request for interlocutory judgment and the Deputy Registrar on 2<sup>nd</sup> August 2011 entered interlocutory judgment against the defendants. It is this interlocutory judgment that has provoked the instant application.

The defendants in support of the application contend that the entry of interlocutory judgment on the part of the Deputy Registrar in favour of the plaintiffs was irregular as it was unprocedural and was not in conformity with the provisions of the Civil Procedure Rules; the defendants hinge their application on the provisions of Order 10 Rules 4-7 which provide for instances when interlocutory judgment may be entered for non appearance. The defendants contend that the Civil Procedure rules only provide for entry of interlocutory judgment where there is a claim for a liquidated sum only or a liquidated claim with some other claim and further where there is a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. These are the instances that Order 10 Rules 4, 5, 6 and 7 cover.

The Defendants argue that the plaintiff's suit does not fall under any of those categories and contend that the plaintiff ought to have taken the quee from the provision of Rule 9 and proceeded to fix the sit for hearing. Order 10 Rule 9 provides thus:

**9. Subject to rule 4 in all suit not otherwise specifically provided for by this order where any party served does not appear the plaintiff may set down the suit for hearing.**

The plaintiffs in response to the defendants submissions has contended their application was merited and properly before the court and cited Order 10 Rule 3 that provides thus:-

**3. Where a Defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff strike out the memorandum of Appearance or the Defence as the case may be and make such order as it deems fit in the circumstances.**

The above provision in my view envisages a situation where the memorandum of appearance or the defence has been filed by the Defendant but the same is not served within the prescribed period. This is not the case in the instant matter as the defendants have not filed any defence but have failed to serve the same. In the instant application we are dealing with the situation where no defence has been filed by the defendants after they filed a memorandum of appearance.

Rules 4 to 9 of orders 10 deal specifically with the situation where a defendant who has been served with summons to enter appearance has failed to appear and the same do not deal with the situation where a defendant has appeared and filed a memorandum of appearance. Order 7 Rule 1 of the Civil Procedure Rules sets out what a defendant who has appeared is supposed to do and provides thus:-

- 1. Where a defendant has been served with a summons to appear he shall unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.**

The consequence for failing to file a defence within the prescribed period is provided under Order 10 Rule 10 that provides as follows:

**10. The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file in defence.**

The issue that arises is whether the Deputy Registrar was right to enter an interlocutory judgment in the instant case having regard to the provisions of order 10 outlined above. The parties have canvassed this issue in their written submissions extensively and as I have intimated the instances in which interlocutory judgment can be entered for default to enter appearance and/or file a defence does not include such an instance as in the present case since it does not fall under any of the categories in Order 10 Rules 4 to 7 and that this case would fall under Order 10 Rule 9 where the plaintiff would have been entitled to fix the suit for hearing in default of a defence on the part of the defendants. I consequently agree with the applicants counsel that the entry of interlocutory judgment was irregular in the circumstances of this case and that the plaintiff should have fixed the suit for hearing.

The ruling of Hon. Justice Edward Muriithi in **Mombasa HCCC No. 171 of 2008** where he considered the provisions under Order 10 Rules 4-7 has been referred to me where he held that as the suit was for trespass and injunction it fell under the category of other suits not specifically provided for under Order 10 and therefore interlocutory judgment could not have been entered and proceeded to set aside the interlocutory judgment *ex debito justitiae*. I agree with Hon. Justice Muriithi in his exposition of the application of Order 10 of the Civil Procedure Rules.

The plaintiffs counter the Defendants position by stating that the entry of the interlocutory judgment only meant the plaintiffs could fix the case for formal proof hearing and that the defendants were on every occasion invited to fix the matter for hearing. The plaintiffs further contend the defendant has not explained the delay in filing the defence and neither have they demonstrated they have a probable or good defence to enable the court to grant them leave to file a defence out of time. Indeed the defendants advocates firm on record filed a Memorandum of Appearance on 29<sup>th</sup> June 2011 and the plaintiffs did not apply for the impugned judgment until 29<sup>th</sup> July, 2011 a whole 17 days after the period allowed for filing of defence had lapsed. The defendants instant application to set aside the interlocutory judgment entered on 2<sup>nd</sup> August 2011 was not filed until 7<sup>th</sup> December, 2012 (15 months later). The defendants application in addition to the prayer to set aside the interlocutory judgment seeks to be given leave to file a defence within such time as the court may deem fit. It is instructive that even after filing the application the Defendants did not seek to have a date for the application and merely waited for the plaintiffs to fix the suit for formal proof only for them to draw the courts attention to the fact that there was a pending application before the court *vide* the defendants advocates letter of 4<sup>th</sup> April, 2013 which they sought to be given the same hearing date as the formal proof hearing.

Whereas I have no hesitation to set aside the Deputy Registrar's order of 2<sup>nd</sup> August 2011 entering interlocutory judgment I am not persuaded I should exercise my discretion to extend time to the defendants to file a defence out of time. The defendants conduct has been dilatory and I am of the view that the delay in bringing the instant application is inordinate and inexcusable. The defendant has not offered any valid reason why no defence was filed within the prescribed period and why it took the defendants over 15 Months to bring this application. To compound the matter the defendants have not demonstrated they have a good defence to the plaintiffs claim and hence there is no basis upon which the court can exercise its discretion.

The defendants should have annexed a draft of intended defence to enable the court to consider whether such defence raises any arguable and/or triable issue. The grant of leave to defend cannot be automatic and an applicant must offer a viable explanation for the delay and should satisfy the court he has an arguable defence and one that raises a triable issue.

The case of **Shah vs. Mbogo (1967) EA 116** lays the principles upon which a court may exercise its discretion to set aside an *ex parte* judgment. I hold that the same principles would hold good where a defendant seeks the leave of the court to file a defence out of time.

The plaintiffs in the instant case have demonstrated that there was a contract of sale and the purchase price save for a balance Kshs. 250,000/= out of the total of Kshs. 3,500,000/= has been paid to the Defendants and the plaintiffs state they have been ready and willing to pay the balance against completion. Without any draft defence it is not possible to determine whether the defendants have an answer to the claim by the plaintiff.

In the premises I would set aside the order by the Deputy Registrar of 2<sup>nd</sup> August 2011 entering interlocutory judgment in favour of the plaintiff but I decline to grant the defendant leave to file a defence out of time. I order that the plaintiffs fix the suit for hearing by way of formal proof and that the defendants be served with a hearing notice and be entitled to cross examine the plaintiffs witnesses during the hearing.

I make no orders as to costs in respect to the defendant's application.

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants