



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 321 OF 2010

RUTH GATHONI NGOTHO-KARIUKI.....PLAINTIFF

VERSUS

WILLIAM MWANGI WAMBUGU..... DEFENDANT

RULING

This suit was originated by way of a plaint dated 23rd June 2010 and filed the same day. According to the plaint the plaintiff seeks the following orders:

- a) **Damages for the libellous statements**
- b) **Exemplary damages for continued libel and slander**
- c) **A permanent injunction to restrain the Defendant whether acting by himself, his agents, servants or any other person, agency or authority from publishing or making libellous, slanderous and false statements against the plaintiff in reports, meetings or any other fora.**
- d) **An order directing the Defendant to tender a written apology that meets the approval of the plaintiff.**
- e) **An order expunging the report/appraisal complained of from the P.C.E.A Kikuyu Hospital and all the P.C.E.A church records.**
- f) **Costs of this suit and interest on (a) and (b) above.**
- g) **Such other and further orders and or remedies this Honourable court may deem fit, just and expedient.**

The cause of action herein arises from a report purportedly authored by the Defendant on or about 29th March 2010.

From the record, there is an affidavit sworn by one **James Ndungu** on 26th July 2011 in which the deponent, a process server of the Court, deposes that he served the firm of **Amuga & Company Advocates**, who had confirmed that they had instructions to receive summons and plaint on behalf of the defendant, with the application and the plaint on one hand and the summons to enter appearance on the other hand on 24th June 2010 and 16th November 2010, respectively. On 26th July 2011, the plaintiff requested for the entry of interlocutory judgement in default of appearance and defence. Pursuant to the said request the Deputy Registrar of this Court on 8th September 2011 recorded an order entering:

“interlocutory judgement against the Defendant herein William Mwangi Wambu as prayed in the plaint – The award of costs shall await Judgement after the matter is fixed for formal proof”

The defendant now comes before this court vide an application dated 10th May 2012 seeking, in the main, an order that the said judgement be set aside and that he be granted leave to file a defence to the said claim. The application is supported by an affidavit sworn by **Paul Amuga**, his advocate in which the deponent states that the defendant instructed his firm to represent him in this case when served with the application dated 23rd June 2010 and that the firm filed a notice of appointment and a replying affidavit to the application which has, however, never been prosecuted to date. On preparing an application to have the suit dismissed towards the end of April 2012, the deponent discovered that the said judgement had been entered against the defendant. He, however, confirms that summons to enter appearance were indeed, served upon the defendant through his firm on 16th October, 2010. However, the person who received the same, his court clerk, failed to bring the same to his attention as the same. According to the information gathered from the said clerk, the clerk inadvertently misplaced the same. According to the deponent, the defendant has a good defence and the plaintiff will not be prejudiced by the setting aside of the judgement.

The application was opposed by an affidavit sworn by Kennedy Kiage, the plaintiff’s advocate who apart from reiterating that the plaintiff’s advocates were duly served avers that no reasons have been adduced as to why the defendant neither appeared nor filed any defence for a period of one year between the time of service and the entry of the interlocutory judgement. That delay, it is deposed is inordinate and hence the excuse not plausible and the reason adduced is not sufficient to entitle the court exercise its discretion. The defendant’s position is therefore that the application is misconceived, frivolous and an abuse of the process of the court and should be dismissed as the applicant has not even offered to pay costs or provide security.

On the day the matter came up for hearing only **Mr. Amuga** for the applicant was present and he relied on the contents of the said supporting affidavit and further submitted that in any case the plaintiff’s claim did not entitle him to an entry of interlocutory judgement and hence the judgement was entered without jurisdiction.

I have considered the foregoing.

Entry of default judgement is provided for under Order 10 rules 4, 5, 6 and 7 of the Civil Procedure Rules. It is important to set out the full text of the said provisions for the proper understanding of their scope, extent of application and relevance. The said provisions are as follows:

“4. (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaint makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff’s right to proceed with the action against such as have appeared.

6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request

in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

From the foregoing it is clear that a final judgement can only be entered where the suit is for a liquidated demand only. Where, however, the claim is for a liquidated demand and some other claim, a default judgement can only be entered in respect of the liquidated demand while the other claims proceed to hearing. Where, on the other hand, the claim is for pecuniary damages only or for detention of goods with or without pecuniary damages, the court is only entitled to enter interlocutory judgement and fix the matter for assessment of the quantum of damages or value of goods (a procedure that is popularly known, erroneously though, as formal proof). It is only in respect of the foregoing claims that a default judgement whether final or interlocutory can be entered. In all other claims the plaintiff must proceed under rule 9 of Order 10 and set the matter for hearing.

What comes out clearly in this case is that the prayers in the plaint herein do not fall under any of the foregoing provisions. There is no doubt that the claims were not liquidated. Whereas part of the plaintiff's claim as regards damages were pecuniary in nature, the other claims for permanent injunction, apology and expunging of records cannot by any stretch of imagination be termed as pecuniary. Nor do they fall under the claims for detention of goods with or without pecuniary damages. However, on the plaintiff's application, the Deputy Registrar, on 8th September, 2011 purported to enter judgement as prayed and fixed the matter for formal proof.

A similar situation came before the Court of Appeal for deliberation in the case of **Kenya Commercial Bank Ltd. vs. Joshua Aggrey Oburi & Another Civil Appeals Nos. 199, 200 & 201 of 1999**, in which the Court of Appeal was categorical that unless the matter falls within the provisions aforesaid the deputy registrar has no power to enter an interlocutory judgement and therefore judgement should be set aside *ex debito justitiae* since such judgement is a nullity. See also **Mint Holdings Ltd & Another Vs. Trust Bank Ltd Civil Appeal No. 249 of 1999 [2011] eKLR.**

In the result, the judgement purportedly entered herein on 8th September, 2011 is a nullity and is set aside on that ground.

Even if the same were not a nullity, I am satisfied that explanation given in the affidavit sworn by **Paul Amuga** herein in support of the instant application, being an oversight on the part of the defendant's legal counsel, justifies the exercise of the court's unfettered discretion in setting aside the judgement. There is no allegation of prejudice caused to the plaintiff and the issues raised in the draft defence are not so frivolous that it can be said to be unarguable. Consequently, the application dated 10th May 2012 is allowed with the effect that the judgement is set aside and the applicant is granted leave to file his defence together with witness statements and list and copies of documents as required by the law within 14 days. The costs of this application will be in cause.

Ruling read, signed and delivered in Court this 16th day of July 2012

G.V. ODUNGA
JUDGE

In the presence of: Mr. Nyakundi for Plaintiff

Mr. Amuga for Defendant

