



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Civil Case 877 of 2010

DASAHE INVESTMENT LTD.....1ST PLAINTIFF/RESPONDENT

SAMWEL WARUGU KIMOTHO.....2ND DEFENDANT/RESPONDENT

VERSUS

UFANISI CAPITAL & CREDIT LTD.....DEFENDANT/APPLICANT

R U L I N G

1. The Application by the Defendant is dated 2nd August, 2012 and is brought under Order 10 Rule 11, Order 22 Rule 11, Order 51 Rule 1 and Rule 3(2) of the High Court Practice and Procedure Rules for orders, inter alia, that a temporary stay of execution of the judgment and decree issued herein, and that the judgment entered on 16th December, 2011 and all the consequential orders be set aside. The Application was supported by the Affidavit of Wilson Kipkot sworn on 2nd August, 2012. The grounds relied upon by the Defendant were set out in the body of the application and reiterated in the Supporting Affidavit. The Defendant contended that the judgment was entered after it had filed its statement of Defence dated 6th September, 2011, that the judgment entered on 16th September, 2011 was unprocedural and irregular and that the Plaintiffs had acted maliciously and mischievously and in an attempt to wind up the Defendant. A Winding-Up Petition No. 15 of 2012 based on the judgment entered on 16th September, 2011 had already been filed by the Plaintiffs and subsequently advertised on 27th July, 2012. The Defendant contended that the Plaintiffs' intention was to scuttle its action for recovery of Kshs. 31.5 Million against them. It was submitted for the Defendant that even after the lapse of 14 days, the Defendant could still file its Defence provided the request for judgment in default had not yet been acted upon and that the Defence having been filed it acted as a bar to any judgment being entered. The Defendant urged that the application be allowed.

2. On their part, the Plaintiffs filed a Replying Affidavit in opposition sworn by David Some Barno on 9th August, 2012. They contended that the Defence was filed out of time and no explanation whatsoever had been given to explain the alleged delay, that the Request for Judgment had been made on 2nd September, 2011 and that the judgment entered was proper since the Defendant had not filed its Defence when judgment was requested. The Plaintiffs further contended that the Defendant had waited until the judgment was to be executed that he took action and filed its Defence on 6th September, 2011. It was submitted on their behalf that there was no case by the Defendant in which the court would exercise its discretion in the matter and that regardless of the Defendant filing its Defence, the delay in filing the same must be explained.

3. The Defendant was properly served with the plaint and summons on 20th July, 2011 by registered

post. It entered appearance on 10th August, 2011. The Defendant should have filed its Defence by 24th August, 2011 being fourteen (14) days after the filing of the Memorandum of Appearance. However, the Defendant filed its Defence on 6th September, 2011, almost one (1) month after filing the Memorandum of Appearance. There are no reasons given as to why the Defence was not filed within the stipulated period of time. What the Defendant contends is that the Defence was already on record as at the 6th September, 2011 and the court should have considered it before entering the Judgment on 16th September, 2011. I do note that the Plaintiffs had filed their Request for Judgment on 2nd September, 2011, four (4) days prior to the Defendant filing its Defence. They contend that the Judgment entered was procedural and was properly entered.

4. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & Others vs David Njeru Karingi CA No 181 of 1994 (UR)** the Court of Appeal held:-

“In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court’s discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment....However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

The court will therefore exercise its inherent jurisdiction to set aside any judgment after considering the circumstances of the particular case. In this instance, the issue to consider would be whether the judgment entered was regular. If regular, then the court will consider the defence filed to see if it raises any triable issues or if there is any sufficient cause to have the judgment set aside.

5. It is clear that the request for judgment was made on 2nd September, 2011. As at that date there was no defence on record. On 16th September, 2011, the Deputy Registrar entered judgment as follows:-

“Judgment

Defendant Ufanisi Capital Credit Limited having been duly served and having failed to enter appearance/file defence and on application of Advocate for the Plaintiff, I enter judgment as prayed for plus costs which shall be party and party costs without interest thereon.

Signed

DATE16/9/2011” (Emphasis added)

From the foregoing, the judgment was entered against the Defendant either for failure to enter appearance or failure to file a defence. This is what the record reads. Obviously something is not proper here. As at 16th September, 2011, the Defendant’s appearance and defence were already on record. On what basis therefore was the judgment being entered? Although it had been requested for earlier than the time the Defence was filed, my view is that that judgment should not have been signed. Reading the record vis a vis the date the Defence was received by the court, the judgment is misleading. I believe and so hold that the fact that the judgment was entered after the Defence had been placed on record, that made the judgment irregular and subject to be set aside ex debito justitiae. The fact that when the judgment was applied for the defence had not been filed does not regularize the same. Judgment in default can only be regular if at the time/date of entry there is no appearance or defence on record.

6. In any event, I have examined the Defence. I am satisfied that the same is not frivolous. The Defendant

has raised reasonable issues for deliberation and it is fair that they should be deliberated at the trial. In reiterating this position, the court in the case of **DAVID JOSEPH GICHAMBA GICHUHI v AGRICULTURAL AND INDUSTRIAL HOLDINGS LTD** [2011] eKLR, held that;

“...The only caveat where the judgment sought to be set aside is regular is that the court will not usually set it aside unless it is satisfied that there is a defence on merits and a defence on merits does not mean a defence that must succeed, but one that raises triable issues, that is an issue which raises a prima facie defence and which should go for trial for adjudication. However, it does not follow that because a mistake may have been made that a party should therefore suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of cost.” (Emphasis added)

7. I have not seen her any fraud or intention to overreach on the part of the Defendant. Accordingly, I am persuaded that the Defendant’s Notice of Motion dated 2nd August, 2012 has merit and I allow the same. However, I will order that the Defendant bears the costs of the motion because had it not delayed in filing the Defence, the Plaintiff would not have filed their request for judgment on 2nd September, 2011 and thereby incur the costs of that request and the application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 5th day of October, 2012.

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A. MABEYA
JUDGE