



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 556 OF 2017

KURIA KIHARA WAITHAKA.....1ST PLAINTIFF

MATHEW MWENDWA.....2ND PLAINTIFF

MERCY BEATRICE AWORI.....3RD PLAINTIFF

VERSUS

JOHN JOSEPH TITO.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Motion application dated the 23rd October, 2018 brought pursuant to section 1A and 1B of the Civil Procedure Act; Order 10 Rules 9, 10 and 11; Order 51 Rule 1 and Order 50 Rule 5 of the Civil Procedure Rules; Section 3 and 19 (1) of the Environment and Land Act 2011. The Applicant seeks to set aside *ex debito justitiae* the interlocutory judgment entered against him pursuant to the Plaintiff's request for Judgment dated the 10th July, 2017 and filed on 11th July, 2017. The Applicant further seeks leave to file and serve Defence out of time.

The application is premised on the summarized grounds that the Deputy Registrar entered interlocutory judgement in default of Defence on 11th July, 2017. The Defendant entered an Appearance on 17th May, 2017 but inadvertently failed to file Defence within time. The interlocutory judgment was irregular, as it cannot be entered on unliquidated claims and or claims for non-pecuniary damages. The Defendant has a good defence that raises triable issues against the Plaintiff's claim. The Plaintiffs acted contrary to the overriding objective by applying for interlocutory judgement instead of setting the suit down for hearing in accordance with the rules. No prejudice will be suffered by the Plaintiffs as they will have an opportunity to reply to the Defendant's Defence.

The application is supported by the affidavit of Esther Monirei who is an Advocate in conduct of the matter where she reiterates the Defendant's claim above and deposes that the Plaintiffs' claim was neither for liquidated demand nor pecuniary damages. She insists that it was plainly irregular and an error in law for the Deputy Registrar to enter the judgment requested. She contends that the Defendant has a serious and arguable Defence to the Plaintiffs' claim, which ought to be heard on its merits. She reiterates that this is a suitable case for the court to exercise its discretion and set aside the interlocutory judgment and extend time to the Defendant to file a Defence.

The Plaintiffs opposed the application and filed a replying affidavit sworn by the 1st Plaintiff KURIA KIHARA WAITHAKA where he deposes that they instituted a suit against the Defendant vide a Plaint dated the 23rd March, 2017 and served him. He explains that the Defendant entered appearance outside the stipulated time and failed to file a Defence prompting them to request for judgment against him on 10th July, 2017 as stipulated under the law. Further, that as a result of the said request, judgment in default of Defence was entered against the Defendant on 17th July, 2017. He avers that the Plaintiffs served the Defendant with a Notice on Entry of Judgment; complied with Order 11 of the Civil Procedure Rules and set the suit down for formal proof. Further, that on the date the matter was fixed for formal proof, it was taken out of the cause list as parties were trying to reach a settlement. He insists the Defendant has not explained why he failed to file a Defence close to one and half years. Further, that the statement of Defence annexed to the application is a mere denial and does not raise triable issues. He reiterates that the Defendant is attempting to use the court process to defeat the rights and interests of the Plaintiffs, which will occasion them great prejudice, financial loss, injustice and defeat their constitutional rights. He states that the application is brought in bad faith and should be dismissed with costs.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 23rd October, 2018 including the supporting and replying affidavits as well as parties submissions, the following is the issue for determination:

- Whether the interlocutory judgment entered on 17th July, 2017 should be set aside and the Defendant granted leave to file his Defence out of time.

As to whether the interlocutory judgment entered on 17th July, 2017 should be set aside and the Defendant granted leave to file his Defence out of time.

From the Court records, it is evident that the Interlocutory Judgment was entered on 17th July, 2017 as a result of the Plaintiffs' request for judgment dated the 10th July, 2017 and filed in court on 11th July, 2017. The Defendant sought to have the same set aside and relied on the case of **Ruth Ngotho Kariuki Vs William Mwangi (2012) eKLR**; to buttress his argument. The Plaintiff opposed the application and relied on the case of **Yamko Yadpaz Industries Limited Vs Kalka Flowers Limited (2013) eKLR and Rajesh Rughani Vs Fifty Investments Limited & Another (2016) eKLR** to support their arguments. I wish to make reference to certain provisions from the Civil Procedure Rules which relates to instances when interlocutory judgment should be entered. These are:

Order 10 Rule 6 which stipulates thus: ' *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.* '

Order 10 Rule 9 provides that: ' *Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.* ' While Order 10 Rule 10 of the Civil provides that: ' *The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.* ' Further Order 10 Rule 11 stipulates thus: ' *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 current scenario, the Plaintiffs' claim as contained in the Plaint was not of a liquidated nature but the Deputy Registrar proceeded to enter interlocutory judgment on 17th July, 2017 contrary to the provisions of Order 10 rules 6, 9 and 10 of the Civil Procedure Rules which provide that the said judgment can only be entered in claims for liquidated damages. In the circumstances I hold that the impugned decision by the Deputy Registrar was irregular. On the issue as to whether the defendant should be granted leave to file defence out of time, I wish to associate myself with the case of **Altana Corporation Limited v Clarence Matheny Leadership Training Institute; National Land Commission & another (Interested Party) [2019] eKLR** where Justice Chacha Mwita while setting aside an interlocutory judgement status thus: ' *Once the court arrives at the conclusion that the judgment was irregular, it must set it aside as a matter of course. In this regard, the Court of Appeal stated in James Kanyitua Nderitu & another v Marios Philotas Lilikas & another [2016] that;*

"In an irregular default judgment...the judgment will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justicie, as a matter of right. The court does not even have to be moved by a party. Once it comes to its notice that the judgment is irregular.it can set the default judgment on its own motion. In addition the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system"

The right to be heard was underscored by the **Supreme Court of India in Sangram Singh v Election Tribunal Kotah 1955 AIR 425 thus;**

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

The impugned default judgment though was not entered because the Applicant had not been served but because the default judgment was entered prematurely. That is before time allowed by the rules of procedure had lapsed. The action deprived the Applicant an opportunity to be heard and was therefore condemned unheard.'

The Plaintiffs' claimed the Defendant did not explain the delay in filing a Defence. I note from the court records on 15th March, 2018; 18th April, 2018; 9th July, 2018 and 1st October, 2018 respectively, the Counsel for the Plaintiffs had actually stated in Court that the parties were negotiating a settlement. I opine that the interlocutory judgment entered against the Defendant culminated in his being condemned unheard and it would be pertinent if he was granted an opportunity to defend the suit. In relying on the facts at hand and being persuaded with the aforementioned decision, since the interlocutory judgment was irregular, I will proceed to set aside the said judgment and allow the defendant to file a defence.

It is against the foregoing that I allow the application dated the 23rd October, 2018 and grant the Defendant leave of 14 days to file and serve his Defence.

Costs will be in the cause.

Date signed and delivered in open court at Kajiado this 15th day of July, 2019

CHRISTINE OCHIENG

JUDGE