



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 55 OF 2008

DELGREEN LIMITED.....PLAINTIFF

-VERSUS-

ODINDO ALFRED & 15 OTHERS.....DEFENDANTS

RULING

1. For my determination is the plaintiff's notice of motion dated 27th November 2015 seeking to set aside the interlocutory judgement entered in favour of the 1st 3rd – 15th defendants on 15th October 2015. The applicant also seek extension of time within which to file and serve a defence to the counter – claim and that the defence filed be deemed as properly filed.

2. The application is supported by the affidavit of Michael O. Oloo and the nine grounds listed on the face of it. Briefly, the plaintiff/applicant avers that the failure to lodge the defence within the stipulated time is an excusable mistake of counsel which ought not to be visited on the plaintiff. Secondly that 8 days delay is not inordinately long. That the applicant has a good defence and that this application has been made timeously.

3. The application is opposed by a preliminary objection dated 11.2.2016. In the preliminary objection, the 1st, 3rd – 15th defendants pleads that this application is defective because it is supported by an affidavit of the plaintiff's advocate on record contrary to Rule 9 of the advocates Practice Rules. In support of the preliminary objection, they quoted the case of **Ahmed Nassir Abdullahi & Co. Advocates vs NBK Ltd (2006) eKLR** and **Agip (Kenya) Ltd vs Highlands Tyres Ltd (2001) eKLR**.

4. Both parties have filed written submissions which I have read while making this determination. In the case of **Ahmed Nassir supra**, the provisions of rule 9 is cited as follows:

“No advocate may appear as such before a Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence whether verbally or by declaration or affidavit. And if while appearing in any matter it becomes apparent that he will be required as a witness to give evidence he shall not continue to appear. Provided that this rule does not prevent an advocate from giving evidence on formal or non-contentious matter of fact in any matter in which he acts”

5. In his submissions, the defendants have stated that setting aside is not a non – contentious matter. However they fell short of stating to this Court the likelihood of Mr Oloo being called as a witness. The said law firm admitted being served with summons to enter appearance but said in advertently they did

not file a defence within the prescribed time. The only matter that would have been contentious in my view is the issue of service which has been admitted. The case of Ahmed Nassir speaks in favour of the applicant. Justice Fred Ochieng at page 3 stated thus, ***“But at the same time until and unless the affidavit in support of the application is contested by way of a replying affidavit, there was no way that the Court could say that the facts deponed to were contentious.”*** The 1st and 3rd – 15th defendants in this instance have not filed a replying affidavit to state what is contested. Consequently I find the preliminary objection to be without any basis and hereby dismiss it.

6. Should the orders be granted? This matter has not proceeded to trial. The rules of natural justice requires that parties be afforded an opportunity to be heard. This is article 48 and 50 of our Constitution. The defendants have introduced through their submissions that if the orders are granted then their right to a fair administrative action will be derogated or limited contrary to the provisions of article 47 (1) of the Constitution and section 4 (b) of the Fair Administrative Act. This submission in my opinion is a misinterpretation of the law. The deputy registrar’s duty though administrative is governed with the Civil Procedure Rules. The same rules give room when such interlocutory orders/judgement can be set aside. The Respondents therefore should not invoke the provisions of the Fair Administrative Act in a process that is purely undertaken with the provisions of the Civil Procedure Rules.

7. The powers of the Court to set aside interlocutory judgement is discretionary which discretion is to be exercised judiciously. The applicant referred the Court to the case of **Paul Asin T/A Asin Supermarket vs Peter Mukembi** where the Judge quoted the decision of **Patel vs E. A Cargo Handling Services Ltd** and held thus:

“In considering an application to set aside an exparte judgement, the nature of the action should be considered, the defence if any has been brought to the notice of the Court. It should be remembered that to deny a litigant a hearing should be the last resort of the Court.”

8. In the circumstance of this case, the applicant has a claim against the defendants. This claim is yet to be determined. The 1st & 3rd – 15th defendants have counter – claimed. For the issues in dispute to be fully determined once and for all, it is imperative that the applicant be given an opportunity to file a defence to the counter – claim. In any case the defendants would still be required to set down their claim for formal proof so I do not see any prejudice they will suffer if the applicant is granted leave to defend the claim. Lastly the application was also filed timeously as the interlocutory judgement was entered on 15.10.2015 and this application filed within 1 ½ months.

9. I am therefore satisfied the application has merit and do allow it in terms of prayer 2, 3 & 4. The interlocutory judgement entered on 15.10.2015 be and is hereby set aside. The time to file the defence to the counter – claim is extended. Consequently the defence to the counter – claim filed is deemed as duly filed upon the payment of the requisite Court fees. The same be served upon the defendants within 14 days of this ruling. Costs of the application awarded to the 1st and 3rd – 15th Defendants in the cause.

Dated and signed at Mombasa this 9TH day of March 2017.

A. OMOLLO

JUDGE

Delivered at Mombasa this 10TH day of March 2017

C. K. YANO

JUDGE