



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 118 OF 2015

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF DOMESTIC HOTELS

EDUCATIONAL INSTITUTIONAL

HOSPITALS AND ALLIED WORKERS CLAIMANT

VERSUS

ORTUM SECONDARY SCHOOL RESPONDENT

R U L I N G

1. Before court is a Notice of Motion Application dated 6th February, 2018 and filed on 7th February, 2018 seeking stay of execution or removal of the proclaimed goods pending the hearing of this application. That the Exparte judgment entered on 8th June 2017 be set aside and the Respondent/JD's draft response to claim annexed to the application be deemed as properly filed subject to payment of requisite court fees.

2. The application is supported on grounds set out on the face of the Notice of Motion and supporting affidavit to wit:-

a. The Respondent has a good defence.

b. Respondent learnt of the exparte judgment recently after proclamation by the auctioneers.

c. Order 10 Rule 11 of the Civil Procedure allows the court to set aside an exparte judgment.

d. The Respondent is a public school in the semi-arid West Pokot County run on the fees paid by the parents and guardians of its students.

3. The Respondent filed a Preliminary Objection to the application dated 28th February, 2018 stating that the application lacks merit and is an abuse of court process for the following reasons:-

a. Judgment was entered on 8th June 2017, and the applicant was served with it promptly but took no interest at all.

b. The Respondent extracted a decree on 30th November, 2017 for the sum of Kshs.637,860.

c. That the Notice of Motion was filed 9 months after the judgment of the court and this amounts to inordinate delay. That the same is an attempt to defeat the justice of the case by punishing the Respondent.

d. That no justifiable reason to set aside the judgment of the court has been disclosed in the notice of motion and supporting affidavit.

e. That the suit was filed on 4th May, 2015 and promptly served on the applicant and it did not enter appearance nor file a defence to the case. The applicant was also served with mention and hearing notices. That the Applicant has no arguable defence to the case in any event.

Determination

4. The claim was filed on 4th May, 2015. The Respondent was served immediately thereafter and did not enter appearance nor file a defence until matter was heard and judgment delivered on 8th June, 2017, more than two years down the line.

5. After the matter was heard and determined the application was filed nine (9) months after when goods in execution of judgment were proclaimed.

6. There is no explanation at all in the notice of motion and

supporting affidavit why the Respondent despite service of summons to enter appearance and Memorandum of Claim and upon being served with numerous mention and hearing notices failed to file a defence to the suit. A party who seeks to be indulged by the court especially after such inordinate delay must have a reasonable explanation as to why a defence was not filed. No reason was put forth by the applicant.

7. The only ground put forth by the applicant is that it has an arguable defence to the suit and that it has a right to be heard before judgment is entered against it.

8. If courts were to set aside judgments where there is no explanation whatsoever by the applicant simply because there is an arguable defence, then indolence and intentional default, to cause hardship to the Plaintiff would be the order of the day with the expectation that exparte judgment would as a matter of course be set aside.

9. There is an overriding objective, of having justice dispensed expeditiously and without undue delay. Parties before court are enjoined to ensure that the court's time is utilized timeously to allow reduction of backlog of cases, which is a reality in the judiciary today.

10. The Claimant/Respondent has an equal right to enjoy the fruits of his judgment where, as in this case there is blatant and unexplained default on the part of the Respondent.

11. It is not sufficient for the Respondent to state that it is a public school in a hardship area, and so its unexplained failure to file a defence to the case for a period of over two years must be automatically condoned.

12. The balance of convenience in this case demands that the expedient delivery of justice to the Claimant be upheld in the absence of any reason given for the blatant disregard of court summons, and notices to attend court only for the Respondent to rise to frustrate the imminent execution of the judgment of the court.

13. I have considered the authorities cited by the applicant to wit; **Prime Bank Limited v Paul Nyamondi 2014 ECLR; Shah v Mbogo and Multi- score Consulting Engineers v Nairobi University 2014, eCLR** and the court is of the considered view that nothing has been put before it to warrant the setting aside of the judgment by Maureen Onyango J. nine (9) months down the line and to allow a defence to be filled three years (3) after the suit was filed.

14. Accordingly, the application lacks merit and is dismissed with costs.

Dated and Signed in Kisumu this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Prof. Sifuna Advocate for Respondents/Applicant

M/s. Doreen Nyasio advocate for the Claimant/Respondent

Chrispo – Court Clerk