Kinlix Limited v Intertropical Timber Trading Company Limited & another (Civil Case E140 of 2021) [2025] KEHC 7537 (KLR) (Civ) (27 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E140 OF 2021

SN MUTUKU, J

MAY 27, 2025

BETWEEN

KINLIX LIMITED ..... PLAINTIFF

AND

INTERTROPICAL TIMBER TRADING COMPANY LIMITED .... 1ST DEFENDANT

PETER KARIUKI NJIIRI T/A NJIIRI KARIUKI & NJAU COMPANY ADVOCATES ..... 2ND DEFENDANT

RULING

The Application

1. Intertropical Timber Trading Company Limited (the Applicant) took out a Notice of Motion dated 29th October 2024 (the Application) brought under Section 3A of the *Civil Procedure Act* (CPA); Order 10, Rule 11, Order 22 and Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Articles 50 and 159 of the *Constitution* of Kenya, seeking to set aside the ex parte judgment entered in the suit and the resultant decree, and further seeking leave to file its statement of defence dated 20th September 2021 out of time and costs.

2. The Applicant has supported the Application with the grounds laid out on face of the Application and in the Supporting Affidavit sworn by the Applicant's Director, Geoffrey Nganga Kariuki. It is deposed that the Applicant was served with summons to enter appearance and the pleadings pertaining to the present suit, upon which the Applicant entered appearance on 12th July 2021; that through its advocates on record, the Applicant filed a statement of defence on 20th September 2021 through the CTS Portal; that unbeknownst to the said advocates, an ex parte judgment had already been

entered in the suit, thereby summarily determining the claim against the Applicant in the absence of its participation.

3. It is deposed, further, that the Applicant's statement of defence raises triable issues which can only be adequately ventilated at the hearing and hence it would not only be imperative, but would also serve the interest of substantive justice, for the orders sought in the instant Application to be granted and that if the orders sought are not granted, the Applicant stands to be condemned unheard and that any inconvenience resulting from a grant of the orders sought herein can be compensated by an award of costs.

The Replying Affidavit

4. The Application is opposed by the Respondent, Kinlix Limited, through a Replying Affidavit sworn by its Director, Gerald Okune Laria, on 19th February 2025. He has deposed, inter alia, that both the Applicant and Peter Kariuki Njiiri T/A Njiiri Kariuki & Njau Company Advocates (the 2nd Defendant) were made aware of the existence of the suit yet neither of them filed their statements of defence within the stipulated timelines, consequently resulting in the ex parte judgment; that both the Applicant and the 2nd Defendant are indebted to the Respondent herein, and that the Respondent's advocates have since extracted a decree to that effect.

5. It is further deposed that whereas the Applicant did not disclose the actual date on which it purportedly filed its statement of defence, the ex parte judgment had already been entered at the time of filing thereof; that there has been an unreasonable and inexplicable delay on the part of the Applicant in bringing the Application from the date the ex parte judgment was entered and that the statement of defence referred to in the Application does not raise any triable issues but contains mere denials.

6. It is deposed that the Applicant is not deserving of the orders sought in the instant Application; that should this court be inclined to allow the Application, then the same be conditional upon the Applicant depositing the decretal sum in a joint interest earning account and that the Applicant be ordered to pay throw away costs of Kshs. 100,000/, otherwise, the application should be dismissed with costs.

7. Though counsel for the Applicant sought leave to file a Further Affidavit on 31st March 2025, this was done. There is no Further Affidavit filed, either in the Court file or in the CTS Portal, at the time of writing this Ruling.

8. Similarly, none of the parties has filed written submissions as directed by the Court on 13th February 2025 and 29th April 2025. In writing this Ruling, I have relied on the Application and the grounds in support of the same as well as the Replying Affidavit in opposition and the law. I have noted that the 2nd Respondent did not participate in these proceedings or file any documents in respect to this application.

Analysis and Determination

9. I have considered the Application, the grounds supporting it and the Replying Affidavit opposing it. The record of the Court file show that the Respondent instituted the present suit by way of a plaint dated 10th June 2021 seeking a principal sum of Kshs. 3,300,000/- plus interest thereon at a rate of 10% p.m. with effect from 7th August 2015 until 7th June 2021, totaling a sum of Kshs. 22,592,000/, and interest on the abovementioned principal sum at a further rate of 8% p.m. from 8th June 2021 until payment in full and costs of the suit.

10. The Respondent's claim is founded on an alleged breach of a contractual agreement dated 31st July 2015 on the part of the Applicant, and an alleged breach of a professional undertaking by the 2nd Defendant dated 30th July 2015. It is apparent from the record that the Respondent's advocate took out summons to enter appearance and served the same, together with the pleadings, upon the Applicant and the 2nd Defendant. It is equally apparent from the record that upon service, the Applicant and the 2nd Defendant entered appearance separately, through their respective advocates, on 12th July 2021.

11. The record shows that soon thereafter, the Respondent lodged a request for entry of judgment dated 4th August 2021, upon failure by the Applicant and the 2nd Defendant in filing their statements of defence within the statutory timelines. Consequently, an interlocutory judgment was entered against the abovementioned parties jointly and severally on 27th August 2021 resulting in the issuance of a decree on 1st October 2021. The said judgment prompted the instant Application, in which the Applicant seeks orders to set aside the interlocutory judgment and leave to defend the suit. The court will address the orders contemporaneously since they are related.

12. The applicable provisions on the issue of setting aside interlocutory judgment is Order 10, Rule 11 of the CPR. It provides that:

> " 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."

13. The power of the court to grant or refuse an application to set aside or vary such judgment or any consequential decree or order, is discretionary. That discretion is wide and unfettered, but ought to be exercised judicially.

14. In the case of Shah v Mbogo & Another [1967] EA 116, the Court rendered itself as follows on the issue of the exercise of court's discretion to set aside an ex-parte judgment:

> " The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

15. The principles in Shah v Mbogo case cited above, were amplified further in the judgment of Platt JA (as he then was) in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193, cited with approval by the same Court in Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR as follows:

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected...is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justiciae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good

sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure...The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter parties hearing, than the judge who acts ex parte... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction."

16. Flowing from the above citation, the first issue arising for determination is whether the Applicant was duly served with summons to enter appearance, which would resultantly ascertain whether the interlocutory judgment entered is regular.

17. From a perusal of the record and as earlier set out, it is not disputed that the Applicant was served with summons accompanied by the requisite pleadings, following which it entered appearance through its advocates. The service is further backed by the affidavit of service sworn by process server Gideon K. Kimatia on 7th July 2021, which affidavit is on record.

18. In view of all the foregoing circumstances, I am satisfied that the interlocutory judgment entered on 27th August 2021 is regular.

19. I am alive to the legal requirement that in determining whether or not to set aside an interlocutory/ default judgment, a court is also required to consider whether a party has a defence which raises triable issues, even where service of summons is deemed to have been proper. The court in the case of Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324 reasoned thus:

> " Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

20. Furthermore, the phrase 'triable issue' was defined by the Court of Appeal in the case of Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR thus:

> " ...a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication."

21. The Court went on to appreciate that:

> " The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."

22. The Applicant claims that it has raised triable issues in the defence and the court has considered the same. However, it is upon this court to consider whether the Respondent stands to be prejudiced. The challenged ex-parte judgment was entered on 1st October 2021. The Applicant did not file this application until 29th October 2024, a period of 3 years later. I have not seen any evidence presented

before this court to demonstrate the reason for that delay. It is my considered view that that delay is inordinate and without sufficient reason being offered as to the reason for the delay, this court finds that it would be prejudicial to the Respondent if this court were to agree with the Applicant and grant the orders sought, given the long delay in bringing this application.

23. I agree with the Respondent that there was an unreasonable delay in filing this application, which, if granted, would be prejudicial to the Respondent.

24. Consequently, for justice to be served, this court finds it untenable to allow this application for reasons that the Applicant slept on its rights and failed to act with haste and seek setting aside the judgment. In the circumstances, this application is dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED ON 27TH MAY 2025.

S. N. MUTUKU

JUDGE

In the presence of:

1. Ms Kyalo for the Plaintiff

2. Mr Ajulu holding brief for Mr. Kuria for the Defendant