



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 83 OF 2007

SILVERIA MURIA
NKONGE.....PLAINTIFF

VERSUS

SIMON MURITHI alias SIMON
ISHMAEL.....1ST DEFENDANT

ELKANA
MUTEMBEI.....2ND
DEFENDANT

EDWARD MUGO
M'MBAUNI.....3RD
DEFENDANT

JULIUS
MWEBIA.....4TH
DEFENDANT

RULING

This application is dated 24th day of July, 2009 and seeks Orders:

1. **THAT** this honourable court be pleased to set aside the Exparte Interlocutory Judgment herein together with all consequential orders arising therefrom and allow the defendant to defend this suit in its merit.
2. **THAT** the Defendant be granted leave to file his defence, this case does proceed for hearing on merit and the 2nd, 3rd and 4th defendants' defence on record be deemed as duly filed.
3. **THAT** costs of this application be in the cause.

The Applicants submitted as follows:

1. The Interlocutory Judgment should be set aside *Ex-Debito Justitiae* as the Plaintiff contained no claim for liquidated damages as required by the then Order IXA of the defunct Civil Procedure Rules. They contended that the proper procedure would have been for the plaintiff to have set the case down for hearing as enunciated by the then Justice Ringera in the case of Abraham K. Kiptanui V. Delphis Bank Ltd and Another.

2. **A lot of time was spent arguing Interlocutory Applications as a result of which the issues of filing a Memo of Appearance and a defence was forgotten. It can be discerned from the pleadings in the Court file that the defendants had all along harboured the intention to defend the suit.**

The 2nd, 3rd and 4th defendants proffered the following authorities:-

1. The Civil Procedure Act
2. The Civil Procedure rules, 2010
3. HCCC No. 1864 of 1999 (**Abraham Kiptanui V Delphis Bank Ltd & Another**)

The Plaintiff submitted as follows:

1. **The application was unmerited. The suit was filed on 31.7.2007 and Summons were served upon the 2nd, 3rd and 4th defendants. Appearances were entered on 14.8.2007 and 14.9.2007. There was a Notice of Appointment of an advocate but there was no defence filed as required. As a result, an Interlocutory Judgment was properly entered for the plaintiff against the 2nd, 3rd and 4th defendants.**
2. **The 2nd, 3rd and 4th defendants filed an application to set aside the Interlocutory Judgment on 24.7.2009 two years after the judgment was entered against them. This was an inordinate delay and setting aside the judgment would prejudice the plaintiff greatly as the land records, which the plaintiff said were fraudulently changed would remain.**
3. **The Interlocutory Judgment was entered properly. Otherwise litigation would never come to an end. As the Civil Procedure Rules only allowed 14 days, the 2nd, 3rd and 4th defendants should have filed their defences in good time and not come to court to seek the setting aside of the Interlocutory Judgment.**

The plaintiff relied on the cases of **Shah V. Mbogo** and **Mbogo V. Shah** to argue that indolent defendants should not enjoy the Court's discretion to set aside an ex-parte Interlocutory Judgment.

The plaintiff proffered the following authorities:

1. **Shah V Mbogo and Another [1967] E.A 116.**
2. **Mbogo and Another V. Shah [1968] E. A 93.**

The 1st defendant associated himself with the submissions of the plaintiff.

I have considered the averments and submissions by the parties. I will deal with the argument that the defendants were entitled to the setting aside of the Interlocutory Judgment *Ex-Debito Justitiae* as under Order IXA of the defunct Civil Procedure Rules, the Plaintiff had no claim for liquidated or pecuniary damages. I have carefully examined the said order and find that it supports the submission by the 2nd, 3rd and 4th defendants. In the circumstances, I find the Interlocutory Judgment entered in this suit irregular. It should be set aside as a matter of right. I will, therefore, not pronounce myself on the other submissions.

I do consider that the 2nd, 3rd and 4th defendants were guilty of inordinate delay before they filed this application. I will, therefore, not award costs in this application.

It is ordered as follows:

1. **The Interlocutory Judgment entered against the 2nd, 3rd and 4th defendants is set aside with no order as to costs.**
2. **The Defendants do file their defence/defences withing 45 days from today.**

Dated and delivered in Open Court this 30th day of September, 2013 in the presence of :

Cc Mwonjaru/Daniel

Omari h/b Nyaga Nyamu for Plaintiff

2nd, 3rd and 4th defendants present

P. M. NJOROGE

JUDGE