



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 527 A OF 2018

FRANCIS KANYI KIARIE.....CLAIMANT

VERSUS

URITHI HOUSING CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

This matter for determination is a notice of motion dated 6.4.2019 by the respondent seeking the following orders:

1. *THAT this application be certified urgent and heard ex-parte in the first instance.*
2. *THAT pending hearing and determination of this Application, this Honorable Tribunal be pleased to stay execution of the judgment and decree issued herein on 10th December 2018.*
3. *THAT his Honorable Tribunal be pleased to set aside the judgment and decree issued on 10th December, 2018 and all the consequential orders.*
4. *THAT this Honorable Tribunal be pleased to grant leave to the respondent to defend this suit.*
5. *THAT costs of this application be in the cause.*

On the grounds that the claimant obtained judgment and decree ex-parte despite the fact that the respondent had filed his defence.

That there is danger of execution against the respondent's assets held by the respondent on behalf of its members.

That the respondent has already filed a defence which raises a triable issues against the claimant's case, and other grounds on the face of the application. The application is supported by one affidavit of *JULIUS MACHARIA GACHANJA* the CEO of the respondent.

The application is opposed vide the replying affidavit of *Lizbeth Mwendu Advocate* for the Claimant deponed on 16.4.2019 filed on the same date.

The claimant avers that the suit was filed on 16.11.18 and the statutory period required to enter appearance and/or file defence had lapsed and judgment was entered in default of appearance and other grounds on the face of the replying affidavit.

The respondent filed a supplementary affidavit on 10.5.19.

The parties filed written submission to dispense the application.

The respondent's written submissions were filed on 10.5.2019 and the claimant's written submissions were filed on 28.6.2019.

We have noted that the statement of claim was filed on 6.11.18. The respondent's filed the memorandum of appearance on 15.11.18 and thereafter a request for judgment was filed on 5.12.18. The statement of defence was filed on 10.12.18.

Judgment was entered on 10.12.18, the same day that the statement of defence was filed.

The Applicant/Respondent avers that the judgment entered was irregular since there was a defence on record.

That the Tribunal has unfettered discretion to set aside interlocutory judgment under order 10 Rule 11 of Civil Procedure Rule. That the application is brought pursuant to the right of hearing as provided for under Section 1A and 1B Civil Procedure Act and Article 159 of the constitution.

That the claimant failed to serve the respondent with Notice of Entry of Judgment as required under Order 21 Rule 6 Civil Procedure Rule rendering the subsequent execution irregular, null and void.

That it has been held in various courts that shutting a litigant from the seat of Justice should be a measure of last resort.

The applicant has cited various authorities with prayers that the application be allowed as prayed.

The respondent in their written submissions have argued that the statutory Period required to enter appearance and/or file defence had lapsed, hence it was on this basis that judgment was entered.

That the respondent was all along aware of the existence of the suit.

That the Principle of exercise of discretion should not be used to assist a litigant who has deliberately whether by evasion or otherwise sought to obstruct or delay justice. The respondent has cited various authorities.

We have carefully considered the submissions of the parties. We note that the defence was filed on the same date that the judgment was entered.

The Tribunal has discretion to set aside on interlocutory judgment as laid down in **PATEL VS E.A CARGO HANDLING SERVICES LTD(1974) EA 75**; in that matter it was held that there are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgments, he does so. On such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

In this matter we note that the defence and the interlocutory judgment are of the same date. The law is clear that a judgment in default of appearance or defence cannot be entered in a matter where there is a defence on record.

We note that the judgment and the defence being on the same date brings up an issue of irregularity and the same can be set aside if a defendant shows that he was a reasonable defence on merits. The discretion to set aside interlocutory judgment should be exercised to ensure that injustice or hardship would not be visited against any party.

Discretion should also be exercised in a way that no party is locked out of any proceedings caused by accident, inadvertence or excusable mistake or error. It is in this regard that we consider the facts as laid out by the parties and the record. We have also considered that any mistake on the face of the record should not make any party to suffer the penalty of having his case determined in its merit as held in **PHILIP KIPTOO CHEMWOLO AND ANOTHER VS AUGUSTINE KUBENDE (1956) KLR 495**.

It is for the above reasons that we accordingly exercise our jurisdiction to allow the application dated 6.2.19 and accordingly order as follows:-

- 1. Stay of execution of the judgment and decree issued on 27.12.18 and all consequential orders are hereby set aside.*
- 2. The respondent is granted leave to defend this suit and the statement of defence filed on 10.12.18 is accordingly deemed as duly filed.*
- 3. Costs in the cause.*

Read and delivered in open court, this 7TH of **November** 2019

In the presence of:

Claimant: Miss Ndolo holding brief for Kiarie for the Claimant.

Respondent: Miss Gitau holding brief for Mr.Mwangi for Respondent.

Court Assistant: Leweri and Buluma

B.Kimemia - **Chairman-signed**

R.Mwambura – **Member-signed**

P.Swanya - **Member-signed**



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