



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. 305 OF 2018

PAUL KIRIMI MATHIU.....CLAIMANT

VERSUS

UNIVERSAL SACCO SOCIETY LIMITED.....RESPONDENT

RULING

Matter for determination is a Notice of Motion application dated 11.12.2018 filed on 20.8.19 seeking the following orders:-

- 1. That this honorable tribunal be pleased to set aside the interlocutory judgment entered on 28.9.2018 and grant the respondent /applicant leave to file its defence and counter-claim out of time.*
- 2. That the annexed defence and counter- claim be deemed as duly filed and served upon payment of the requisite fees.*
- 3. That costs of this application be in the cause.*

Based on the grounds on the face of the application supporting affidavit of JANET MUTUA advocate the same is opposed vide the grounds of opposition dated 27 (8) 2019 filed on 28.8.19 on the grounds that:

- 1. The delay in filing the appearance and delay is inordinate and no good reason(s) have been given.*
- 2. There has also been inordinate and inexcusable delay in filing the application.*
- 3. The Application is made in bad faith and merely intended to delay hearing and final disposal of this suit.*
- 4. The Application lacks merit, is an abuse of the court process and is tainted with mala fides.*

The Application was canvassed by way of written submissions. The claimant filed their written submissions on 14.10.19 while the respondent/applicant filed their submissions on 9.10.19.

The Applicant has submitted that there was an honest mistake where the respondent entered appearance but failed to file defence in good time.

The Applicant has shown willingness to defend the matter to a just determination since the parties through their advocates are in constant communication as demonstrated by the letter dated 4.12.2018 hence there was no inordinate delay.

That the defence raises triable issues since a loan was advanced to the claimant but was never repaid in full. Hence the reason why the respondent has filed a counter claim.

That there are many issues based in the defence and counter-claim hence justice would only be served if the application is allowed.

The respondent has cited various authorities in their submissions in the prayer for allowing the application.

The respondent /claimant has submitted that there was inordinate delay in filing the defence since the claim was filed on 4.7.2018 served on 17.7.18 and the memorandum of appearance was filed on 2.8.18.

That interlocutory judgment was entered on 28.9.18 and the matter was set for formal proof on 2.10.19.

That the current application dated 11.12.18 was filed on 20.8.19.

That the delay should not be excused.

That having entered appearance the applicant would be accorded an opportunity to cross examine the witness hence there would be no need to set aside the interlocutory judgment.

The claimant has cited authorities and submitted that the application should be dismissed.

We have carefully considered the submissions of both parties and note that indeed there is a draft defence which contains a counter claim.

It is trite law that setting aside a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the court. In **PATEL VERSUS E.A CARGO HANDLING LTD (1974) E.A 75** it was held that discretion of a judge is unlimited except in variation of a judgment which should be done on just terms. That the main concern should be to do justice to the party. Hence discretion should be exercised judiciously, in considering the application and whether there was any inordinate delay we find that the applicant has given a reasonable explanation for the delay in that the parties were engaged in negotiations.

This therefore should not be interpreted as disinterest or negligence on the part of the respondent who were willing to negotiate an out of court settlement.

On the issue whether the defence raises triable issues we find that the draft defence attached to the application raises triable issues noting that there are various issues raised in the same and that there is also a counter-claim , and this raises a prima facie defence which should go to trial for adjudication..

In the Patel case(*supra*)these issues were determined and it was held that the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.

In this case we find that there is a draft defence on record which raises triable issues and despite service, the fact that the defence raises triable issues then it goes without saying that the judgment in default should be set aside.

It is on the above grounds that we allow the application dated 11.12.18 and order as follows:-

1. The interlocutory judgment entered on 28.12.18 is set aside.

2. That the applicant is granted leave to file and serve a defence and counter claim out of time.

3. That the draft defence and counter-claim dated 11.12.18 is deemed as duly filed and served subject to the payment of filing fees.

4. Corresponding leave is granted to the claimant to file and serve their reply to the defence and counter claim within 14 days herein.

5. That the applicant does pay Kshs.7500/= as thrown away costs within 14 days herein.

Read and delivered in open court, this 7th November,2019.

In the presence of:

Claimant: Nzuka holding brief for Mrs.Muteti for Claimant.

Respondent: Miss Muthoni holding brief for Respondent/Applicant.

Court Assistant: Leweri and Buluma.

B.Kimemia - Chairman-Signed.

R.Mwambura – Member-Signed.

P.Swanya - Member-Signed.



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