Case Number:	Civil Suit 101 of 2017
Date Delivered:	06 Feb 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Grace Lidembu Nzioka
Citation:	Richard Murigu Wamai v Attorney General & another [2018] eKLR
Advocates:	Mr. Wachira holding brief for Mr. Mutiso for the Plaintiff/Respondent Mr. Leitame for the 1st Defendant/Respondent Ms. Litoro holding brief for Mr. Okwara for the 2nd Defendant/Applicant
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 101 OF 2017

RICHARD MURIGU WAMAI.....PLAINTIFF/RESPONDENT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION....2ND DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 14th July 2017 brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant is seeking for orders;-

(a) That this Honourable Court be pleased to set aside the Interlocutory Judgment entered herein on 5th July 2017 against the 2nd Defendant/Applicant and all consequential orders and proceedings thereto;

(b) That this Honourable Court deems the 2n Defendant/Applicant's defence filed on 3rd July as duly filed and properly on record;

(c) That the costs of this Application be provided for.

3. The Application is premised on the grounds on the face of it and a Supporting Affidavit dated 14th July 2017, sworn by Culent Simiyu Lunyolo, an Advocate of the High Court of Kenya, practicing as such with Ethics & Anti-Corruption Commission.

4. He averred that on 18th May 2017, the Applicant was served with Summons to Enter Appearance and they duly entered appearance on 2nd June 2017. Owing to the age of the matter herein and the fact that the lead Investigating Officer, one Njeri Mburu had left the Commission in the year 2013, it took the 2nd Defendant/Applicant some time to trace the investigating file, to enable it file its defence in good time.

5. By the time, he received the investigation file and studied the same for purposes of extraction of relevant documents, the time file for filing the Defence had lapsed. The defence was to be filed on 16th June 2017, however, he managed to file it on 3rd July 2017 together with a Notice of Preliminary Objection on the ground that the Plaintiff's suit is time barred as against the 2nd Defendant, and thus offends the mandatory provisions of Section 4(2) of the Limitation of Actions Act, (Chapter 22), Laws of Kenya.

6. That the Applicant became aware of the request for Interlocutory Judgment against it when serving its defence and Notice of Preliminary Objection. This prompted the Advocate to peruse the Court file to establish and/or confirm if there were any detrimental orders as against the 2nd Defendant.

7. Upon the perusal of the file on 12th July 2017, he established the following;-

(i) On 22nd June 2017, the Plaintiff filed a Notice of Motion Application dated 21st June 2017, seeking to be granted leave to enter judgment against the 1st Defendant;

(ii) On 23rd June 2017, the Plaintiff's Advocates fixed a hearing date for the above mentioned Notice of Motion Application. The Application was set to be heard on 21st September 2017;

(iii) On 30th June 2017, the Plaintiff filed a Request dated 28th June 2017, for judgment in default of Appearance against the 2nd Defendant;

(iv) On 5th July 2017, a rubber stamp was affixed in the Court file with the following inscription:-

"DEFENDANT ….Ethics and Anti-Corruption Commission….HAVING BEEN DULY SERVED AND HAVING FAILED TO ENTER APPEARANCE/FILE DEFENCE AND ON THE APPLICATION OF THE ADVOCATE FOR THE PLAINTIFF ENTER JUDGMENT AS PRAYED

DATE……

DR

HIGH COURT

MILIMANI"

(v) On the same date, (5th July 2017), the Deputy Registrar gave the following order;-

"I have noted that the 2nd Defendant has not filed its defence within the stipulated period. This is however not an entirely a liquidated claim. The Plaintiff is directed to set the suit for hearing as per the provisions of Order 10 Rule 9 of the Civil Procedure Rules."

8. The Applicant avers that it's Defence and Notice of Motion Preliminary Objection filed on 3rd July 2017 was not in the Court file at the time the Deputy Registrar was entering judgment in default of Defence , yet these documents are still on the Court file, therefore the Interlocutory Judgment entered is erroneous.

9. On 3rd July 2017, the Plaintiff/Respondent was served with the 2nd Defendant's/Applicant's Defence and Notice of Preliminary Objection. The failure file its Defence in good time was not intentional but was occasioned by an excusable reason. The Defence and Notice of Preliminary Objection filed on 3rd July 2017 raise triable issues.

10. Therefore, if the Court does not set aside the Interlocutory Judgment, the Plaintiff/Respondent will set the suit for formal hearing and if the same is allowed to proceed, it will prejudice the 2nd Applicant, as it will be condemned to pay the Plaintiff/Respondent Kshs 30,600,000, interest, plus damages as per the interlocutory judgment without having been given a chance to defend the claim against it. The 2nd Defendant/Applicant will then suffer irreparable loss, as the matter involves public fund and the same is of great public interest. The Plaintiff/Respondent will not suffer any prejudice if the Interlocutory judgment is set aside. It is only fair, just and in the interest of justice that the Applicant's Preliminary Objection be heard first since it will determine whether or not the Plaintiff's suit should be heard.

11. However, the Application was opposed by the Plaintiff/Respondent vide the grounds of opposition dated 20th July 2017. The grounds state that, the Application is unmerited as no explanation is given at all for the failure to file an Appearance within the stipulated time yet the Summons to Enter Appearance and all pleadings were served on 18th May 2017 as per the Affidavit of Service already on record.

12. The Parties agreed to dispose of the Application by filing written submissions. The Applicant submitted that this Application

stems from the fundamental principle of natural justice which states that, no party should be condemned unheard. That the well-established principles of setting aside interlocutory judgments are laid out in the case of; ***Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75.***

13. That the 2nd Defendant/Applicant entered appearance on 2nd June 2017 within the stipulated time as per the Summons to Enter Appearance. The Applicant was required enter an appearance within 15 days from the date of service thereof. The summons to Enter Appearance was served on 18th May 2017. The 2nd Defendant entered appearance on 2nd June 2017. The 1st June 2017 was Madaraka Day and hence cannot be counted in the computation of time. Therefore Applicant entered appearance within 14 days of service of summons.

14. On 3rd July 2017, the defence and Notice of Preliminary Objection were filed. The Applicant has offered a reasonable cause as to why it did not file its Defence within 14 days of filing an Appearance. The failure to file its Defence in good time was not therefore intentional but was occasioned by the time taken to locate the investigation file. If the orders are not granted the Applicant will suffer prejudice as aforesaid.

15. The Applicant further submitted that, its Defence and Notice of Preliminary Objection raises triable issues to the Plaintiff's claim and it is only fair and just that the 2nd Defendant/Applicant be given leave to file its Defence out of time.

16. That in the case of; ***Thuranira Karauri vs Agnes Ncheche (1997) EKLR,*** it was held that the issue of limitation goes to jurisdiction. Further reliance was placed on the case of; ***Zachariah Onsongo Momanyi vs Erasto Nanga Manasse & 2 Others (2017) eKLR***,

And the Court urged to to exercise its wide discretion to set aside ex parte judgment.

17. However, the Plaintiff/ Respondent submitted that the pleadings herein were served upon the 2nd Defendant/Applicant, way back on 18th May 2017, as evidenced by their official stamp on the said documents. Consequently, the 2nd Defendant/Applicant filed its Memorandum of Appearance on 2nd June 2017. From the submissions and the pleadings filed by the Applicant, it is very clear that they filed their Defence on 3rd July 2017, one month after filing the Memorandum of Appearance.

18. The Civil procedure Rules in Order 10 Rule 4, clearly states that where the Plaint makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the submissions or all the Defendants fail so to appear, the Court shall, on request in Form No. 13 of Appendix A, enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the Court thinks reasonable, to the date of the judgment and costs.

19. Where the plaint makes a liquidated demand together with some other claim, and the Defendant fails, or all the Defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand; and interest thereon provided by sub-rule (1) but the award of costs shall await judgment upon such other claim

20. Further, the Civil Procedure Rules Order 10 Rule 4 states:

"The provisions of Rules 4 to 9 inclusive shall apply with any necessary modification where any Defendant has failed to file a Defence."

21. Therefore from the foregoing, Order 10 Rule 4 is apt for the circumstance in this case. All documents pertaining to this case were within the knowledge of the 2nd Defendant/Applicant's office as from 18th May 2017, it highly implausible that an investigation file can be missing for a period of one and a half months in an organization such as the 2nd Defendant's/Applicant's. The aforementioned reason is thus vague and/or ambiguous, as no dates have been given as to the period the file got lost and what efforts were taken to look for the file.

22. Further, the legitimacy of reasons averred herein cannot be verified by Court and in the current set of circumstances, it is just not enough to simply state that the reason for delay was a missing investigation file, so as to invoke the discretion of the Court. The aggrieved Party has the onus of demonstrating how this file got lost in the organization. It is the tailor of its own misfortune and

should bear the consequences. That the current status of the matter is solely because of the 2nd Defendant's indolence and lethargy in filing its defence precipitating the subsequent consequences stipulated under the law.

23. The fundamental conclusion is that there has been no excusable mistake and/or compelling reason that has been presented before Court to warrant the orders prayed for in the Application. The maxim of equity states that, equity aids the vigilant and not the indolent. The 2nd Defendant/applicant seeking for a remedy for their indolence is bad in law and an afterthought, since the Court rightfully exercised its discretion in issuing judgment in default of filing a defence.

24. That the Court of Appeal in the case of; ***Waweru vs Ndiga (1983) KLR 236*** ,reviewed and upheld its previous decisions on the Application under Order 10 Rule 11 of the Civil Procedure Rules and held that a Court has unfettered discretion to do justice between the parties. Further, it held that it may be just and on the facts of a particular case to set aside an exparte judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion **should not** be exercised to assist anyone to delay the course of justice. Delay defaults equity.

25. Further, without prejudice to the foregoing, in the unlikely event that this Court deems fit to set aside judgment, the 2nd Defendant/Applicant must bear the costs of the non-compliance with procedure and indolence of its Advocates. That this is the holding in the case of; ***Kenya Pipeline Company Limited vs Mafuta Products Limited (2014) eKLR.***

26. I have considered the arguments advanced by the respective parties and find the issue to determine is whether the Applicant has satisfied the legal requirements for grant of the orders sought. The provisions dealing with setting aside a default judgment are out under Order 10 Rule 4(1) of the Civil Procedure Rules, 2010. It is provides that:-

"where the plaint makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs."

27. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. As held in the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75:-*

"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 judgment, 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."

28. In the same vein, the Court in the case of; *Shah vs Mbogo (1967) EA 166*, held that:-

"this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

29. However, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the Applicant's case as to whether it raises any triable issues.

30. In the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) (supra)* the Court held that:-

"That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.'

31. Similarly in the case of; *Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

"Even if service of summons in 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."

32. In the instant case, the suit was filed on 10th March 2017; vide Plaint dated 9th March 2017 and the summons issued on 20th March 2017 and served on 18th May 2015. The Defendants were required to enter appearance within 15 days of service of the summons. Apparently, there is no dispute that the 2nd Defendant/Applicant entered appearance within the stipulated time.

33. However, the Applicant did not file a Statement of Defence within 14 days of entering appearance as required under Order 7 Rule1 of the Civil Procedure Rules 2010. The Statement of Defence was filed on 3rd July 2017. This was well over 14 days.

34. In the meantime, the Plaintiff requested for interlocutory judgment against the Applicant on 28th June 2017 and the same was entered on 5th July 2016. It is however not clear whether at the time the interlocutory judgment was entered on 5th July 2016, if the alleged statement of defence was indeed on the Court file.

35. I have gone through all the documents on the court file, and I find that the alleged statement of defence is not available. The only copy thereof is annexed to the Affidavit in support of this Application marked 'EACC2'. It bears a stamp with the date of July 2014, but other details thereon are illegible; and other save for a receipt stamp endorsed by the office of the Attorney General. There is also no evidence that any copy thereof was ever served on the Plaintiff/Applicant. It is therefore doubtful as to whether it was ever filed at all.

36. This is informed by the contents of ground 3 and 4 in support of the Application, which states that:-

"3. On the date that the 2nd Defendant filed its defence and Notice of Preliminary Objection, the court file could not be retrieved as the 2nd Defendant was informed by the registry official that the matter had a hearing date. The registry official however approved and endorsed the 2nd Defendant's documents for the cashier to accept payment."

"4. The 2nd Defendant filed its defence and Notice of Preliminary objection on 3rd July 2017 and left the Court's copy with the registry official."

37. However, I find the Applicant's conduct rather strange that, a party cay go to file documents in court and merely leave the same with unknown "court official." It is a matter of common knowledge and practice that all Court documents are filed in the respective Court file. It is therefore not surprising that a copy of this Statement of Defence was not and cannot be traced on the Court file. That conduct of the Applicant is not impressive.

38. Be that as it were, it is clear that, by the time the Applicant purported to file the said Statement of defence, the time of filing of the same had long lapsed and indeed the Plaintiff/Respondent had already filed a request seeking for interlocutory judgment. I note the judgment was entered on 5th July 2017. That judgment is therefore properly on record and valid.

39. I have considered the reasons advanced for the delay in filing the defence, being that the 2nd Defendant/Applicant could not trace its investigating file and I find that it has no merit. As rightfully submitted by the Plaintiff/Respondent, the issue is an internal matter within the Applicant's knowledge and over which the Court cannot be able to authenticate. I would not set aside the interlocutory judgment on that reasoning.

40. However, I do appreciate that, every person has a constitutional right to be heard, and that parties should not be deterred from approaching the seat of justice. In this regard, I have considered the Statement of defence annexed to the Affidavit in support of the Application and I find the Applicant has raised an issue that the claim herein is statute barred under the provisions of Section 4(2) of the Limitation of Actions Act (Cap 22) Laws of Kenya.

41. Similarly, it is quite clear from the pleadings that, under prayer (a) of the Plaint, the Plaintiff is claiming for Kshs 30,600,000, being the balance of the sum payable for the supply of bitumen, to the Ministry of Roads and Public Works. The Ministry is

represented herein by the Attorney General, the 1st Defendant therefore, the enforcement of the debt should be against the 1st Defendant, who are better placed to defend it on merit. Even then, if the Respondent can be compensated in damages it will be in the interest of justice to accord the Applicant an opportunity to be heard.

42. In summation, I wish to refer to the holding in the case of; *In Sebel District Administration vs Gasyali & Others (1968) E.A. 300, the Court* ,observed that:-

"in my view the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."

43. In the light of the aforesaid, I allow the Notice of Motion Application dated 14th July 2017, in terms of prayer (b) on condition that:-

(i) The Applicant files its statement of defence and serve it within two days of this order, the alleged statement filed on 5th July 2017, is not properly on record having been filed out of time and without court's leave;

(ii) The applicant to pay the Respondent throw away costs of Kiss 20,000, for the inconvenience caused and delay in prosecuting the matter;

(iii) The Applicant to pay the Respondent costs of this Application; and

(iv) If the orders (a), (b) and (c) above are not complied with, the order setting aside the interlocutory judgment be vacated forthwith and the matter to proceed to formal proof.

44. Those then are the Court orders.

Dated, signed and delivered in an open Court on this 6th day of February 2018.

G.L.NZIOKA

JUDGE

In the presence of:-

Mr. Wachira holding brief for Mr. Mutiso for the Plaintiff/Respondent

Mr. Leitame for the 1st Defendant/Respondent

Ms. Litoro holding brief for Mr. Okwara for the 2nd Defendant/Applicant

Teresia……...Court Assistant