



Case Number:	Tribunal Case 306 of 2017
Date Delivered:	07 Nov 2019
Case Class:	Civil
Court:	Cooperative Tribunal
Case Action:	Ruling
Judge:	B.Kimemia - Chairman-signed. R.Mwambura – Member-signed. P.Swanya - Member-signed.
Citation:	Times U Savings & Credit Co-operative Society Limited v Jackson Kithinji Mungania [2019] eKLR
Advocates:	Claimant: Mrs.Simiyu for Claimant/Respondent. Respondent: Miss Kirui h/b for Kabathi for Applicant.
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed with costs
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL

AT NAIROBI

TRIBUNAL CASE NO. 306 OF 2017

TIMES U SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED.....CLAIMANT

VERSUS

JACKSON KITHINJI MUNGANIA.....RESPONDENT

RULING

This matter for determination is a Notice of Motion dated 24.5.2017 seeking the following order:

1. Spent

2. Spent

3. That, *this Honorable Court be pleased to grant a stay of execution for the judgment entered on 19th May 2017 and subsequent orders made pursuant thereto pending the hearing and determination of the suit.*

4. That, *this Honorable Court be pleased to set aside its judgment entered 19th May 2017 and subsequent orders made pursuant thereto pending the hearing and determination of this suit.*

5. That, *costs of this application be provided for.*

The Application is based on the grounds and the face of the application and the affidavit of the Respondent. The same is opposed by the Replying Affidavit of the claimant filed on 27.6.2017. The Respondent filed a Supplementary Affidavit on the 18.6.2019.

The parties filed written submissions in the dispensation of the said application. Both parties filed their submissions on 27.6.2019.

The Applicant submitted that they were served with the summons to enter appearance and he sent a third party to file his memorandum to enter appearance on 10.5.2017, but the said 3rd party neither filed nor informed the Respondent.

That the said 3rd party file the memorandum to enter appearance on 22.5.2017 at this time the ex parte judgment had already been entered.

The Applicant avers that there was an inadvertent mistake to file the memo to enter appearance as well as to file a defence within the prescribed period.

That the Applicant seeks setting aside the interlocutory judgment and subsequent orders based on the said inadvertence.

That under order 10 Rule 11, the Tribunal is empowered to set aside *ex parte* judgment on terms that are just.

That these powers are discretionary, and failing to allow the application will amount to a hindrance to the Applicant's Constitutional and Statutory Rights.

That the Applicant has a good and meritorious defence which raises triable issues.

That the Applicant has come to court within a reasonable time and without undue delay.

That no prejudice will be suffered by the claimant that cannot be settled by way of costs.

The Respondent/Claimant submitted that the application should not be allowed because the Respondent was duly served with the summons to enter appearance and failed to put in the response within the prescribed time.

That at the time of entry of judgment in default, the respondent had not entered appearance or filed a defence.

That the Respondent after filing this application under certificate of urgency he was granted temporary stay and directed to set down the application for hearing.

That the Respondent has not however taken any steps to prosecute the application from the date it was filed on 24.5.2017 and two years have lapsed.

That the Applicant has been indolent and using the Tribunal to escape his obligations as a Judgment Debtor.

That it is the duty of the Applicant to take steps to progress his application and with the lapse of over 2 years the applicant has run contrary to the overriding objectives as stipulates section 1A, 1B and 3A of the Civil Procedure Act.

That the Respondent has not proved that he has sufficient grounds to warrant the setting aside of the judgment, this is because he does not deny that he owed the claimant money but rather that the claimant ought to have deducted the said money owed from his savings. And further that he should be allowed to pay the amount owed in monthly instalments. The respondent therefore prays for the application to be dismissed with costs.

We have carefully considered the submissions by the parties, we note that this suit was filed on 11.4.2017, memorandum of appearance was filed on 22.5.2017 request for judgment was filed on 19.5.2019 and judgment entered accordingly. Applicant filed is application on 24.5.2017 and interim orders granted on 29.5.2017. Since then the applicant has never prosecuted the said application until 28.5.2019 when the applicant moved the Tribunal for directions.

We note the substance of the claim arises from the loan obtained by the respondent as pleaded in the statement of claim paragraph 7 and/or failed, party serviced the loan. This fact has not been disputed in the draft defence.

This application was brought under certificate of urgency and interim orders obtained, however it has been over 2 years since the same was prosecuted. We have noted the provisions of section 1A, 1B and 3A of Civil Procedure Act and Rule 4 of the Cooperative Tribunal practice Rules; which provide for expeditious disposal in the circumstances, the applicant has been indolent enjoying interim orders for stay of execution for over 2 years. The applicant avers that no prejudice will be occasioned to the claimant if their application is granted. However, we note that failure to prosecute, the application has caused great delay in the matter.

We have also noted the contents of the draft defence and that the same has not demonstrated any sufficient grounds to stay execution and or set aside the judgment. We note that the said defence does not raise any triable issues since there is no express denial of the amount owed. The draft defence proposes the modes of payment and the suggestion that the claimant should offset the amount from the savings of the respondent in the circumstances therefore we find that the draft has not

raised any triable issues.

We note that the respondent was duly served and alleges failure to file a memorandum of appearance and defence within time due to the error/omission of a third party, which third party did not swear any affidavit on the said allegations.

The respondent also alleges to have been unwell hence the reason why he sent the 3rd party but no evidence or documents showing the nature of illness.

The two allegations/grounds raised by the respondent do not demonstrate any sufficient cause to set aside the interlocutory judgment.

In light of the above we find that no reasonable cause has been shown for the defendants failure to enter an appearance within the stipulated time. We also find that the respondent has not demonstrated sufficient grounds or merits to our satisfaction that there was a good defence as per the draft defence filed. In the circumstances we find that the application has no merits and its prosecution has been unduly delayed.

We therefore dismiss the application dated 24.5.2017 with costs.

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

In the presence of:

Claimant: Mrs.Simiyu for Claimant/Respondent.

Respondent: Miss Kirui holding brief for Kabathi for Applicant.

Court Assistant: Leweri and Buluma.

B.Kimemia - Chairman-signed.

R.Mwambura - Member-signed.

P.Swanya - Member-signed.



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