REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 222 of 2010

WINNIE WAMBUI KIBINGE.....….....1ST PLAINTIFF

ERNEST NJENGA KIBINGE.....2ND PLAINTIFF

FRANCIS KAHINDI KIBINGE.....3RD PLAINTIFF

Suing as Legal Representatives of Isaiah Ngei Kibinge - Deceased

VERSUS

MATCH ELECTRICALS LIMITED……..……..DEFENDANT

RULING

By a Notice of Motion dated 15th August 2012 expressed to be brought under the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 8 rule 3, Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law the Defendant seeks orders:

1. That this Honourable Court be pleased to set aside the interlocutory judgement entered on 6th July 2012.

2. That time for filing the Defence, Witness Statements and all documents be extended and such pleadings filed on 18th July 2012 be deemed as duly filed in the extended period.

3. That the Defendant be granted leave to amend the defence in terms of the draft amended defence annexed herewith.

4. That costs of this Application be borne by the Plaintiffs.

The application is grounded on the fact that the purported judgement entered on 6th July 2012 does not lie in law and is irregular; that the Defendant entered appearance on 28th May 2012 through the firm of **Omollo & Company Advocates** but the Advocates did not file the Defence timeously; that the said advocate filed its Defence on 18th July 2012 by which time interlocutory judgement had already been

entered; that the suit has been fixed for formal proof on 1st October 2012; that the Defendant stands to suffer enormously if the interlocutory judgement is not set aside as it has a good defence to the claim; that the Defendant has a good Defence borne in the Defence, Witness Statements and Documents filed on 18th July 2012; and that it is in the interest of justice for the application to be allowed.

The application is supported by an affidavit sworn by **Christopher Maina**, a plaintiff's director sworn on 15th August 2012. According to the deponent, following the institution of this suit, the defendant instructed the firm of **Omollo & Company Advocates** to represent the defendant and the said firm filed a notice of appointment of advocates. The said firm was duly instructed on the nature of the defence together with the need to take out the third party proceedings against the firm which was subcontracted to undertake the works that caused the accident. The deponent then promptly availed the witnesses and believed that the pleadings had been filed and completed which was confirmed by **Mr Omollo**. However, in July 2012, the deponent learn from **Mr Omollo** that the matter was coming up for formal proof on 1st October 2012 since by the time he lodged the Defence on 18th July 2012 interlocutory judgement had been granted on 6th July 2012 hence locking the defendant out of challenging liability or joining the third party. Being unhappy with the said firm the defendant instructed the present firm on record to take over the matter. As a consequence of the failure by the erstwhile firm to file the defence within time the defence was filed 30 days out of time which in the defendant's view is not inordinate. According to his legal advisers the claim herein being damages arising from an accident does not qualify for entry of interlocutory judgement hence the interlocutory judgement entered herein is irregular and ought not to have been entered. Upon perusal of the said defence, it is deposed that the role of the third party as well as the particulars of the negligence of the third party were not pleaded hence the need to amend the same. Once the third party is joined in these proceedings, it is deposed the Court will be fully aware of the material facts necessary for a just determination of the claim. In the deponent's view, the defendant stands to suffer enormously if the interlocutory judgement is not set aside as it has a good defence to the claim. Although the defendant's advocates sought to have the said judgement set aside by writing to the plaintiffs' advocates no reply was received hence the application has been brought without undue delay and it is in the interest of justice that that the interlocutory judgement be set aside so as to allow the free flow of justice.

The application was opposed by a replying affidavit sworn by **Winnie Wambui Kibinge**, the 1st plaintiff herein. According to her the summons and plaint having been properly served, the defendant chose not to file a Defence until 11 days after the interlocutory judgement had been entered in the matter. According to her the interlocutory judgement was entered in the plaintiffs' favour in the sum of Kshs. 16,276,976/- being liquidated sum in form of pleaded special damages and loss of family income provable by way of receipts and documentation and the matter set down for formal proof. In her view there is no excuse or justification to comply with the rules otherwise deliberate non-compliance with the rules would defeat the purpose of the rules that provide timetable for conduct of litigation. In her view, the defendant is at liberty to seek recourse for negligence against the Advocate who failed to file the defence. The defendant's purported inclusion of the third party, in her view, dos not extinguish the plaintiffs' right to proceed to formal proof and realise the decretal amount herein and hence the application is not merited and the applicant not entitled to unconditional leave to defend. In the deponent's view, her family will seriously be prejudiced if the Judgement is set aside as it will serve to delay recovery to her detriment and the family which has no other source of livelihood.

The application was prosecuted by way of written submissions. In its submissions, the defendant contends that the plaint herein does not contain a liquidated demand and as such does not warrant entry of interlocutory judgement. In the defendant's view, the reliefs sought are in the nature of unliquidated damages founded in tort of negligence and therefore the interlocutory judgement entered in favour of the plaintiff herein is irregular and should be set aside. According to the defendant the only provision for

entry of interlocutory judgement is found in Order 10 rule 4 of the Civil Procedure Rules and relying on Supreme Court Practise 1995 Volume 1 para. 6/2/4 at page 36, a liquidated demand is a demand in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertainable or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand" but constitutes damages. On the authority of **Mwatsahu vs. Maro [1967] EA 42** it is submitted that the true nature of the claim was one of pecuniary damages for breach of warranty of title for which the registrar had no power to enter judgement. On the authority of **Mint Holdings Ltd & Another vs. Trust Bank Ltd Civil Appeal No. 182 of 1999 [2000] eKLR** and **Abraham K Kiptanui vs. Delphis Bank Ltd & Another HCCC No. 1864 of 1999**, it is submitted that the entry of interlocutory judgement in respect of prayers in a plaint without liquidated demand is irregular and such judgement will be set aside as a matter of right. Therefore, it is submitted that the plaintiff should not have sought interlocutory judgement but should have set down the suit for trial to prove their case. If the Court finds the judgement regular, it is submitted that the defendant has a good defence to the case and the court ought to exercise its discretion to set aside the judgement. In the said defence the defendant contends that it was the negligence of the deceased that caused the accident and the consequent death and hence the particulars of negligence attributed to the defendant are denied. Relying on **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** and **Tree Shade Motors Limited vs D T Dobie and Company (K) Limited & Another Civil Appeal No. 38 of 1998 [1998] eKLR** , it is submitted that in an application for setting aside an ex parte judgement, the Court must consider not only the reasons why the defence was not filed or why the Defendant failed to turn up for the hearing but also whether the applicants had a reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raises triable issues. On the issue of amendment, it is submitted that it is necessary to do so since it is only when the proposed 3rd party is a party to this suit that the Court will be able to appreciate the dispute in its entirety and reach a just determination. It is further submitted that though the defendant was diligent in instructing counsel, the delay was solely caused by the defendant's previous advocate and in any event a delay of 30 days is not inordinate and the plaintiff can be compensated by costs hence the said advocate's fault should not be visited upon the Defendant and the cases of **Charles Munyeki Wachira vs. Kenya Pipeline Company Limited [2006] eKLR** and **Maina vs. Mugiria [1983] KLR 78** are cited for the preposition that to deny the subject hearing should be the last resort of a court. Accordingly, it is submitted that the applicant is deserving of the exercise of the Court's discretion in its favour.

On the part of the plaintiffs it is submitted that the interlocutory judgement entered by the court is both regular and good in law and the prayers sought by the Plaintiff are in the form of liquidated demand. Relying on ***Black's Law Dictionary, 8th Edition***, it is submitted that Liquidated amount is a figure readily computed based on an agreements term. On the authority of **G L Baker Limited vs Barclays Bank Limited & Others [1956] 1 WLR 1409** and **Naiju Investments Limited vs. George Adongo & 5 Others [2006] eKLR** it is submitted that it would not be right to give the phrase 'liquidated demand' so narrow and technical a significance as long as the figures claimed in the plaint are specific enough. According to the plaintiffs, the prayers sought in the plaint are General damages under the Fatal Accidents Act and Law Reform Act, Special damages and costs of the suit and as such there is a pecuniary claim under Order 10 rule 6. In their view, the defendant's annexed draft amended defence does not raise any triable issues and are only afterthoughts calculated at delaying the payment of the decretal sums awarded in the interlocutory judgement. Relying on the decision in **Jimba Credit Limited vs. Galot Industries Limited & Others HCCC 799 of 2002**, it is submitted that whereas it is true that a party should always expect and be accorded opportunity to put its side of the case, to allow it to do so that party must demonstrate why it did not do the needful in time and what that intended defence will ultimately come to. In the plaintiffs' view, there is no good reason why the defendant did not file its

intended defence in time. On prejudice it is submitted that the plaintiffs will seriously be prejudiced if the judgement is set aside as it will serve to delay justice to their detriment as the family does not have any other source of livelihood and the case of **Jimba Credit Limited vs. Galot Industries Limited & Others** (supra) is again relied upon. It is further submitted that the defendant is guilty of prolonged inordinate and inexcusable delay and by extension is guilty of laches evident by its move to file its defence out of time and by filing an application to set aside the interlocutory judgement and while quoting **Total Kenya Limited vs. Supa Hauliers Limited HCCC No 939 of 2002**, it is submitted that the discretion of the court is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed or intended to assist a party who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. On the authority of Kodak (K) Limited vs. Business Imaging System (K) Limited HCCC No. 1886 of 2000, it is contended that since the defendant was served with summons, if the court were minded to exercise its discretion to set aside the interlocutory judgement in favour of the Defendant, then the court ought to require the defendant to deposit the decretal sum in a joint interest earning account in the names of the Advocates for the parties and award the plaintiffs thrown away costs. In the result the plaintiffs' view is that the application to set aside the interlocutory judgement should be dismissed with costs.

The first issue for determination is whether in the circumstances of this case, it was open to the Deputy Registrar to enter interlocutory judgement in default of defence. Entry of default judgement is provided for under Order 10 rules 4, 5, 6 and 7 of the Civil Procedure Rules. It is important to set out the full text of the said provisions for the proper understanding of their scope, extent of application and relevance. The said provisions are as follows:

"4. (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons 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.

(2) 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 as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaint makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the

damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders."

From the foregoing it is clear that a final judgement can only be entered where the suit is for a liquidated demand only. Where, however, the claim is for a liquidated demand and some other claim, a default judgement can only be entered in respect of the liquidated demand while the other claims proceed to hearing. Where, on the other hand, the claim is for pecuniary damages only or for detention of goods with or without pecuniary damages, the court is only entitled to enter interlocutory judgement and fix the matter for assessment of the quantum of damages or value of goods (a procedure that is popularly known, erroneously though, as formal proof). It is only in respect of the foregoing claims that a default judgement whether final or interlocutory can be entered. In all other claims the plaintiff must proceed under rule 9 of Order 10 and set the matter for hearing.

In the present suit the plaintiffs' claims from the defendant:

A. General damages under the Fatal Accidents Act and Law Reform Act.

B. Special damages as pleaded.

C. The costs of the suit;

D. Such other relief as the Court may deem fit to grant.

I have no doubt at all in my mind that general damages are pecuniary damages and the same position applies to special damages claimed. As for costs those are consequential awards and nothing turns upon them. With respect to prayer (D) that is a general prayer which has been held is inconsequential as the Courts ordinarily do not and ought not to, save in exceptional circumstances, peg substantive orders thereon. It is trite for example that the common claim for further and other relief does not entitle the Court to award general damages. See **Municipal Board of Mombasa vs. Ogilvie [1956] 23 EACA 157** and **Sultan Sir Saleh Bin Ghaleb And Others vs. Saif Bin Sultan Hussain Al Quaiti and Others Civil Appeal No. 17 of 1956 [1957] EA 55.**

It is therefore my view and I so hold that an interlocutory judgement as opposed to final judgement, which only applies to a liquidated demand, could properly be entered in default of a defence pursuant to Order 10 rule 6 aforesaid. It must always be remembered that in determining the nature of the claim it is not the words employed by the parties but the substance of the claim that is important. In other words, it is the course of action rather than the forms of pleading that determines whether a demand is liquidated or general damages. See **Ramzan Abdul Dhanji vs. Union Insurance Company Ltd. Kisumu HCCC No. 239 of 1994.**

Counsel have made substantive submission on whether the claim herein was liquidated or not. However, in my respectful view, that issue does not fall for determination in this application. The judgement that was entered by the Deputy Registrar on 6th July 2012 was an interlocutory judgement rather than a final judgement. If the Deputy Registrar had been of the view that the sum of Kshs. 16,276,975/- was in respect of liquidated demand, he would have instead entered final judgement in respect of the said sum as provided under Order 10 rule 4(2) aforesaid. That he entered an interlocutory judgement instead is a clear indication that the said sum was deemed to be pecuniary but unliquidated demand.

I therefore find that the Deputy Registrar was entitled and had jurisdiction to enter interlocutory judgement as he did in this matter and the decisions in **Mint Holdings Ltd & Another vs. Trust Bank Ltd eKLR** (supra) and **Abraham K Kiptanui vs. Delphis Bank Ltd & Another** (supra) are clearly distinguishable.

As was held by the Court of Appeal in **CMC Holdings Limited vs. Nzioki** (supra):

"**In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed".**

That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt. The discretion is, however, intended so to be exercised to avoid injustice and hardship resulting from

accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **Shah vs. Mbogo & Another [1967] EA 116.**

In **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

The Court further recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline and that a defence on merits does not mean a defence, which, must succeed, but one, which discloses *bona fide* triable issue for adjudication at the trial.

In this case the defendant's failure to file the defence has been attributed to the fact that the erstwhile advocates for the defendant failed to file the defence within the time stipulated under the Civil Procedure Rules. That the defendant entered appearance is not disputed. The fact of entering appearance was, in my view, a step in the proceedings and therefore the version placed forward by the defendant that it was desirous of defending the suit but was let down by its advocates manifest a reasonable cause. It is however, nolonger necessary that the cause shown be sufficient since the discretion whether or not to set aside is unfettered.

In considering whether or not to set aside the default judgement a judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, are certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie*defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in

view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

Since the advent of the overriding objective stipulated under section 1A of the Civil Procedure Act, the Court is now enjoined, in the exercise of its powers under this Act or the interpretation of any of its provisions, to seek to give effect to the overriding objective specified in subsection (1) of section 1A of the Civil Procedure Act. That objective requires that the Court must aim at inter alia the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Accordingly the court must consider the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. NAI. 68 of 2008.**

What this means is that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not mean that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective and the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity.

Taking into all the circumstances of this case I am satisfied that the reason advanced for not filing the defence within the stipulated period as attributable to mistake of the defendant's legal counsel constitutes a reasonable ground for the purposes of the exercise of the Court's discretion in the defendant's favour. On the issue of the defence, since the defendant attributes the cause of the accident to a third party, in order to avoid multiplicity of suits and ensure that all the real questions in dispute between the parties the Court must exercise its discretion in a manner that would go a long way in achieving the overriding objective. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** the Court of Appeal held *inter alia* that:

"The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

In determining this application, I take cognisance of the fact that even if the application is disallowed the matter would still have to proceed to assessment damages and since there an appearance on record, the defendant would be entitled to participate in the said process. Yes the setting aside of the judgement will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the defendant to put forward its case on

merits. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective.

I have said enough to show that I find merit in the Notice of Motion dated 15th August 2012. Accordingly, the interlocutory judgement entered herein on 6th July 2012 is hereby set aside, the defence filed herein is deemed to have been filed within time and leave is hereby granted to the defendant to amend the said defence within 10 days. The plaintiffs are at liberty to amend their plaint, if need be within 10 days of service of the amended defence.

In setting aside, the Court is however, required to do so on terms that are just. The terms in question must not only be just to the defendant but to the plaintiff as well. The plaintiff has sought orders that the decretal sum be deposited. I am, however, not prepared to grant the application on such condition which I do not consider just in the circumstances. The condition that commends itself to me is that the defendant pays thrown away costs assessed in the sum of Kshs. 15,000.00 within 15 days from the date hereof and in default execution to issue.

Dated at Nairobi this 5th day of December 2012

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Odhiambo for Plaintiffs

Mr Mwihuri for Mr Ojiambo for the Defendant