Trans Africa Energy Limited & another v Alten Renewable Energy Developments Africa, BV & another; Standard Bank of South Africa Ltd & 2 others (Objector) (Civil Suit E023 of 2023) [2024] KEHC 7517 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7517 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E023 OF 2023

JRA WANANDA, J

JUNE 24, 2024

BETWEEN

TRANS AFRICA ENERGY LIMITED ..... 1ST PLAINTIFF

KENSID SOLAR SYSTEMS LIMITED ..... 2ND PLAINTIFF

AND

ALTEN RENEWABLE ENERGY DEVELOPMENTS AFRICA, BV ..... 1ST DEFENDANT

ALTEN KENYA SOLAR FARMS BV ..... 2ND DEFENDANT

AND

THE STANDARD BANK OF SOUTH AFRICA LTD ..... OBJECTOR

STANBIC BANK KENYA LTD ..... OBJECTOR

THE EMERGING AFRICAN INFRASTRUCTURE FUND LTD ..... OBJECTOR

RULING

1. Before me are three applications for determination. The applicants filed two applications; one dated 16th February, 2024 and another dated 26th February, 2024. The Objectors later filed an application dated 19th March, 2024 seeking stay of warrants of attachment and sale dated 26th February, 2024. A chronology of the applications is as follows:

2. The application dated 16th February, 2024 is expressed to be brought under the provisions of Article 50(1) and 159 (2)(d) of *the Constitution* of Kenya, Sections, 1A and 3A of the *Civil procedure Act*, Order 5 Rule 3 and 21, Order 10 Rule 11, order 42 Rule 6(1), Order 51 Rule 1 and Order 50 Rule 9 of the Civil Procedure Rule. The applicants seek the following reliefs:

a. Spent

b. That pending the hearing and determination of the application herein, there be an order of stay of execution of the interlocutory judgment entered on 5th December, 2023 and the decree arising from the said interlocutory judgment.

c. That the Interlocutory Judgment entered against the Defendants on 5th December, 2023 be set aside ex debito justitiae.

d. That pending the hearing and determination of the intended appeal against the ruling of 8th February, 2024, the proceedings herein be stayed.

3. In support of the application are ten substantive grounds and the affidavit of James K. Muthui, an Advocate of the High Court of Kenya. The applicants aver that:

i. On 20th November 2023, the Applicants' Advocates herein filed a Notice of Appointment under protest and an application dated 20th November, 2023 challenging the jurisdiction of this Honorable Court and sought that the suit be struck out

ii. Directions on the Defendants' Application were issued by Hon. Justice Nyakundi on 21st November, 2023 wherein the parties agreed that the application should be determined on priority and the same would proceed by way of written submissions. The parties attended court on 19th December, 2023 to confirm filing of submissions in respect of the Defendants' Application and the court set the delivery of the Ruling for 17th January, 2024. On the scheduled date, the Defendants' Advocates were informed that the Hon. Judge was indisposed and that the ruling would be delivered on notice.

iii. The Defendants' Advocates wrote to the Court on 1st February 2024, inquiring on the ruling date issued.

iv. On 9th February, 2024, the Plaintiffs' Advocates served upon the Defendants' Advocates a Decree dated 19th December, 2023 indicating that interlocutory judgment was entered on 5th December, 2023 together with a Notice of Entry of judgment dated 9th February, 2024.

v. The defendants' advocates contacted the registry and inquired into the pending ruling. The Applicants' Advocates were informed that the ruling was delivered on 8th February, 2024.

vi. The Applicants were neither served with a ruling notice nor informed of the date for delivery of the ruling. The matter was further not listed for ruling on the cause list posted on the Kenya Law website for 8th February, 2024 before Hon. Justice Nyakundi.

vii. The Defendants' Application challenging jurisdiction on the grounds that the shareholder agreement and loan agreement provided for arbitration and or were governed by the law of the Netherlands and Court of Amsterdam have exclusive jurisdiction, precluded the filing of any defence and hence the entry of interlocutory judgment against the defendants on 5th December, 2023. The interlocutory judgment entered is irregularly and liable for setting aside ex debitio justitiae.

viii. Both Defendants are foreign registered entities and were not properly served with summons to enter appearance as required by Order 5 Rule 3 and Rule 21 of the Civil Procedure Rules.

ix. The Defendants are apprehensive that there is real likelihood that the Plaintiffs will move to execute the decree for recovery of the cumulative sum of USD. 10,960,100 upon the lapse of

10 days from the date of service of the Notice of Entry of judgment which is set to lapse on 19th January, 2024.

x. The Defendants have a constitutional right to a fair hearing under article 50(1) of *the Constitution*. The Plaintiffs' claim should be decided on merit before a tribunal or court with requisite jurisdiction.

4. The Applicants soon thereafter did a subsequent application dated 26th February, 2024 brought under the provisions of Article 50(1) and 159 (2) (d) of *the Constitution*, Sections 1A and 3A of the *Civil procedure Act* and Order 51 Rule 1 of the Civil procedure Rules. The applicants sought orders as follows:

a. Spent

b. That pending the inter partes hearing of the Application dated 16th February 2024 scheduled for 15th March, 2024 by the Defendants, there be an interim order of stay of execution of the interlocutory judgment entered on 5th December 2023 and the decree arising from the said Interlocutory judgment.

c. That in the alternative to prayer (2) herein, the court do issue an early date before the Court on priority, for hearing and determination of the prayers for certification of urgency and interim order of stay of execution of the Interlocutory judgment entered on 5th December, 2023 and the decree arising from the said interlocutory judgment pending inter partes hearing of the Notice of Motion Application dated 16th February 2024 scheduled for 15th March, 2024.

d. That costs of the application be in the cause.

5. The application is anchored on grounds enumerated as hereunder:

i. That on 9th February 2024, the Plaintiffs' advocates served upon the Defendants' Advocates a Decree dated 19th December, 2023 indicating that interlocutory judgment was entered on 5th December 2023 together with a Notice of Entry of Judgment dated 9th February, 2024.

ii. The Notice of Entry of Judgment was set to lapse after ten days, being 19th February, 2024 and which date has already lapsed and there is real likelihood that the Plaintiffs will move to execute the decree for recovery of the cumulative sum of USD 10,960,100.

iii. Vide the Notice of Motion dated 16th February, 2024 filed under certificate of urgency, the defendants sought inter alia that the application be certified as urgent and an order for interim stay against the execution of the interlocutory judgment entered on 5th December, 2023 and the decree arising from the said interlocutory judgment be issued pending inter partes hearing.

iv. The court on 20th February 2024 reportedly issued directions that the application be served for inter partes hearing on 15th March, 2024.

v. Both Defendants who are foreign registered entities and who were not properly served with summons to enter appearance as required by Order 5 Rule 3 and Rule 21 of the Civil Procedure Rules stand exposed to imminent execution of the astronomical sum of USD. 10,960,100 in the absence of any interim orders of stay pending inter partes hearing of the application.

6. The Plaintiffs/Respondents in response to the two applications filed a replying affidavit sworn by Edward Njoroge on 12th March, 2024. The Respondents deponed that the defendants were properly and duly served with all the pleadings in this matter including the summons to enter appearance, on

10th November, 2023. That as a consequence, of service of the requisite pleadings, the defendants filed a notice of appointment of advocates dated 20th November, 2023, evidencing service.

7. The Respondents argued that the defendants' averments that they were not properly served are immaterial and therefore inconsequential in all respects, since the defendants were duly served and have been aware of these proceedings. They further stated that the application dated 20th November, 2023 and determination thereof did not preclude the defendants from the rules of procedure in the Civil Procedure Rules, 2010 regarding timelines for filing of pleadings. That an objection on account of jurisdiction does not automatically oust the laid down procedures and/or stop time from running for the filing of pleadings as set out in the Rules, unless there is a clear order for stay in that regards.

8. The Respondents maintained that the interlocutory judgment entered herein in favor of the Plaintiffs on 19th December, 2023 is well within the law, is regular in all respects and therefore, there is no justification whatsoever to have the same set aside. In the respondent's view, a grant of stay of proceeding by this honorable Court as sought in the Application will be tantamount to sitting on appeal of its own decision regarding the issue of jurisdiction and this is contrary to law. That this court lacks the requisite jurisdiction to grant a stay order on proceedings on the ground of jurisdiction which has already been determined by this very court.

9. The objectors came in with an application dated 19th March, 2024 seeking to set aside the warrants of attachment and sale dated 26th February, 2024 issued to Agunja Traders Auctioneers and on order unconditionally raising/lifting the attachment of all the Objectors' properties which were proclaimed on 29th February 2024.

10. According to the objectors, they have a legal and equitable interest over all of the properties listed in the proclamation notice by Agunja Traders Auctioneers dated 29th February, 2024. They contend that the proclaimed properties form part of the Objectors' security by virtue of various credit facilities that were advanced to the 2nd defendant by the objectors.

11. That the objectors secured their interests in the proclaimed properties under a guarantee and debenture dated 29th April, 2021 which created fixed and floating charges over all the assets of the 2nd defendant and several credit facility/security agreements which are listed in paragraph 5 of the affidavit of Venashan Seerangam sworn on 19th March, 2024.

12. The objectors argued that that their rights as secured creditors of the 2nd defendant rank in priority to the rights of the Plaintiffs/Decree Holders.

13. In response, the Plaintiffs/Respondents filed a replying affidavit sworn on 19th April, 2024. In it, the Plaintiffs through their learned counsel deponed that the objectors' application as drafted is a deliberate attempt to obstruct the cause of justice contrary to the overriding objectives of this Honorable Court and with the sole intention of further denying the Plaintiffs herein the fruits of their judgment.

14. The Plaintiffs further averred that the nature of the debentures annexed to the application by the objectors purport to create a fixed charge over all the assets of the 2nd Defendant. However, the objectors have not established the application and their written submissions in respect thereof as presented, their equitable and/or legal interest regarding the assets proclaimed by Agunja Auctioneers on 29th February, 2024 pursuant to the interlocutory judgment herein against the defendants.

15. The Plaintiffs contention is that a floating debenture only crystallizes upon the appointment of a receiver and/or an administrator under the *insolvency Act*, 2015. However, as at the time of the proclamation of the said assets, the objectors had not appointed an administrator and/or receiver and

therefore the charge was yet to crystallize. In the premises, the said assets were available for attachment and therefore the rights of the Plaintiffs rank in priority to those of the objectors.

16. That at the time of proclaiming the assets aforesaid, the debentures itemized at paragraph 5(a) – (b) of the supporting affidavit of Venashan Seerangam were yet to crystallize and therefore the rights of the objectors have to be subordinated to the Plaintiffs' rights in so far as the assets so proclaimed are concerned.

Plaintiffs/Respondents' submissions on the application dated 26th February, 2024

17. It is submitted for the Respondents that the defendants were duly served with all the pleadings including the summons to enter appearance aforesaid pursuant to the provisions of Order 5 Rule 22B of the Civil procedure (Amendment) Rules, 2020 and Section 1(B) 1(e) of the Civil Procedure Rules which are in full force and effect regarding service of court process. The defendants received all the pleadings hereinabove and chose to participate in the proceedings unconditionally.

18. Learned counsel for the Respondents made submissions that the only issue the defendants protested upon was the issue of jurisdiction in view of the agreements referred to in their application challenging jurisdiction. In the circumstances, the defendants' averments that they were not properly served is immaterial and therefore inconsequential in all respects, since the defendants were duly served and have been aware of these proceedings and have actually actively participated in the same through their appointed advocates. That the purpose of service is to ensure that a defendant is made aware of the subject court proceedings against it. In this case, the defendants were made aware of these proceedings and submitted to its jurisdiction under protest. According to the Respondents, Order 5 Rule 21 was overtaken by events by the defendants choosing to participate in the proceedings unconditionally with regard to rule 21.

19. It was the Plaintiff's submission that the defendants did not apply for any and there was no stay order in place on the filing of pleadings on the part of the defendants in particular the filing of a memorandum of appearance. That it is irrelevant that the Rules do not make provision for stay application when an issue on jurisdiction arises. On this reliance was placed on the case of Raytheon Aircraft Credit Corporation & another v Air Al-faraj Limited (2005) eKLR.

20. Learned counsel submitted that the interlocutory judgment was procedurally obtained and was well within the law and in support of this position, the following decisions were cited;

    a. Dodhia Motors Limited v Mbathi Mule & another (2021) eKLR

    b. Jimmah Mwangi Irungu v Emily Wambui Wairimu (2021) eKLR

    c. Corporate Security Services Limited v Linksoft Communication Systems Limited (2016) eKLR

Determination

21. I have carefully read through the three applications. In my judgment, a determination as to whether the interlocutory judgment entered on 5th December, 2023 ought to be stayed would cure the subsequent application dated 26th February,2024. I say so for reasons that the application dated 26th February, 2024 sought stay of execution of interlocutory judgment entered on 5th December, 2023 pending the hearing and determination of the application dated 16th February, 2024. The application dated 16th February, 2024 and the application 26th February, 2024 are twinned in the sense that the general thread running across them is stay of execution of the interlocutory judgment entered on 5th December, 2023.

22. The starting point would be the provisions of Order 10, rule 11 of the Civil Procedure Rules, which provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside. The provisions speaks in a language as follows:-

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

23. This Court's discretion to stay or set aside an interlocutory judgment is wide and there are no limits or restrictions on the Court's discretion as long as it is exercised on such terms as may be just. In the case of Mbogo & Another vs Shah (1968) 1 EA 93, the court held as follows:

> " Applying the principle that the Courts discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

24. Similarly, in the case of Patel vs EA Cargo Handling Services Ltd (1974) EA 75, the Court held thus: -

> " There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

25. The principle that emerges from the above cited cases is that the discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position that was adopted in Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd [2018] eKLR where the court listed the matters to be considered in the exercise of this discretion as follows: -

i. The defendant has a real prospect of successfully defending the claim; or

ii. It appears to the court that there is some other good reason why;

iii. The judgment should be set aside or varied; or

iv. The defendant should be allowed to defend the claim

26. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede (1982-1988) KAR, the Court of Appeal held that: -

> " The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani -v- MC Conmell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

27. There is no doubt that the Defendants were duly served with the pleadings in question. As submitted by the Plaintiffs/Respondents' counsel, the defendants have been actively participating in the proceedings through their appointed advocates. That the defendants were made aware of the proceedings and submitted to its jurisdiction under protest.

28. The Applicants instead argued that their application challenging jurisdiction on the grounds that the shareholder agreement and loan agreement provided for arbitration and or were governed by the law of the Netherlands and Court of Amsterdam have exclusive jurisdiction, precluded the filing of any defence and hence the entry of interlocutory judgment against the defendants on 5th December, 2023.

Was the interlocutory judgment regularly entered?

29. In the case Mohamed & Another -v- Shoka (1990) KLR 463 the Court set out the tenets a court should consider in entering interlocutory judgment to include:

    i) Whether there is a regular judgment;

    ii) Whether there is a defence on merit;

    iii) Whether there is a reasonable explanation for any delay;

    iv) Whether there would be any prejudice.

30. The statutory timelines for filing a defence are provided for under Order 7, Rule 1 of the Civil Procedure Rules which provides that;

> " Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

31. In the case of, Kimani -v- MC Conmell (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

32. There is no question given this statutory background and the rules as prescribed by the legislature that the default judgment was regularly entered by the Deputy Registrar of the High Court. That is notwithstanding the position taken by the defendant that the court lacked jurisdiction which essentially was a moot question until the court pronounces itself on the matter. Indeed, the issue of jurisdiction cannot oust the express the provisions of the law on institution of suits, countdown of time upon service of the claim upon the defendant and proper service having been complied with, there is a legitimate expectation of the law that the defendant must enter appearance and after 14 days file the appropriate defence. It is also undisputed that a defendant may also plead the issue of jurisdiction in the statement of defence bringing to the notice of the court that the claim is non-justiciable for want of jurisdiction. In this case, the applicant defendant placed emphasis on the issue of jurisdiction as an independent issue by filing the motion dated 20th November, 2023. As regards to the default judgment,

the record account shows an affidavit of service upon the defendant requiring the court to exercise discretion in complying with the statutory timelines. The explanation by the defendants/applicants that challenging jurisdiction of the court was a bar to filing any other suit papers having been properly served is never a ground stipulated in the *civil procedure act* and rules. It is therefore not true unless on clear arbitral clauses in the commercial agreements can then one consider not to file a defence since a court of law is not the first port of call by dint of an arbitration clause in the agreement. I also do not agree with the complaint by the defendant that the Deputy Registrar erred in making an entry of interlocutory judgment, that the reason given of a pending application on jurisdiction was sufficient to oust her jurisdiction. It therefore means that there is no reason given by the defendant on the issue of delay in filing a statement of defence to the Plaint duly served by the Plaintiff.

33. A glance at the record shows that upon the Plaintiff serving the Plaint and other annextures, the defendant moved to file a notice of motion dated 20th November, 2023. The assertion by the applicants that service did not comply with the provisions on the regulatory framework on foreign service as provided for in the Civil procedure Rules, is a claim not borne out by the evidence. There is an irrebuttable presumption in Art 50(2)(g) of *the Constitution* on legal representation applicable in both criminal and civil law that a party has a right to be represented by an advocate of his own choice. This has been considered in the context of the fact that legal counsel for the defendant could not have filed memorandum of appearance on behalf of the defendant without instructions or retainer. In my respective view, the firm of Kaplan & Stratton Advocates could have only entered appearance on behalf of the defendants in keeping with the constitutional imperatives and other statutory provisions on legal representation. It is my understanding that with the advent of technology, the traditional model of foreign service of a party to litigation is no longer sequenced on events exhibited on Order 5 Rule 3 and Rule 21 of the Civil Procedure Rules in its strict sense.

34. Speaking on the context of this case as it presented itself and every case being determined on its own factual circumstances, the Plaintiff and the defendants' relationships was founded on contract prior to this dispute. What that means as reasonably practicable, their nature of communication was not based on domiciled physical addresses but on a more transformative digital platforms of emails etc. That fact is not acknowledged by the defendant for reason that they might want to exploit the provisions of Order 5, which was enacted before the advent of high-level technological advancement of communication between parties including international joint ventures. I believe that the defendants are not on firm ground on this issue for the very reason that they acted with diligence to enter appearance in answer to the claim by the Plaintiff.

35. In any event, the defendants have been trading in Kenya and foreign service in such circumstances allows one not to seek leave to serve. That was echoed in the case of Law Society of Kenya v Martin Day & 3 others [2015] eKLR in the following terms:

> " On the question of service of summons to enter appearance outside the jurisdiction of this court on a defendant who is residing outside Kenya, Order 5 Rule 25 of the Civil Procedure Rules provides that: where leave to serve a summons or notice of summons out of Kenya has to be granted under rule 21, and the defendant is a Commonwealth citizen as defined in sub sections (1) and (2) of section 95 of the(former) Constitution or resides in any of the countries for the time being mentioned in sub section (3) of that section, the summons shall be served in such manner as the court may direct."
>
> The rider that exists is that leave may not be necessary if it is shown that the foreign company or foreigner is also either trading or domiciled in Kenya."

36. For this court to set aside the interlocutory judgment, the evidence presented by the applicant defendant must answer to the question that the learned Deputy Registrar exercised her discretion in the circumstances of the case, in failing to give weight to the strength of the notice of motion challenging the jurisdiction of the court. This is in contrast with what is in the letter and spirit of the law. That on expiry of the said timelines in the *Civil Procedure Act* and Rules, there was no draft defence on record. The complaint by the defence counsel is that the application considered by the learned Deputy Registrar was in excess of jurisdiction bearing in mind the application filed on jurisdiction. In this respect therefore, having opined that there is no error of fact or error of law in the entry of interlocutory judgment for this court to revisit the issue, certain criteria must be met by the defendants as discussed in the case of Mohamed & Another -v- Shoka (1990) KLR 463 (Supra).

37. The primary consideration in respect of this application of interlocutory judgment is whether the defendants/applicants have filed any statement of defence or draft defence in answer to the Plaint defending the claim. Why is this critical?

38. In the instant case, there is nothing else the court can anchor the decision save for the insistence by the defendant applicant on jurisdictional issues. As far as this court is concerned, right or wrong, is an issue which is fait accompli. Counsels' submissions that the pronouncement of the interlocutory judgment should not have overridden that application on jurisdiction cannot interpreted to mean that the provisions of the statute are to be held in abeyance or withheld. Undoubtedly, an important consideration is the proper approach to abide by the timeline expressly stated by the law on all the circumstances of filings of pleadings. The essential question of jurisdiction then if it is predominant question becomes a determinant factor in the suit. The effect of this, that this court having determined the issue of jurisdiction already the litigation highway was opened for the defendant to file some form of statement of defence as contemplated by the law, as it pursues to settle the issue in the superior court in accordance with our legal system. For that proposition of setting aside the controversial interlocutory judgment, without prima facie proof of some existence of triable issues, the court finds itself at a cross road in absence of relevant instruments to place reliance on to interfere with the decision. The sense in which I use prima facie here in effect means nothing more than sufficient proof on the part of the defendant that there are certain triable issues which the law recognizes to be canvassed as between the disputants in this suit. That is to say, some defence which a prudent man or judge exercising his/her authority under Art 50(1) of *the constitution* in the circumstances of the particular case ought to act upon.

39. It has been observed that the different provisions of the *Civil Procedure Act* and Rules may require different interpretation and construction as for example the court exercises its power in a given case liberally in condoning delay in filing the statement of defence to a suit. However, the same may not be true while construing the facts of another case, in which the court draws from its inherent jurisdiction to exercise discretion in favor of an applicant for his or her indolence to comply with the Rules. It is in the light of legal public policy upon which the *Civil Procedure Act* and Rules is based, the object behind the law being that the mandatory and directory nature of the provisions such as Section 1A and 1B of the *Civil Procedure Act* has to be read in conjunction with Order 7 Rule 1 and Order 10 Rule 11 of the Civil Procedure Rules. It must always also be borne in mind that while construing existence of sufficient cause to set aside a regular exparte judgment, in an application under order 10 of the CPR that on expire of the period of limitations prescribed for filing a statement of defence, substantive rights in favor of a decree holder accrues particularly on money decrees and this right(s) ought not to be lightly disturbed by the court. The decree holder treats the decree to be binding with the lapse of time and may proceed with such assumption creating new rights enforceable in law. Incidentally in this matter, we are not being asked for leave by the defendant to file the defence outside

the prescribed period so as to delve into the grounds on sufficient cause to entitle them condonation of delay and have the defence be heard on merits. The court has time and again observed that when mandatory provisions are not complied with and delay is not properly, satisfactorily and convincingly explained where a statement of defence was never filed by a party, it is not the business of the court to condone delay on sympathetic grounds alone. The merits of this application on setting aside the interlocutory judgment cannot be considered without first having a panoramic view of a draft defence filed by the defendants. This application is being presented before this court beyond the limitation period set out in the Civil Procedure Rules of a party to file his/her defence to the claim. In my view, I do not find sufficient reasons which prevented the defendants from approaching the court within the period under which they were to file the statement of defence notwithstanding the disputed jurisdiction of the court. In deciding the case within the parameters of setting aside a regular default judgment, the defendants filed affidavits in response, which fall short threshold in the *Civil Procedure Act* and Rules. As borrowed from the principles of Gatirau Peter Munya V Dickson Mwenda Kithinji (2014) eKLR, when interpreting the provision of the Act, we cannot disengage from the principles that lead to their enactment. This means that when considering statutory timelines, one also considers the constitutional principle of timely resolution of disputes. Failure to observe timelines in a statute is incurable and not even Art 159(2)(d) can remedy it. I think time has come for courts not to condone certain abdication of the law and to engage the court's jurisdiction on grounds of unfettered discretion to enlarge time in circumstances which even time is unforgiving. It is implicit as a matter of law that setting aside an ex parte interlocutory judgment in default of defence as sought by the defendant it must be shown that there are issues to be tried by the court.

40. The defendants/applicants have failed to identify the issues to be tried in the event the interlocutory judgment is set aside. There was no draft defence exhibited at that time and in the turn of events before this court, there is no such defence setting out any factual matters or evidence which could be relied on to ground and or substantiate to the action to the claim by the plaintiff. There was no statement then under oath, and even now as to the facts which will be relied on by the defendants/applicants to challenge the claim save for the intended appeal on the ruling of this court on jurisdiction. The Defendants have admitted elsewhere in some of the averments that the Plaintiffs are not strangers to the crucial aspects of the claim raised by the Plaintiff. However, in other respects, the defendants have simply not admitted the jurisdiction of the court. In light of this factors, the court is not certain as to why it should be asked to set aside an ex parte judgment when jurisdiction is at the core of this case. It is settled law that if this court has to go by the submissions and averments in support of the application by the defendants/applicants, the locus classicus case in this subject being the Owners of the Motor Vessel "Lilian s" v Caltex Oil Kenya Ltd (1989) is emphatic:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of

> the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

41. In construing the defendants/Applicants' application, in line with the "Lilian s" case (Supra), Having taken strong view that this court has no jurisdiction, any invitation to that effect would be in contravention to above guidelines. from the start until overruled by this court, the defendants applicants have held a strong position that this court lacks both jurisdiction personam and in rem. However, let me say something more as to why I am reluctant and unconvinced to concur with the defendants/applicants in so far as the interlocutory judgment is concerned which I have already ruled that in the four corners of the *Civil Procedure Act* it was regularly entered. On the merits of it, a motion, chamber summons or an application for that matter which involves a primary remedy of setting aside a judgment in default of defence has all to do with a litigant first seeking leave to enlarge time with an outline of the reasons by the defendants/applicants' failure to comply with the time limits prescribed by the particular rule. The defendant must go further than that by demonstrating that there is merit to the defence. In other words, the application must be supported by a statement under oath as to the applicant's version of the facts of the subject matter in issue. Therefore, for an applicant to succeed in setting aside a regular ex parte judgment. He/she must satisfy the court that there is the real prospect of successfully defending the claim. that is not the case here before this court. What will be the court be applying in exercising jurisdiction to stay or set aside the interlocutory judgment? The Court is told of many things but central to it is just the predominant grievance of jurisdiction. The court therefore cannot even test the real prospect of success test which can only be satisfied from the evidence and not Pleadings. In the case before me, no affidavit has been filed to that effect in the first instance. The court in assessing the parties' respective positions can only do so on the basis of affidavit evidence in line with the particulars of the claim as pleaded. As a consequence, there was no material before court then with the alleged efforts made by the defendants which deals with the enlargement of time before asking for setting aside of interlocutory judgment.

42. Consequently, there are no exceptional circumstances in this case to warrant this court to exercise discretion to set aside the interlocutory judgment. The essence of the draft statement of defence is meant to provide a basis in which evidence can be called by the defendant to bolster the defence and at an appropriate time to have both cases determined on merits. In absence of a draft defence or proposed defence to determine whether the applicants have a case with high chances of success against the Plaintiff, judgment in default of defence carries the day as decreed.

43. In the persuasive case of Fiesta Jamaica Limited v National Water Commission, (2010) JMCA Civ 4 the court held: -

> "The question arising is whether the affidavit in supporting the application contained material which was sufficiently meritorious to have warranted the order sought. The learned judge would be constrained to pay special attention to the material relied upon by the appellant not only to satisfy himself that the appellant has given good reasons for its failure

to have filed its defence in the time prescribed by the Rule 10.3 (1) of the Civil Procedure Rules (C.P.R.) but also that the proposed defence had merit."

44. In the first instance, the defendants/applicants even within the context of settled factors of setting aside default judgment, they have denied the court the opportunity to assess the evidence on the merits. To that extent, any exercise discretion to grant the relief of interfering with the default judgment lacks reasonable grounds for the court to exercise jurisdiction on the matter. Secondly, under Section 1A of the *Civil Procedure Act*, an overriding objective enabling the court to deal with cases justly in accordance with considerations including those listed in this provision are tailored to guide the courts towards dealing with cases justly so far as is practical, expeditiously and fairly. The effect of this is that under the *Civil Procedure Act* and Rules, the court takes into account all relevant circumstances and in deciding what order to make, it has got to consider the conduct of a party prior, during and after the entry of the default judgment. The decision depends on the justice in all the circumstances of the individual case. Like in this case, the Plaintiff postpones the issuing of the writ of the statement of defence even at the end of the limitation period prescribed by the Civil Procedure Rules. The bitter truth is that the defendant in this case, having been served with the Plaint was a clear notice that commenced the proceedings and therefore had the responsibility to proceed with the required urgency to comply with the regulatory framework. This did not happen even after the issue of jurisdiction was determined by this court. The most striking aspect of this sorry terror of delay is the Plaintiff's unchallenged evidence in bringing the matter to have interlocutory judgment applied for in giving effect to the provisions of the Rules in the *Civil Procedure Act*.

45. My take is procedural and substantive justice are on equal footing when it comes to adjudication of cases. Under section 1A, 1B and 3A of the *Civil Procedure Act*, a judge has an unqualified discretion to strike out a case such as this one where there has been a failure to comply with a rule. The court exercises those powers with circumspection for it is also essential that parties to a suit do not disregard timetables laid down by the statute. If they do so, then the court must make sure that the default does not go unmarked. I strongly believe that if the courts were to ignore delays which occur to abide or comply with the rules of procedure under the umbrella of Article 159(2)(d) that justice shall be administered without undue regard to procedural technicalities, then undoubtedly there will be a return to the traditional culture of regarding time limits as being unimportant. I consider delay to be always the enemy of justice.

46. It is of significance that the defendants/applicants complain of the Plaintiff/Respondent's conduct of applying for interlocutory judgment as an aspect which may be considered unprocedural given the fact that the issue jurisdiction was at stake. It is not lost for this court in appreciating the record that the defendants/applicants filed their notice of appearance and this rendered it necessary for them to file statement of defence within the time prescribed but that did not happen. In the circumstances of the present case, a decision was pronounced on the jurisdictional issue of the court and yet relying on that ruling, the defendants/applicants failed to challenge the Plaintiff on the issues raised in the Plaint by filing a defence. This exercise gave rise to endless arguments and citations of cases raising the same contentious issues on jurisdiction. In determining the type of order which is appropriate in this given situation, exercise of discretion is dependent upon evaluating the evidence before it. It is that court's ability which a court in considering the matter on a variety of factual situations, it can interfere with the session Deputy Registrar's decision to enter interlocutory judgment. So, is there evidence in the affidavit by the defendants/applicants which show that she had erred in law or misdirected herself on the impugned orders issued that will lead this court to conclude, that it would be manifestly unjust to stand. In dealing with this criterion, and having noted there has been no assertion, there is an arguable defence, this court lacks the basis to review the decision. Why is the defence important? It provides the relevant information and evidence, the defendant sought to have admitted in the case.

47. The learned author Peter Murphy of Murphy on evidence (ninth Ed) defines 'relevant evidence' as "evidence which had probative value is assisting the court to determine the facts in issue. In that regard he explained that:

> " Relevance is not a legal concept, but a logical one, which describes the relationship between a piece of evidence and a fact in issue to the proof of which the evidence is directed. If the evidence contributes in a logical sense, to any extent, either to the proof or the disproof of the fact in issue then the evidence is relevant to the fact in issue. If not, it is irrelevant. It is a fundamental rule of law of evidence that, if not actually material, evidence must be relevant in order to be admissible. The converse, however is not true, because much relevant evidence is admissible under the specific rules of evidence affecting admissibility. To be relevant the evidence must be such that if believed it could affect the court's conclusion regarding a fact in issue. It must also have some prospect of being believed otherwise there is no point in admitting it. The test of relevance applies not only at the trial, but whenever the court is asked to make a decision about evidence."

48. This court therefore had the burden to determine whether the information contained in the affidavits is capable of proving or disapproving the facts in issue in the substantive matter of setting aside interlocutory judgment. The dominant matter for consideration of the court is to be measured in its widest sense on compliance of the timeline set by the Civil Procedure Rules. The starting point being the nature of the proceedings in which the question arises on account of all the circumstances of the case. In my view, these statements accord with good conscience and judgment that the defendant applicant falls short of meeting the threshold to justify setting aside the interlocutory judgment of this court.

The Objectors' Application

49. Having said that, I proceed to consider the Objectors' application dated 19th March, 2024 which essentially seeks stay and setting aside of warrants of attachment and sale dated 26th February, 2024. It is contended by the Objectors that the properties that have been proclaimed by the Plaintiffs are charged to the Objectors pursuant to various credit facilities that were advanced to the 2nd Defendant by the Objectors. They maintained that they secured their interests in the proclaimed properties under a guarantee and debenture dated 29th April, 2021 which created fixed and floating charges over all the assets of the 2nd Defendant. That they are therefore secured creditors of the 2nd defendant and their legal rights over the properties listed in the proclamation notice dated 29th February, 2024 by Agunja Traders Auctioneers rank in priority to the rights of the Plaintiffs/Decree Holders.

50. The law on debentures finds its basis in the *companies Act*, 2015 but predominantly operates under the *Movable Property Security Rights Act* which introduced the concept of prior security rights by virtue of registration of debentures under that Act.

51. Let me point out that where there is a dispute as to priority between an unsecured creditor and a secured creditor, the secured creditor will as of right initiate objector proceedings to pause the process. Our courts have spoken on this issue and the position is that a secured creditor has priority over an unsecured creditor if the following criterion has been met

52. To start with, it must be established that a security right has been registered as it was in the case of James Kinene Muraguri Vs. Raffia Bags (East Africa) Limited (Judgment Debtor); Diamond Trust Bank Kenya Limited (Objector) [2022]eKLR where the Court dismissed the Objector's application on the basis that the Objector entered into the initial debenture with Polycem Bags Limited (PBL) in

2012, and by the time it was registered, PBL had changed its name to Raffia Bags (East Africa) Limited, hence the debenture was incapable of creating legal or equitable rights accruing or accrued to it.

53. The next condition to be satisfied is that the execution and attachment against the company's assets should be included as some of the events of default in the asset debenture. Once this event takes place, the floating charge created over the assets crystallizes and the debenture holder gains priority over the assets of the company.

54. The final condition is that the execution process should not have been completed by the time the Objector proceedings have been initiated. The court in Lochab Brothers v Kenya Furfural Co. Ltd understood the law to be that the right of an executing creditor ranks in priority over that of a debenture-holder only where execution has been completed by sale of the attached property before the charge crystallizes.

55. The question I then ask myself is whether the debenture herein dated 19th April, 2021 has crystallized. But first, there is need for a distinction between a floating and a fixed charge. The most common form of security taken against companies is the charge. A charge creates an equitable security interest over specified assets owned by a company. The are two types of charge: a fixed charge and a floating charge. A fixed charge attaches to specific assets and prohibits the company from dealing with those assets in the ordinary course of business without permission from the charge holder. A floating charge allows such dealing. Every charge must be one type or the other as a matter of law. See Evans v Rival Granite Quarries Ltd (1910) 2 KB 979. S Worthington.

56. In Re Yorkshire Woolcombers' Association Limited (1903) 2 Ch. 284, the court identified the distinguishing characteristic between a fixed and a floating charge. This characteristic of the floating charge is that, until some step is taken, the company can carry on its business in the ordinary way in relation to the charged assets. Essentially, a charge will be categorized as floating if the company is permitted to deal with the assets in the ordinary course of business.

57. In addition, and in distinguishing a floating charge and a fixed charge, the sentiments of the Privy Council in Agnew V. Commissioner of Inland Revenue (2001) 2 AC 710 are worth noting:

> " In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorization. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it"

58. Finally, on this, the accurate and true representation of a floating charge in my view was echoed in Evans V. Rival Granite Quarries Ltd (1910) 2 KB 979 as hereunder: -

> " A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some act or event

occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

59. It is not always clear which type of charge a debenture creates. Some debentures are ambiguous, and some are internally inconsistent in describing the characteristics of the charge. Because every charge must be either fixed or floating, the courts must develop rules for classifying such debentures. The current legal position is that to create a fixed charge there must be express clauses preventing the company from dealing with specific charged property in the ordinary course of business. A floating charge will be created if the debenture expressly allows the company to deal with the charged property in the ordinary course of business or is silent on the point. The classification of a charge as fixed or floating is not made on the basis that the parties intended to create a specific type of security. Rather, it is made by an assessment of the rights and obligations agreed between the parties and a further assessment as to the legal classification of that set of rights and obligations. Parties who aim to create a fixed charge but who fail to include express contractual restrictions on the company's ability to deal with specific charged property will fail to legally achieve their aims and create a floating charge. Similarly, parties who never intended to create a floating charge, but who agree a set of rights and obligations which amount to a floating charge will be deemed to have created a floating charge. (See Re Cimex Tissues Limited [1995] 1 BCLC 409, Re Spectrum Plus Ltd [2005] UKHL 41; Re Keenan Brothers Ltd (1985) IR 401 (SC), Re Yorkshire Woolcombers' Association Limited [1903] 2 Ch. 284 (supra), Agnew v. Commissioner of Inland Revenue [2001] 2 AC 710 and Peachdart Ltd [1983] All ER 204; Re Charles Dougherty [1984] ILRM 137)

60. There are events that trigger crystallization of a floating charge. Such events curtail the freedom to deal provided by a floating charge, which in turn is converted into a fixed charge. There are two types of crystallization: Express and Automatic. Automatic crystallizing events have been developed at common law and their occurrence results in the automatic crystallization of the charge. The crystallization is automatic in the sense that the charge holder is not required to take any action and there is no requirement for the events to be expressed in the debenture. Automatic crystallization events are such as an order for liquidation, appointment of a receiver and cessation of business. Express crystallization refers to clauses expressed in the debenture that provide for crystallization on a given event. The most common form of express crystallization is the crystallization by the lender issuing notice to the company that the charge has crystallized. See Re Colonial Trusts Corp (1879) 15 Ch D 465, Re Panama, New Zealand and Australian Mail Co. (1870) 10 Ch D 530, Re Woodroffes (Musical Instruments) Ltd (1985) BCLC 227.

61. In the present debentured instrument dated 29th April 2021, the parties had a consensus on the events that would crystallize the floating debenture in clause 4, which provided as follows:

> " 4.1 Crystallization by Notice
>
> The security may at any time by notice in writing to the Borrower convert the floating charge created under clause 3.3 (floating charge) into a fixed charge with reference to any assets specified in the notice:
>
> a. on or after an enforcement date or;
>
> b. the security agent considers that any of the secured assets may be in jeopardy or in danger of being seized or sold pursuant to any form of legal process or;
>
> c. The security agent considers that it is desirable in order to protect the priority of the security created by this debenture

4.2 Automatic crystallization

Notwithstanding clause 4.1 (crystallization by notice and without prejudice to any law which may have a similar effect, the floating charge created by clause 3.3 (floating charge) will automatically be converted (without notice) with immediate effect into a fixed charge as regards all the assets subject to the floating charge if:

a. The borrower creates or attempts to create any security (other than permitted security) or otherwise encumber any of the secured assets or to dispose of any secured assets other than as permitted by the Finance documents; or

b. Any person levies or attempts to levy any distress, execution, sequestration or other process against any of the secure assets;

c. A resolution is passed or an order is made for the winding up, dissolution or re-organization of the Borrower; or

d. An administrator is appointed or any step intended to result in such appointment is taken."

62. In terms of the secured assets, Clause no. 3.1 (d) provides as follows:

" The borrower, as legal and beneficial owner, charges to the security agent as a continuing security for the payment and discharge of the Secured liabilities:

(d) by way of first charge all present and future fixed assets, plants machinery, vehicles, computers and office and other equipment of the Borrower including tools, spare parts, replacements and additions and all related rights."

63. In the instant case, the proclaimed assets as per the proclamation notice were identified to be:

a. Transformers assorted

b. Solar panels

c. Power substation

d. Office furniture

e. Ten (10) complete computers

f. The solar plant

g. Conference table

h. Photocopiers

i. Television set

j. Assorted office desks

k. Assorted side boards

l. Water dispenser

m. Assorted office chairs

n. Assorted cabinets

64. In clause 4.2, the debenture has clearly made provision for the circumstances the parties find themselves in. It therefore means that once the goods were proclaimed automatic crystallization kicked in. It is equally evident that the proclaimed have not yet been attached or sold and therefore the execution process is incomplete. It is not in doubt that the debenture was both a fixed and floating charge. The parties had an agreement on the events that would trigger crystallization of a floating charge into a fixed charge. In this case the agreement was that the floating charge would crystallize if any person levies or attempts to levy any distress, execution, sequestration or other process against any of the secure assets. In the end, it is my considered view that the events of crystallization of the floating charge into a fixed charge happened when the interlocutory judgment was entered and a proclamation notice issued as a result.

65. In the case of Lochab Brothers v Kenya Furfural Co. Ltd [supra], the Court of Appeal noted that once a Floating Charge becomes crystalized through any of the events of default mentioned in a Debenture, the Debenture Holder gains priority over the assets of a company unless the said assets have been sold and or execution is complete. This position was affirmed in the case of Mackenzie (Kenya) Ltd v Pharmico Ltd [supra]

66. From the foregoing, the warrants of attachment and sale dated 26th February, 2024 were some of the agreed circumstances under which crystallization would occur. It therefore means that in the instant case, the act of proclaiming the charged property had the immediate effect of crystallizing the floating charge. The Debenture did not envisage the appointment of a Receiver by the Objector(s) as the point of crystallization as argued by the Plaintiff.

67. It is evident that whereas the Defendants' assets have been attached by the Plaintiff who is the executing creditor herein, the execution process has not been completed since the assets have not been sold. In the circumstances, I find that the Objectors' interest in the attached assets of the Defendants takes precedence over that of the Plaintiffs. (See Menengai Rolling Mills Limited & another v Blue Nile Wire Products Limited & another.

68. For those reasons, I will therefore decline to grant any orders of setting aside the interlocutory judgment.

69. As for the Objectors, application, a freezing order is issued in terms of the assets which fall under clause 3.1 (d) as read with Clause 4.2 of the debenture instrument dated 29th April, 2021. Pursuant to the proclamation dated 29th February, 2024, some of the assets so proclaimed are within the defined instrument governing the relationship between the defendants and the debenture holder.

70. Costs of this applications be borne by the defendants. Leave to apply granted in any event

71. It is so ordered.

DELIVERED ON BEHALF OF JUSTICE R. NYAKUNDI ON THIS 24TH DAY OF JUNE 2024

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HON. WANANDA J. R ANURO

JUDGE

In the Presence of:

Mr. Nyachoti & Co. Advocate

Mr.Kaplan & Stratton Advocates

M/s Iseme Kamau & Maema