



**Celanese Sales Germany GMBH v Monster Beverage Uganda Limited & 4 others  
(Civil Case 26 of 2018) [2022] KEHC 3301 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 26 OF 2018  
OA SEWE, J  
MAY 24, 2022**

**BETWEEN**

**CELANESE SALES GERMANY GMBH ..... PLAINTIFF**

**AND**

**MONSTER BEVERAGE UGANDA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GLOBAL OUTSOURCING LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK KASOZI ..... 3<sup>RD</sup> DEFENDANT**

**RICHARD RANTALA ..... 4<sup>TH</sup> DEFENDANT**

**KENYA PORTS AUTHORITY ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated January 28, 2020. The application was filed by the 5<sup>th</sup> defendant, Kenya Ports Authority, pursuant to Sections 3, 3A, 25 and 27 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, and Order 10 Rules 10 and 11, and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, for the following orders:
  - (a) Spent
  - (b) That the 5<sup>th</sup> defendant's application filed on 28<sup>th</sup> January 2020 be listed for hearing; (spent)
  - (c) That in the interim, the Court do set aside the interlocutory judgment entered herein against the 5<sup>th</sup> defendant pending the hearing and determination of the application; (spent)
  - (d) That in the interim, the Court be pleased to grant an order of stay of the judgment scheduled for delivery on January 29, 2020;



- (e) That leave be granted to the 5<sup>th</sup> defendant to file its response to the application dated March 29, 2018;
  - (f) That leave be granted to the 5<sup>th</sup> defendant to file its defence out of time;
  - (g) That the costs of the application be in the cause.
2. The application was premised on the grounds that on the April 17, 2018, the plaintiff served upon the 5<sup>th</sup> defendant a Notice of Motion, pleadings in this suit dated March 29, 2018 and ex parte orders dated April 16, 2018; and that the orders restrained the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from transferring or otherwise disposing of the goods in three consignments identified as TCLU4292824, EMCU9821107 and BEAU4387148. The 5<sup>th</sup> defendant further explained that it was, likewise, restrained by the said orders from releasing containers numbers TCLU4292824 and BEAU4387148 to the 1<sup>st</sup>, 2<sup>nd</sup>, third and 4<sup>th</sup> respondents; and that it received the documents under protest because two of the containers had already left its premises on 21<sup>st</sup> February 2018 and November 7, 2017, respectively. It however placed a terminal hold on container No. EMCU9821107 which was within its premises.
  3. The 5<sup>th</sup> defendant further complained that, without notice at all, the matter thereafter progressed without its participation; and that it was not until January 17, 2020 that notice for delivery of judgment was served on it. It was therefore apprehensive that judgment would be delivered on January 29, 2020 as scheduled without consideration of its responses, which would make execution unmanageable granted that the subject containers are not in its custody. The 5<sup>th</sup> defendant also indicated that directions would be required as to the payment of any outstanding statutory charges due prior to the release of the container No. EMCU9821107 which is in its premises.
  4. The application was supported by the affidavit of Stephen Kyandih, the 5<sup>th</sup> defendant's Principal Legal Officer, Litigation & Disputes Department, in which the grounds aforementioned were explicated. Mr. Kyandih also annexed to his affidavit copies of the documents served on the 5<sup>th</sup> defendant, including the court orders as well as the Judgment Notice issued by the Deputy Registrar on January 6, 2019. He explained that, in line with the procedures, the 5<sup>th</sup> defendant entered appearance in the suit with intent to serve the Memorandum of Appearance upon the parties during the inter partes hearing of the application; but that this escaped the attention of the 5<sup>th</sup> defendant when no hearing notice was served on it. He further averred that the matter proceeded without the 5<sup>th</sup> defendant's knowledge; and that it was not until January 17, 2020 that it got to know of this when a Judgment Notice was served on it.
  5. It was, consequently, the assertion of Mr. Kyandih that, the 5<sup>th</sup> defendant having received no audience, is apprehensive that the Court will not be in a position to appreciate its incapacity to comply with the court orders regarding release of containers number TCLU4292824 and BEAU4387148, which are not within its premises. Mr. Kyandih relied on the documents marked as Annexure SK4 to demonstrate that the two containers left the 5<sup>th</sup> defendant's premises on 21<sup>st</sup> February 2018 and November 7, 2017, respectively. He consequently prayed for leave for the 5<sup>th</sup> defendant to file its Replying Affidavit and Defence out of time in terms of the draft copies annexed to the Supporting Affidavit as Annexure SK5; and added that the 5<sup>th</sup> defendant has no interest whatsoever in the subject matter of this suit, save for the statutory charges due and payable to it.
  6. In response to the application, the plaintiff filed an affidavit on 3<sup>rd</sup> March 2020, sworn by its Vice President, Mr. Martin Fischer. He explained, by way of background, that the plaintiff filed this suit seeking delivery up of its goods in container numbers TCLU4292824, EMCU9821107, BEAU4387148, TCLU7844948 and BEAU4367326 on account of fraud perpetrated against it by the



1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; and that the plaintiff also prayed for orders compelling the 5<sup>th</sup> defendant to release to it container number TCLU7844948 as well as container number BEAU4367326, presently in its custody. Mr. Fischer further averred that, along with the Plaint, the plaintiff filed an application for interim injunction restraining the 5<sup>th</sup> defendant from releasing the plaintiff's goods in containers numbers TCLU7844948 and BEAU4367326 to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; which orders were granted on 16<sup>th</sup> April 2018. He added that the orders and the suit papers were duly served on the 5<sup>th</sup> defendant on 17<sup>th</sup> April 2018 and an Affidavit of Service to that effect filed herein. A copy thereof was annexed to the Replying Affidavit at pages 1-20 of the Annexures jointly marked as Exhibit "MF 3".

7. It was further averred on behalf of the plaintiff that the 5<sup>th</sup> defendant duly entered appearance on 8<sup>th</sup> June 2018 and therefore ought to have filed a Defence within 14 days upon filing its Memorandum of Appearance, but did not do so. Consequently, an interlocutory judgment was entered against it; after which the suit proceeded for formal proof by way of affidavit evidence and fixed for judgment on 22<sup>nd</sup> January 2020. Consequently, Mr. Fischer deposed that the reason advanced by the 5<sup>th</sup> defendant in support of its application, namely, that it escaped its attention that it needed to file a Defence, is not plausible. He added that, as the 5<sup>th</sup> defendant chose to sit on its rights by failing to defend the suit or take any action for 3 years, the Court should not aid such indolence by allowing the application.
8. Without prejudice to the foregoing, Mr. Fischer also averred that the 5<sup>th</sup> defendant has not demonstrated any triable issues to warrant the setting aside of the interlocutory judgment; having confirmed at paragraph 10 of its Supporting Affidavit that it has no interest in the matter. He urged the Court to note that the plaintiff has already lost goods worth Euro 501,270.00 due to the fraudulent activities of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; and therefore that it ought not to be subjected to further hardship by the 5<sup>th</sup> defendant in connection with the remaining goods. Thus, Mr. Fischer prayed for the dismissal of the 5<sup>th</sup> defendant's application.
9. The application was canvassed by way of written submissions, pursuant to the directions given herein on 3<sup>rd</sup> March 2020 and November 1, 2021. In the written submissions filed on March 12, 2020, counsel for the 5<sup>th</sup> defendant, Ms. Dena, proposed the following issues for consideration:
  - (a) Whether the Court should set aside the interlocutory judgment against the 5<sup>th</sup> defendant and allow it to file its Defence out of time;
  - (b) Whether the 5<sup>th</sup> defendant is in breach of the ex parte orders granted on 16<sup>th</sup> April 2018; and,
  - (c) Whether the setting aside of the ex parte judgment will prejudice the interests of the plaintiff.
10. Counsel relied on Order 10 Rule 7 of the *Civil Procedure Rules* and the cases of *Patel v E.A. Cargo Handling Services Ltd* [1974] and *Tree Shade Motors Ltd v D.T. Dobie & Another* [1995-1988] 1 EA 324 to support her submission that the draft defence exhibited by the 5<sup>th</sup> defendant as Annexure SK5 to the Supporting Affidavit discloses triable issues worth reopening the case for. She further submitted that the 5<sup>th</sup> defendant has demonstrated that the application served on it was undated and had no hearing notice attached; hence the inaction on its part.
11. Ms. Dena further submitted that, upon receipt of the court order dated April 16, 2018, the 5<sup>th</sup> defendant swiftly took action in execution thereof by placing a terminal hold on the subject containers; thereby restraining their removal. She however reiterated the plaintiff's assertion that containers number TCLU42928224 and BEAU4387148 had already been released by the time the order was served. She therefore urged for the setting aside of judgment for the purpose of affording the 5<sup>th</sup> defendant an opportunity to explain why it did not fully comply with the orders of the Court.



12. On whether the setting aside of the interlocutory judgment will prejudice the interests of the plaintiff, counsel submitted that the 5<sup>th</sup> defendant only seeks to defend the suit to avoid injustice being visited on it. She relied on *Mungai v Gachubi & Another* [2005] eKLR in which Hon. Ojwang, J. (as he then was) held that:
- “ a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. When these conditions have not been satisfied when hearing the matter and that hearing leads to a ruling, it is apparent that some of the most crucial matters of fact will be inadvertently or deliberately distorted, and so just outcome will not be arrived at...”
13. Consequently, Ms. Dena urged the Court to consider, not only the reason given by the 5<sup>th</sup> defendant for not filing its Defence within the prescribed time, but also the nature of the action and the issues raised in the draft Defence. She added that to deny a subject a hearing should be the last resort for a Court; and that sufficient cause has been shown by the 5<sup>th</sup> defendant for the re-opening of the case so as to afford it an opportunity to make its defence to the claim.
14. I have carefully considered the application, the affidavits filed in respect thereof by the 5<sup>th</sup> defendant and the plaintiff, as well as the written submissions prepared and filed by learned counsel. I have, likewise, perused the court record and ascertained that the background facts are, largely undisputed. The parties are in agreement that the 5<sup>th</sup> defendant was served with the Plaint as well as Summons to Enter Appearance; and that because it failed to file its Defence within the period of 14 days after filing its Memorandum of Appearance dated April 27, 2018 and filed on May 2, 2018, the plaintiff applied for and was granted interlocutory judgment on August 2, 2018.
15. The record further confirms that similar orders had been obtained prior thereto by the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; and that it was on that basis that the suit proceeded to formal proof. In terms of formal proof, an order was made that the same be achieved by way of affidavit evidence, in accordance with the provisions of Order 19 Rule 1 of the *Civil Procedure Rules*. The suit had consequently been fixed for Judgment on January 28, 2020 when the instant application was filed.
16. The record further shows that upon instituting this suit, the plaintiff contemporaneously filed a Notice of Motion dated March 29, 2018 seeking, *inter alia*, the following interim reliefs:
- (a) That pending the hearing and determination of the application, a temporary injunction do issue restraining the 5<sup>th</sup> defendant whether by itself, its directors, officers, employees, servants, agents, successors and/or assigns from releasing container numbers TCLU7844948 and BEAU4367326 which arrived at the Port of Mombasa on or about October 22, 2017 aboard Evergreen Shipping Line to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants whether directly or by their directors, officers, employees, servants and/or agents.
- (b) That pending the hearing and determination of the application, a temporary injunction do issue restraining the 5<sup>th</sup> defendant whether by itself, its directors, officers, employees, servants, agents, successors and/or assigns from proceeding with any transactions, arrangements, agreements and/or deals howsoever arising and which are aimed at or have the result of, whether directly or indirectly, alienating, distributing, dissipating, excluding and transferring or otherwise disposing of the goods in the containers numbers TCLU7844948 and BEAU4367326.



17. Those prayers are among the orders granted ex parte on April 16, 2018 by Hon. P.J. Otieno, J. Thereupon, the 5<sup>th</sup> defendant was duly served as directed and service was expressly acknowledged in the 5<sup>th</sup> defendant's Supporting Affidavit at paragraphs 3 and 4 thereof. Indeed, the 5<sup>th</sup> defendant was explicit, at paragraph 4 of that affidavit that it immediately complied by placing a terminal hold on the subject containers, thus restraining their movement.
18. In the premises, the only issue for consideration is the question whether the 5<sup>th</sup> defendant has made out a good case for the setting aside of the default judgment recorded against it on August 2, 2018. In this regard, Order 10 Rule 11 of the [Civil Procedure Rules](#), which gives the Court unfettered discretion to set aside or vary any default judgment, provides that:
- “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.”
19. Hence, in *Shah vs. Mbogo* [1967] EA 116, it was held that the discretion is intended to be exercised “...to avoid injustice or hardship resulting from 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. Similarly, in *Patel vs. East Africa Cargo Services Ltd* (1974) EA 75, this principle was expressed thus:
- “The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”
20. It is also well-settled that because there is a distinction between regular and irregular default judgments, different considerations apply. Thus, in *Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & Another*, HCCC No. 241 of 1998 (UR), Njagi, J. (as he then was) expressed the view that:
- “A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right.”
21. In the instant matter, the 5<sup>th</sup> defendant was duly served with Summons to Enter Appearance and Plaint, and in response it filed a Memorandum of Appearance on May 2, 2018. It however failed to file its Defence as required by Order 7 Rule 1 of the [Civil Procedure Rules](#). Accordingly, the default judgment entered herein on 2<sup>nd</sup> August 2018 is a regular judgment which can only be set aside if there is a defence on merit. In this regard, I find instructive the expressions of the Court of Appeal in [Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs. Augustine Kubende](#) [1986] eKLR that:
- “...The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence...obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion.



22. In the premises, the parameters for gauging the merits or otherwise of the 1<sup>st</sup> Defendant's application are:
- (a) Whether there is a justifiable explanation for the default and the ensuing delay;
  - (b) Whether there is a defence on the merits from the standpoint of the 1<sup>st</sup> Defendant;
  - (c) The question of prejudice.

**(a) Whether there is justification for the default and the ensuing delay:**

23. The justification offered by the 5<sup>th</sup> Defendant was that no hearing date was indicated on the Notice of Motion that was served on it along with the Court Order of April 16, 2018. It was further the contention of the 5<sup>th</sup> defendant that it intended to serve the Memorandum of Appearance upon the parties during the inter partes hearing of the said application; and therefore that when it was not notified of the hearing date, the matter escaped attention. I agree entirely with the plaintiff that this excuse is implausible. Having filed a Memorandum of Appearance, the 5<sup>th</sup> defendant was enjoined to make a follow up and file its Defence within 14 days of appearance and thereafter cause it to be served on the plaintiff within 14 days of filing, if indeed it intended to resist the plaintiff's suit. This was a separate process that had nothing to do with the interlocutory application. It was therefore completely distinct from the question as to whether or not a Hearing Notice was served in respect of the Notice of Motion.
24. The explanation that the matter escaped the attention of the 5<sup>th</sup> defendant for about 2 years, from May 2, 2018 when appearance was entered is therefore untenable in the circumstances. Accordingly, it is my finding that the delay, in this instance, was not only prolonged, but is also inexcusable. I nevertheless, bear in mind that even where there is inordinate delay, the Court's discretion may still be exercised if the interests of justice so demand; and if no prejudice will befall the other side for which an award of costs would not suffice. I have in mind the words of Apaloo, JA in *Philip Keipto Chemwolo and Mumias Sugar Company Ltd vs. Augustine Kubende* (*supra*) that:
- "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits ... 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 for the purpose of imposing discipline."
25. It is necessary therefore to consider whether the 5<sup>th</sup> Defendant has demonstrated that it has a defence on the merits.

**(b) On whether there is a merit defence:**

26. A perusal of the plaint reveals that the plaintiff sued the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, contending that it was approached on or about the May 27, 2017 by the 3<sup>rd</sup> defendant on behalf of the 2<sup>nd</sup> defendant, seeking to purchase potassium sorbate on behalf of Monster Beverage Corporation; an American corporation that markets and distributes energy drinks, including Monster Energy drinks, through its subsidiaries. The Plaintiff further averred that it was subsequently led by the 3<sup>rd</sup> and 4<sup>th</sup> defendants to believe that the 1<sup>st</sup> defendant was a subsidiary of Monster Beverage Corporation; and therefore, after a series of correspondence, the plaintiff received an order dated August 21, 2017 purportedly from Monster Beverage Corporation for the supply of 104 metric tonnes of Nutrinova potassium sorbate.



It was then agreed that the goods would be shipped to the Port of Mombasa in five containers from Rotterdam Port in the Netherlands.

27. At paragraph 11 of the Complaint, the plaintiff averred that the goods were ultimately shipped between 19<sup>th</sup> and 22<sup>nd</sup> October 2017 in container numbers TCLU4292824, BEAU4387148, EMCU9821107, TCLU7844948 and BEAU4367326. Monster Beverage Corporation was to pay for the above goods at the price of Euro 4.90 per kg within 30 days of the Bills of Lading. It was the contention of the plaintiff that it did not receive payment on the due dates and was thereafter unable to make contact with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> defendants. It resorted to contacting Monster Beverage Corporation and got to learn that it has no connection whatsoever or dealings with the 1<sup>st</sup> defendant. Accordingly, the plaintiff made a complaint to the 5<sup>th</sup> defendant on December 13, 2017 requesting it to detain the goods in container numbers TCLU7844948 and BEAU4367326 that were still in its custody, pending further investigations; but that the 5<sup>th</sup> defendant was hesitant; and was threatening to nevertheless release the containers. It was at that juncture that the plaintiff filed this suit.
28. As has been pointed out hereinabove, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were duly served with the Complaint and Summons to Enter Appearance by way of substituted service and having failed to react thereto, interlocutory judgment was entered against them on July 31, 2018. Their aspect of the case awaits Judgment. I have therefore looked at the 5<sup>th</sup> defendant's Supporting Affidavit and noted that, at paragraph 10 thereof, it was averred that the 5<sup>th</sup> defendant has no interest whatsoever in the subject matter of the suit save for the payment of the statutory charges due and payable to it in respect of the two remaining containers.
29. I have also looked at the draft Defence annexed to the 5<sup>th</sup> defendant's affidavit and noted that at paragraph 8 thereof, the contention of the 5<sup>th</sup> defendant is that it is not privy to the circumstances that gave rise to the dispute between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and is therefore a stranger to the allegations of fraud made by the plaintiff against its co-defendants; and yet, at paragraph 20 it proposes to object to the orders sought by the plaintiff; especially the order for the release of the two containers to the plaintiff. It is therefore plain to me that the draft Defence raises no triable issue at all; granted that the 5<sup>th</sup> defendant is not without recourse in connection with recovery of any statutory payments owed to it in connection with the subject transaction. Moreover, there is no indication in the draft Defence of any intention to raise a Counterclaim.

### **(c) On Prejudice**

30. The Plaintiff averred that it has already lost goods worth Euros 501,270.00 to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants; and that only two containers were intercepted. The two containers have been under the custody of the 5<sup>th</sup> defendant for about 5 years now. It is therefore my finding that there is no justification for reopening this matter; especially in the face of the assertion by the 5<sup>th</sup> defendant that it has no interest in the subject matter of the suit.
31. In the result, I find no merit in the Notice of Motion dated 28<sup>th</sup> January 2020. The same is hereby dismissed with an order that costs thereof be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF MAY 2022.**

**OLGA SEWE**

**JUDGE**

