



**Anez Catering Company LTD v Gems National Academy Limited  
t/a Regis School Runda (Miscellaneous Case E266 of 2021)  
[2022] KEHC 13509 (KLR) (Civ) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CASE E266 OF 2021  
JN MULWA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**ANEZ CATERING COMPANY LTD ..... APPLICANT**

**AND**

**GEMS NATIONAL ACADEMY LIMITED T/A REGIS SCHOOL  
RUNDA ..... RESPONDENT**

**RULING**

1. Before the court is an application dated April 11, 2022 brought by the defendant – Gems National Academy Limited, under provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 10 rule 11, and 51 rule 1 of the *Civil Procedure Rules* (CPR)
2. The defendant seeks the following orders:-
  - a) Spent
  - b) That the court be pleased to vacate and set aside ex parte judgment entered on the April 1, 2022 pending hearing and determination of the application.
  - c) That the court be pleased to order for leave to allow the defendant /applicant to file a preliminary objection.
  - d) That the applicant be granted leave to file a defence and any other document in support of defence.
  - e) Spent



3. An interim order staying execution of the *ex parte* judgment was allowed in terms of prayer 5 on the June 8, 2022. The application is premised on the grounds stated at the face of the application and supporting affidavit sworn by Ian Kuria a legal officer in the defendant institution on the April 11, 2022, and a supplementary replying affidavit sworn on June 3, 2022.
4. In opposing the application, the respondent filed a replying affidavit sworn on the May 10, 2022 by one Alex Hassan, a director of the plaintiff company. Both parties have filed their written submissions. Which I have carefully considered.
5. The dispute between the two parties is in respect of a contract signed by both parties on the January 4, 2021 as seen from the defendants annexure No. “1K001” being an agreement for provision of catering services to the defendant by the plaintiff. Clause 20 thereof, provides:
  - a) Any dispute arising out of agreement, including any question regarding its existence, validating or termination shall be exclusively referred to and finally resolved by arbitration, under the arbitration laws of Kenya *Arbitration Act* Cap 49 laws of Kenya.
6. In its supporting affidavit, the defendant denied the claim of Kshs 24,072,145/= but admitted a claim for Kshs 8,934,980/= and averred that the balance was not the true balance owed to the Plaintiff.
7. By the supplementary affidavit, the applicant avers that the interlocutory judgment entered against it was irregular as the court had no jurisdiction to entertain the suit in the first instance, by dint of clear provisions of the agreement wherein all disputes arising therefrom were to be subjected to arbitration, and therefore the suit is itself, and the interlocutory judgment prejudicial to the defendant, by the plaintiff’s arbitrary breach and abandonment of the parties obligations under the contract.
8. By the above averments, the applicant seeks leave to file a preliminary objection, objecting to the court’s jurisdiction to entertain any further actions, and leave to file a defence thereto upon setting aside the interlocutory judgment. The intended notice of preliminary objection and the intended defence and counter claim are annexures “1K007”.
9. The applicant’s submissions are dated June 13, 2022. The applicant submits that they were duly served with a notice of entry of judgment on April 4, 2022, in the sum of Kshs 24,072,145/= which as preceded with a demand notice of Kshs 1,613,050 upon which the applicant put forth proposals to pay by instalments, but while awaiting for responses, the respondent proceeded to file the instant suit despite the arbitration clause in the parties contract. The applicant further submits that due to the covid-19 pandemic, it was unable to file its defence or its preliminary objection on the court’s jurisdiction upon reasons stated therein, which the applicant submits can only be dealt with once it is granted leave to file its defence and counterclaim.
10. Citing Order 10 rule 11 of the CPR, it is submitted that the court has power to set aside the said *ex parte* judgment upon terms and allow the applicant to defend the suit. Reliance is placed on the cases; *David Kiptanui yego & 134 others vs Benjamin Rono & 3 others* [2021] e KLR, *Patel v E A Handling Services Ltd* [1974] EA 75 and *Tree Shade Motor Ltd vs D T Dobie Co Ltd* CA 38 of 1998, with a general holding across board that:

“courts ought to be guided by focusing on substantive justice rather than procedural technicalities; that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error; and that just because a mistake has been made, a party should suffer the penalty of not having his case heard on merit”.



11. The applicant further cited the case *Mohamed and another vs Shoka* [1990] KLR wherein the court set the tenets a court should consider in setting aside interlocutory judgment, being whether there is a defence on merit, whether there is a reasonable explanation for any delay and whether there would be any prejudice to the other party if the interlocutory judgment is set aside.
12. By the above submissions, the court has been urged to set aside the interlocutory judgment and allow the defendant to defend the suit.
13. On the part of the respondent, its submissions are dated June 17, 2022.
14. Proposed are issues for determination by the court; whether the interlocutory judgment was regular, whether the delay to file defence on time has been sufficiently explained; whether the proposed draft defence raises trial issues, and whether this court may exercise its discretion in the applicant's favour. Cited decisions in support are; *James Kanyiita Nderitu & another vs Marios Philotas Ghikos & another* [2016] e KLR, *Fidelity Commercial Bank Ltd s Owen Amos Ndungu & another* HCCC No 241 of 1998 (UR), *AG v The Law Society of Kenya & another* Civil Appeal No 133 of 2011 [2013] e KLR among others.
15. It is a submission by the respondent that its claim is for a liquidated sum of Kshs 24,072,145/= and other claims that await to be heard, that the respondent has failed to demonstrate any sufficient reasons why it never entered appearance and therefore urges that the prayer to set aside the exparte judgment be dismissed.  
  
It is further submitted that the draft defence raises no triable issues as the breach of contract was for outstanding invoices in the sum of Kshs 12,613,050 and Kshs 11,309,850/= being the sum of money that he respondent would have earned had the applicant not unilaterally and illegally terminated the contract, citing the case *Rose Mbula Ojwang T/A Falda 2002 Caterers vs Baralla EPZ* (K) Liited [2004] e KLR.
16. On the matter of the arbitration clause, the respondent admits existence of the debt partly, but seeks solace from Section 6 of the *Arbitration Act* that provides that a party who seeks to rely on the clause would first apply for stay of the proceedings and referral of the dispute to arbitration at the earliest time without taking any other step on the proceedings. Citing the cases of *Eunice Soko Magui vs Suresh Pama & 4 others* [2017] e KLR; and *Clear Pan Construction (A) Ltd vs East African Gas Company Ltd* [2008] e KLR for the proposition that a defendant cannot rely on an arbitration clause where there is no dispute, and that a plaintiff is entitled to judgment on a partly admitted claim, then apply for stay of the balance of the claim.
17. The issues that I deem necessary for determination, in my view are:-
  - a. Whether the court has jurisdiction to entertain the applicant's application by dint of the arbitration clause.
  - b. Whether the interlocutory judgment against the applicant in the sum of Kshs 24,072,145/= was regular.
  - c. The import of the arbitration clause in the parties contract/agreement dated January 4, 2021.
18. I have perused the plaint dated October 28, 2021. At paragraph 13, particulars of special damages are tabulated as:
  - a. Outstanding invoices of Kshs 12,613,050/=.
  - b. Loss of user of the plaintiff's equipment at Kshs 237,690/= per day till return.



- c. Kshs 11,309,850/= being invoices from October 21, 2021 to December 23, 2021.
- d. Kshs 149,245.000 being value of the perishable goods left at the store.  
Total Kshs 24,072,145.00.
19. At the prayers section, stated at paragraph 16, the plaintiff/respondent seeks:
- a. Payment of the sum of Kshs 24,072,145.00 plus interest at commercial rates till payment in full.
- b. The plaintiff's request for interlocutory judgment dated 23.11.2021 was for Kshs 24,072,145.00 together with costs and interest, which was so entered on the April 1, 2022 by the Deputy Registrar.
20. That takes me to issue no (b) above, whether the interlocutory judgment entered against the defendant was regular; and whether it was a liquidated claim. The Court of Appeal in the case, *James Kanyinya Nderit & another* (Supra) defined a regular judgment to mean:
- "in a regular judgment, the defendant will have been duly served with summons to enter appearance but for one reason or another, he had failed to enter appearance or to file defence, resulting in a default judgment"
21. It is not in dispute that the applicant was duly served with court process; that makes the interlocutory judgment regular. However, was the exparte judgment entered based on a liquidated claim, or on an admitted claim?
- Order 10 rule 4(1) of the *Civil Procedure Rules provides* :
- "where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons at all and the defendant fails to appear, the court shall 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".
22. Looking at the plaintiff's claim at paragraph 18 (reproduced as is), there lingers doubts in my mind as to whether the sum entered as interlocutory judgment was indeed a liquidated claim. Particulars of special damages at (i) is stated as outstanding invoices, in the sum of Kshs 12,613,650/=.
23. As to (ii), (iii) and (iv), it is clear that those items have to be proved; and therefore, not liquidated claims. That in my view, is the purport of Order 10 rule 4 (2) that:
- "Where the plaintiff makes a liquidated demand 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 (i) but the award of costs shall await judgment upon such other claim."
- I do not agree with the plaintiff's submission that the sum of Kshs 24,072,145/= was purely a liquidated claim, as the other claims stated thereof together are subject to proof.
24. At the applicant's affidavit in support of its application at paragraph 7, the applicant admitted a sum of Kshs 8,934,980 as the verifiable debt, which is expressly stated in the response by letter dated October 25, 2021 (Ext. 1K003), and stating clearly that any other demand was unacceptable and would be denied; and proposals of settlement put forth. This is further buttressed by the applicant in the draft



statement of defence, which, by a perusal raises numerous triable issues, contrary to the respondent's assertion that it has no triable issue at all.

25. Further, in its replying affidavit, the respondent at paragraph 12 admits having been aware of the unequivocal admission of Kshs 8,934,980/= by the applicant. I am also minded that the respondent's demand letter of the November 23, 2021 stated a sum of Kshs 12,613,050/= upon which the applicant acknowledged owing Kshs 8,934,980/= as stated above. On the March 25, 2022, the learned Deputy Registrar entered interlocutory judgment upon a request by the plaintiffs advocate Odera Obar & Co Advocates as follows:

“Interlocutory judgment is hereby entered against the defendant. Other prayers sought in the plaint and assessment of damages to await formal proof”

See also entry no 4 by the Deputy Registrar(DR) . Nowhere did the court (DR) state the sum of Kshs 24,072,145/=. That is so because the above stated sum cannot and could not amount to a liquidated demand as stated above, for reasons stated.

26. In the wording of Order 10 rule 4(2) (CPR), judgment can only be entered if the whole claim or part of it was liquidated. The plaintiff applied for interlocutory judgment under Order 10 rule 4(2) on the assumption that the plaint made a liquidated demand together with some other claim, as evidenced by the wording on the plaint – see paragraph 18 of this ruling.

A liquidated claim or debt is defined in [\*Black's Law Dictionary 10th Edition\*](#) page 489 thus:

Liquidated debt is a debt whose amount has been determined by agreement of the parties or by operation of law; a debt that is due immediately and unconditionally”.

27. In addition, a liquidated debt or claim is one that need not be ascertained. The plaintiff's claim cannot be said to be ascertained at first glance. It must go for trial so as to prove the claim. The interlocutory judgment entered was a default judgment that ought to be proved by evidence.
28. In the case *Mwala vs Kenya Bureau of Standards* [2001] EA 148, the court rendered itself on what constitutes a regular and irregular ex-parte judgment, thus where the judgment sought to be set aside is a regular one, then the court is called to exercise its discretion. On the other hand, if the judgment sought to be set aside is an irregular one, it ought to be set aside not as a matter of discretion but ex debito justitiae for a court should never countenance an irregular judgment on its record.
29. Order 10 rule 11 [\*Civil Procedure Rules\*](#) 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.

In doing so the court is guided by provisions of article 159(2)(b) of the [\*Constitution\*](#) as well as section 1A, and 1B of the [\*Civil Procedure Act\*](#) being the focus on substantive justice as opposed to procedural technicalities, the just, efficient and expeditious disposal of cases [\*David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others\*](#) [2021] e KLR; and [\*Rosemary Wanjiku Kungu vs Directline Assurance Company Ltd\*](#) [2017] eKLR .

30. Upon careful consideration of the submissions, I am of the view that justice will be served by an order the setting aside the exparte interlocutory judgment entered against the defendant on the January 14, 2021 and all consequential orders arising therefrom.
31. I have already rendered that the draft statement of defense raises serious issues for trial. Before I delve into whether or not to allow the applicant to defend the suit, I must state the place of an arbitration clause in a contract or agreement.



32. Section 6(i) provides that if a matter in dispute is subject to an arbitration agreement, a party served with summons to enter appearance, but before filing a defence or acknowledges the claim, ought to apply for stay of proceedings and for the matter to be referred to arbitration, unless the court finds:
- a) That the arbitration agreement is null and void, in operative or incapable of being performed or;
  - b) That there is no infact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
  - c) Proceeding before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

33. The above principles were underscored by the Court of Appeal in the case *Eunice Soko Mlagui* (supra) that once the court determines that there exists a dispute in respect of the matter, then it is obligated to stay the proceedings – *Clearspan Construction (A) Limited* (supra).

34. It is also possible that a claim may be brought to court for an admitted claim even when there is an arbitration clause. If that is done, the claimant is entitled to judgment on the admitted claim and a stay may issue on the balance of the claim. These principles, resonate well with the matters in dispute in this case, and parties may be in order to invoke the same for some expeditious disposal of the admitted claim.

By the above, it is clear that the court has jurisdiction to entertain the claim despite the arbitration clause for the reasons that the ex-parte interlocutory judgment was irregularly obtained and the court cannot be called upon to sanitize an irregularity that is also illegal as is the case in this application.

35. As to the matter of allowing the applicant to defend itself, it is trite that if a defence has been brought to the court's knowledge, however irregularly, it should be considered as it would be absurd to deny a party a hearing. The court should look at the draft defence to see if it contains a valid or reasonable defence as rendered in the case *TreeShade Motor Ltd vs D T Dobie Co Ltd* CA 38/98.

Order 10 Rule 11 CPR empowers the court to set aside or vary judgment and any consequential decree or order upon terms as are just.

In the instant case, there is no dispute that the defendant was served with court process but one reason or another failed to appear or file a defence, or take the necessary step or applying to stay the proceedings and referring the dispute to arbitration.

36. On the part of the respondent, it ought to have known that the claim stated as a liquidated demand was not such as it was subject to proof and therefore was not clean, without any blemish. In case *Rayat Trading Company Ltd vs Bank of Baroda & Tetezi House Ltd* [2018] e KLR, it is stated that if the court sets aside a default judgment, it may do so on terms; either by an order of costs or throw away costs. I will do neither, because each party carries a portion of the blame, in the circumstances of the case.

37. For the aforesaid, the following orders commend themselves for issue, I find and hold that the application dated April 11, 2022 succeeds partially in the following manner:-

- a. The exparte interlocutory judgment entered against the defendant/applicant hereof is vacated and set aside in its entirety.
- b. The defendant/applicant is granted leave to file whatever documents it may wish to file including, and not limited to a statements of defence and counterclaim within 14 days of this ruling.



c. Each party shall bear own costs of the application

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022**

**J. N. MULWA**

**JUDGE**

