Gulf African Bank Limited v Petroafric Company Limited & 2 others (Civil Suit E154 of 2020) [2022] KEHC 14295 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14295 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E154 OF 2020

A MSHILA, J

OCTOBER 21, 2022

BETWEEN

GULF AFRICAN BANK LIMITED ..... PLAINTIFF

AND

PETROAFRIC COMPANY LIMITED ..... 1ST DEFENDANT

AHMED ABDULLAHI ALI ..... 2ND DEFENDANT

NUR AHMED HARI ..... 3RD DEFENDANT

RULING

1. The notice of motion dated March 4, 2022 pursuant to the provisions of section 1A, 3A and 80 of the *Civil Procedure Act*; order 22 rules 22 and 25 of the *Civil Procedure Rules*; order 45 of the Civil Procedure Rules 2010; order 49 of the Civil Procedure Rules; and order 51 rule 1 of the Civil Procedure Rules. The applicant sought the following orders;

    a. There be a stay of execution of the interlocutory judgment and decree entered herein against the defendants on November 12, 2020, and all consequential orders thereto, pending the inter partes hearing and determination of this application.

    b. That there be a stay of all proceedings in this matter pending the hearing and determination of this application.

    c. The court to review and/or set aside the interlocutory judgment and decree entered herein against the defendants on November 12, 2020, and direct that the matter proceeds to a merit hearing.

    d. The costs of this application be provided.

2. The application was supported by the grounds on the face of it and by the sworn affidavit of Mary Koko who stated that the defendants' statement of defence raised triable issues. In paragraph 4 of the said defence, the defendants denied that all the securities listed in the schedule of securities were used to secure the Murabaha facility of 9th November. In paragraph 11, the defendants denied the extent of indebtedness, that is, they denied that they owed the plaintiff Kshs 76, 531,262.67 as at February 4, 2020 as alleged, and averred that they owed Kshs 26, 700,000 in paragraph 13.

3. Despite the existence of a filed defence on record, the court took the draconian action of striking out the defence for the reasons specified in the plaintiff's notice of motion dated October 2, 2020, specifically for the reason that the defence raised no reasonable defence in law.

4. The defendants are cognizant of the fact that their advocates at the time did not file a replying affidavit to the notice of motion dated October 2, 2020, and neither did they file submissions in opposition to the plaintiff's application. The failure to file a response and/or submissions was a mistake by the defendants former counsel and ought not to be visited on the client.

Applicant's case

5. It was the applicant's case that the provisions of order 7 rule 11 of the Civil Procedure Rule are clear that non filing of witness statements and other documents by a party does not stop the holding of a pre-trial conference. The mode in which the judgment was obtained was unprocedural, cannot stand the test and must therefore be set aside.

6. According to the applicant, for summary judgment to be justified, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial.

7. Further, although there exists an admission of an outstanding amount of Kshs 26,700,000 in paragraph 13 of the defence, the contents of paragraph 11 of the plaint are disputed. This is a triable issue not necessarily one that must succeed but a bonafide trial issue between the parties nonetheless.

8. It was the applicant's submission that the mistake of the applicant's former counsels ought not to be visited upon them. The delay was occasioned by non-communication by former advocates. The applicants issued instructions on time to have the statement of defence to be filed within the time limits provided under the rules. The former advocates were also provided with instructions to have the application defended, but the same was also not done. It was upon filing of change of advocates that the current advocate for the applicant became aware of the application allowed on November 11, 2020 and the orders issued.

9. The applicant admitted that it did not comply with order 7 rule 5 of the Civil Procedure Rules. However, the consequences of non-compliance are not set out as held in the case of *Johana Kipkemei Too vs Hellen Tum [2014] eklr* where the court held that;

> ' There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in order 3 rule 7 and order 7 rule 5. The provisions of order 3 and order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the *Constitution* under article 50 (1), provides that every party deserves a fair trial, and

it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.'

10. It was contended by the applicant that failure to file witness statements or documents on support of its defence is not a ground upon which defence ought to be struck out. Article 159 of the *Constitution* calls upon the courts not to pay undue regard to procedural technicalities but strive to ensure that substantive justice is administered.

11. The applicant submitted that no prejudice will be occasioned to the respondent in the event the orders being sought are granted. In any event, the same can be compensated by way of costs.

12. It was the applicant's position that the respondent is likely to execute the decree against the applicants without a stay of execution in place. The applicants are apprehensive that if the orders of stay are not granted until the application filed is heard and determined, the application shall be rendered nugatory.

13. The issues as deponed raises points of law and facts within the knowledge of the advocate. In the case of *Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR* the court stated that 'where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.'

Respondent's case

14. In response to the applicant's case, the respondent stated that the defendants never complied with the mandatory provisions of order 7 rule 5 of the CPR on filing of documents to oppose the plaint. The defendants have not explained why they failed to comply and adduce evidence to support their bare denials in the sham defence.

15. The failure to file any witness documents is fatal leading to the striking out of a suit. To date, no evidence has been adduced to rebut the plaintiff's evidence and nothing useful will be achieved by setting aside a valid judgment. The importance of filing of witness statements and documents was stressed by the court in the case of *Sendy Kenya Freight Limited v Multiple Solutions Limited [2021] eKLR* where the defendant was denied leave to rely on oral evidence after failing to comply with order 7 rule 5.

16. The overriding objective is to do justice and not delay a party from its fruits of litigation where no triable issues exist. By filing the application 18 months after final judgment is unreasonable, a delaying tactic and merely seeks to frustrate the plaintiff. It is too late for the applicant to submit that because of lack of case management procedure the court had no jurisdiction to deal with the application. Firstly, the defendants had no valid defence to the suit. Secondly, they are estopped from raising such an argument 18 months after the event and not having raised in in any event. Thirdly, no evidence by the defendants has been adduced to explain the delay. An advocate as explained below, cannot adduce evidence

17. In addition, the respondent submitted that the defendants have not laid any legal basis to review the judgment. There is no error on the face of the record or discovery of new evidence to warrant the setting aside of the judgment.The remedy would be to appeal the decision setting aside the judgment that was regularly obtained rather than oppose for the sake of obstructing justice and the plaintiff's fruits of litigation.

18. The defendant's advocate Mary Koko has sworn both the supporting affidavit dated March 4, 2022 and the further affidavit dated March 30, 2022. She committed the following cardinal sins that unwary advocates fall for when swearing affidavits on contentious matters:

i. In the supporting affidavit she merely avers that she has the conduct to the matter but does not set out any authority from corporate and individual defendants to swear the affidavits.

ii. She swears on contentious matters without any information as to who provided the information.

iii. She fails to appreciate that this was a final judgment and embarrasses herself at paragaph 12 of the supporting affidavit when she swears that it was an interlocutory judgment when on the face of it the decree clearly shows it was pursuant to an application.

iv. She submits on issues only her clients can attest to regarding their acts of omissions.

v. She has absolutely no authority or capacity to refer to the purported losses that may be suffered by the defendants.

vi. She cannot allege that the previous advocate refused to oppose the application in the absence of any evidence.

19. The respondent argued that the very essence of a trial advocate is to never to enter into the arena of litigation and assume the combative role of a litigant as he invites the ignominy of being called as a witness. The duty of an advocate to avoid swearing on contested facts was determined in the case of *Habiba Ali Mursai & 4 others v Mariam Noor Abdi [2021] eKLR* where the court admonished the advocate for swearing on contested facts that required evidence. The court held [pages 23-31]:

> ' Be that as it may, I must state that the provisions of rule 9 of the *Advocates (Practice) Rules* as well as the various decided case law, dating back to the decision in the case of Simon Isaac Ngui vs Overseas Courier Services [1998] eKLR, have underscored the fact that it is not acceptable for an advocate to swear an affidavit and/or declaration, in respect of contentious evidential facts and/or issues.
>
> I must also add my voice to the same trite, if not, hackneyed legal position, which frowns upon advocates abusing their privileged positions, by venturing into and swearing affidavits pertaining to contentious evidential facts and/or issues, in matters where same have been retained as advocates.'

Issues for determination

20. Having considered the application, response and the written submissions, the issue before this court is:

a. Whether this court should set aside the interlocutory judgment delivered on November 12, 2020?

b. Whether there has been inordinate delay in filing the application to set aside the interlocutory judgment?

Analysis

Whether this court should set aside the interlocutory judgment delivered on November 12, 2020? Whether there has been inordinate delay in filing the application to set aside the interlocutory judgment?

21. Order 10 of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10, Rule 4 empowers Courts to enter interlocutory judgment in cases where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, rule 9 gives

the plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this order. Order 10, rule 10 provides that in cases where a defendant has failed to file a defence, Rules 4 to 9 shall apply with any necessary modification. While rule 11 empowers the court to set a side or vary a judgment that has been entered under order 10.

22. Order 10 rule 4 (1) and (2) of the Civil Procedure Rules stipulates as follows: -

> ' 4 (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in form No 13 of appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
>
> (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in form No 13 of appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.'

23. Order 10, rule 11 of the Civil Procedure Rules, on the other hand provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it states 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.'

24. It is notable that the interlocutory judgment herein was entered on November 12, 2020 and a decree issued. The application herein was filed 18 months later. This court takes the view that delay of one and half years in filing the present application is inordinate and unreasonable. The applicant has not explained it. The client cannot hide behind the excuse that the delay was occasioned by non-communication by former advocates. The case belongs to the client who has the responsibility and duty to follow up on the progress of their case.

25. In addition, the respondent herein filed a reference dated April 29, 2021 in which the applicant fully participated. In the reference the applicant herein opposed the same while defending the taxing officer's decision. It therefore follows that this present application has been overtaken by events.

Findings and determination

26. For the foregoing reasons this court makes the following findings and determinations;

    a. This court finds that there was inordinate delay in filing the instant application.

    b. This court finds the application to set aside the judgment delivered on November 12, 2020 to be devoid of merit.

    c. The application is hereby dismissed.

    d. Each party shall bear its/their own costs on this application.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Kigata holding brief for Allen Gachuhi for the Petitioner/Respondent

No appearance by the Defendant/Applicant

Lucy----------Court Assistant