Master Power Systems Limited v Civicon Engineering Africa & another (Civil Case E397 of 2018) [2022] KEHC 16129 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E397 OF 2018

WA OKWANY, J

NOVEMBER 24, 2022

BETWEEN

MASTER POWER SYSTEMS LIMITED ..... APPLICANT

AND

CIVICON ENGINEERING AFRICA ..... 1ST RESPONDENT

GZI KENYA LIMITED ..... 2ND RESPONDENT

RULING

1. This ruling determines three applications, the plaintiff's applications dated July 30, 2020 and October 16, 2020 and the defendant's application dated September 29, 2020.

Application Dated July 30, 2020

2. The plaintiff filed the application seeking orders that:-

    a) Spent

    b) That pending hearing and determination of this Application, the 2nd Defendant, their agents, servants and or anybody claiming under them be and is hereby restrained from alienating, selling, leasing, assigning, disposing off, transferring, charging, encumbering and or entering dealings of any nature including advertising or agreements for [ease, sale, disposal and or interfering in any way with the property known as title Kajiado/Kaputei South/3875 situate in Kajiado pending hearing and determination of the Application and the suit herein.

c) That this application be heard inter-parte as a matter of urgency on such date and at such time as this Honourable Court may direct.

d) That in the alternative to (2) above, the 2nd Defendant/Respondent deposits in a joint interest earning account the sum of Kshs. 47,387,974.14/= duly ascertained as owing to the 1st Defendant in respect of interim payment certificate No 20 within 21 (twenty one) days from the date of this Order pending hearing and determination of this suit.

e) That this Honourable Court be pleased to strike out the 1st Defendant/ Respondent's statement of defence dated February 22, 2019 and filed on February 27, 2019 for being frivolous, vexatious and failing to raise any triable issues.

f) That consequent to grant of prayer (5) above, this Honourable Court be pleased to enter judgment in favour of the Plaintiff/Applicant against the 1st Defendant/Respondent in the sum of Kshs 66,475,542.21/= as particularized in the Plaint, plus interest at commercial rates till payment in full.

g) That further consequent to grant of prayer (5) & (6) above the Hon Court be and is hereby pleased to Order, for the release of the sum of Kshs 47,387,974.14duly ascertained as owing to the 1st Defendant in respect of interim payment certificate No 20; be paid by the 2nd Defendant to the 1st Defendant.

h) That the costs of this application be provided for.

3. The application is supported by the affidavit of the plaintiff's Director Mr Keval Lalji Bhanderi and is based on the following grounds;-

(i) That vide a ruling delivered by this Honourable Court on April 23, 2020, the 1st Defendant/Respondent was directed to deposit the sum of Kshs 66,475,542.21/2 in court or furnish such security as may be sufficient to satisfy any decree that may be passed against it within 30 days of the 23rd of April, 2020 (this date has long since passed).

(ii) That despite entering appearance, the 1st Defendant/Respondent elected not to participate in the proceedings leading to the instant ruling delivered by this Honourable Court on April 23, 2020: worse still the 1st Defendant/ Respondent's premises now remain closed and attempts to effect service of the physical copies of the orders of this Honourable Court upon the 1st Defendant/Respondent have been futile. Advance copies having been served via email on May 7, 2020.

(iii) That worse still the Plaintiff/Applicant has since the delivery of the ruling learnt that the 2nd Defendant/Respondent is in the process of disposing the property which is the subject of the Plaintiff's claim against the Defendants; but also the only property known to the Plaintiff/Applicant more commonly described as Kajiado/Kaputiei South/3875 situate in Kajiado.

(iv) That critically the Plaintiff/Applicant has also reliably learnt that the 2nd Defendant/Respondent is in the process of winding up its local undertaking

and relocating outside the local limits of this Honourable Court's jurisdiction; further threatening the ability of the Plaintiff to realize the fruits of the judgment herein should it succeed,

(v) That the Defendant/Respondents' financial means or free attachable assets other than the property known as title Kajiado/Kaputiei South/3875 situate in Kajiado in the name of the 2nd Defendant/Respondent and the amount of Kshs. 47,387,947.14 duly ascertained as owing to the 1st Defendant/ Respondent by the 2nd Defendant/Respondent in respect of interim payment certificate No 20 are unknown to the Plaintiff/Applicant.

(vi) That the Plaintiff/Applicant is apprehensive that should the 2nd Defendant/ Respondent proceed with the alienation, sale, leasing, assignment, disposition off, transfer, charging, encumbrance and entering of dealings of any nature including advertising or agreements for lease, sale and disposal of the only ascertainable property in the name of the 2nd Defendant/Respondent, such would significantly compromise the Plaintiff/Applicant's lawful claim to work undertaken on the subject property evinced in the improvements undertaken thereon and adversely hamper the realization of the decretal amount and accrued interest effectively rendering the instant suit nugatory.

(vii) That further, the 1st Defendant/Respondent's statement of defence dated February 22, 2019 (hereinafter the "Defence") is unsustainable, scandalous, frivolous and vexatious.

(viii) That the Defence is a sham, consists of unmaintainable contradictions and bare denials devoid of sufficient material particulars to the averments particularized in the Plaint.

(ix) That whereas the 1st Defendant/Respondent admits under paragraph 4 of its Defence the existence of a contractual relationship between it and the Plaintiff/Applicant, it curiously and contradictorily denies the existence of this relationship under paragraph 12 of the Defence.

(x) That while the 1st Defendant/Respondent vehemently denies being indebted in any amount whatsoever to the Plaintiff/Applicant under paragraphs 8, 9, 10 and 13 of its Defence, it quite curiously in its witness statement prepared by Geoffrey Njue and dated February 22, 2019 admits under paragraph 4 therein that it has been negotiating a payment plan for any amounts due to the Plaintiff for the services offered.

(xi) That it is evident that the 1st Defendant/Respondent's entire Defence consists of mere and bare denials which do not traverse or answer the substantial pleadings contained in the Plaint and evinces how the 1st Defendant/ Respondent is merely trifling with the Court.

(xii) That the contradictory pleadings contained in the Defendant/Respondent's Defence are unarguable, quite hopeless and oppressive to the Plaintiff/ Applicant and will lead to the waste of valuable judicial time.

(xiii) That notwithstanding the glaring inconsistencies, the Defence does not explain to what extent the 1st Defendant/Respondent admits indebtedness to

the Plaintiff/Applicant neither does it explain why it does not owe the Plaintiff money.

(xiv) That a mere denial of liability without reasons adduced by the 1st Defendant/ Respondent is not in the circumstances sufficient.

(xv) That consequently, there are no triable issues raised by the 1st Defendant/ Respondent's Defence.

(xvi) That it is just that the instant Application be allowed.

(xvii) That unless this Application is urgently heard and interim Orders granted, the 2nd Defendant/Respondent will at any time during the pendency of the suit against them alienate, dispose of, sell, transfer, lease, charge and/or mortgage its property hereof which is the only known free attachable asset of the Defendants with intent to defeat execution of any decree that may be passed against the Defendants adversely prejudicing the Plaintiff/Applicant's interests and exposing it to substantial and irreparable loss as the suit will rendered nugatory.

(xviii) That further, the outstanding debt as more particularized in the Plaint dated November 20, 2018 accrues from a commercial contract for which the non-payment thereof continues to adversely prejudice the Plaintiff/Applicant which has been constrained to take unprecedented financial re-adjustments.

(xix) That it is just that the instant Application be allowed

Application Dated October 16, 2020

4. The plaintiff also filed the an application dated October 16, 2020 seeking the following orders:-

a. Spent;

b. That pending the inter parte hearing and determination of the Application, dated July 30, 2020 and/or until further orders by this Honourable Court, an interim order by way of injunction be issued restraining the 2nd Defendant, whether by themselves, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with title Kajiado/ Kaputiei South/3875 situate in Kajiado.

c. That the Costs of this Application be provided for.

5. The application is also supported by the Affidavit sworn by the plaintiff's director Mr Keval Lalji Bhanderi and is based on the grounds that:-

a. That the Plaintiff/Applicant filed an Application dated July 30, 2020 (under Certificate of Urgency) seeking for injunctive orders to preserve the only known asset, against which the judgment sum may be realized: by restraining the 2nd Defendant, its agents, servants and or anybody claiming under them from alienating, selling, leasing, assigning, disposing off, transferring, charging,

encumbering and or entering dealings of any nature including advertising or agreements for lease, sale, disposal and or interfering in any way with the property known as title Kajiado/Kaputiei South/3875 situate in Kajiado pending hearing and determination of the Application and the Suit.

b. That the Application was only premised on a then real apprehension of an imminent sale - which intended sale the 2nd Defendant has previously denied; but this fact has since crystalized, as evinced in the advertisements for sale annexed hereto.

c. That the Application was certified urgent and scheduled to proceed for inter-parte hearing on October 29, 2020: however, quite conveniently the 1st Defendant has since filed an Application — which seeks to obviate and vacate the hearing supposedly seeking to arrest a Ruling, vacate the contempt proceedings which is clearly calculated at derailing the consideration of the urgent need to restrain the Application disposal of the subject property.

d. That on or about the October 15, 2020, (after the instant application was lodged in Court!) the 2nd Defendant had proceeded to advertise for sale property known as title Kajiado/ Kaputiei South/3875 situate in Kajiado notwithstanding the scheduled inter-parties hearing date of the Application for injunction in an attempt to defeat any orders that may be granted by this Honourable Court and render the Plaintiff's Application dated July 30, 2020 otiose and per functionary.

e. That the Plaintiff/Applicant's claim centers on a claim for work done on the subject property, with improvements and thereof, which now the 2nd Defendants quite mischievously seeks to dispose of and as previously submitted such disposal is part of its winding up of its Kenyan operations.

f. That the effect of failure to grant the interim Orders sought herein would be to allow the Defendants steal a march on the Plaintiff and indeed on the Hon Court: as prejudice will be suffered on the 2nd Defendant in preserving for the interim the suit property and hearing this application contemporaneous to the Application dated July 30, 2020 as the 2nd Defendant is intent on prejudicially conducting itself by alienating and selling the Suit Property to unsuspecting third parties, the occurrence of which events would result in irreparable loss and damage being suffered by the Plaintiff incapable of being sufficiently compensated by an award of damages, noting that the Plaintiff has reliably learnt that the 2nd Defendant is in the process of winding up its local undertaking and relocating outside the local limits of this Honourable Court's Jurisdiction; further threatening the ability of the Plaintiff to realize the fruits of the judgement should it succeed.

g. That this Application has been filed with sufficient promptitude and for the foregoing reasons, it is mete, fair and in the interests of justice that the Application filed herewith be certified urgent and orders sought therein be granted in the first instance to preserve the substratum of the Suit herein.

h. That by reason of the new developments that subsist since the lodgment of the Application dated 30th July, 2020, and the foregoing, the Plaintiff has

indisputably evinced that this Application has met the conditions for the grant of interlocutory orders of injunction and urgent intervention by the Court to prevent the wasting and removal of the substratum of this Suit form the jurisdiction of the Hon Court which is the practical effect of the intended sale.

6. The 2nd defendant opposed the applications through the replying affidavit sworn by its Financial Manager Mr Billy Luhuzu Unguku who states that the plaintiff is not entitled to the orders sought as the same is res judicata. The 2nd defendant maintains that the court had already considered the two applications and directed the 1st respondent to furnish security and at the same time restrained the 2nd defendant from releasing Kshs 47,387,947.14 to the 1st defendant. He contends that the property known as Kajiado/Kaputei South/3875 is not the subject of the suit.

7. The 1st defendant opposed the application through the replying affidavit of its Chief Finance Officer Mr Geoffrey Njue who avers that that the 1st defendant was not served with the applications that gave rise to the exparte ruling. He further avers that the defendant does not admit the claim as alleged by the plaintiff and that striking out the defence at this stage would amount to condemning the 1st defendant unheard.

8. The application was canvassed by way of written submissions which I have considered. The issue for determination is whether the applicant is entitled to the orders sought. The applications are related as they both seek injunctive orders over the same subject matter. I will therefore consider them together.

9. The principles governing the granting of orders of injunction were stated in the case of *Giella v Cassman Brown Co Ltd* [1973] EA 358 which principles were reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal where it was held that:-

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a) establish his case only at a prima facie level,
>
> b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

10. Prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 as follows:-

> "So what is a prima facie case.....In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter."

11. The applicant seeks injunctive orders to restrain the 2nd defendant from selling or transferring the property known as Kajiado/Kaputei South/3875.

12. The 2nd defendant opposed the application on the basis that it is resjudicata as that the court had already determined the same issue in a previous ruling.

13. A perusal of the court record reveals that the plaintiff had through previous applications dated December 10, 2018 and February 4, 2019 sought orders to restrain the defendants from disposing of the same parcel of land. I note that the same issue was considered by the court and status quo orders granted to preserve the property. I find that considering the same application again would be akin to re-litigating over the same subject matter.

14. The plaintiff further seeks orders to strike out the defendants' statement of defence on the basis that it does not raise triable issues.

15. Order 2 rule 15 provides for the striking out of pleadings as follows;

> " 15.
>
> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> (a) it discloses no reasonable cause of action or defence in law; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

16. In *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR it was held that: -

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan, JA (as he then was) in his judgment in the case of DT Dobie and Company (Kenya) Ltd v Muchina [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
>
> > The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts, LJ in the case of Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and others (No 3) [1970] ChpD 506, where the Lord Justice said:-

> The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan, JA, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. "

17. Similarly, in *Crescent Construction Co Ltd v Delphis Bank Limited*, [2007] eKLR, the Court of Appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application for striking out a suit as it is draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

18. The plaintiff contends that the 1st defendants defence contains bare denials and is devoid of sufficient material particulars to counter the averments particularized in the plaint. The 1st defendant, on its part, contends that striking out the defence at this stage would amount to condemning it unheard.

19. I have perused the defence and I find that it raises triable issues and cannot be said to be an abuse of the court process. I am of the view that the 1st defendant should be given a chance to defend the suit.

20. In the upshot, I find that the prayers for injunction are not merited. I similarly find no merit in the two applications dated October 16, 2020 and July 30, 2020.

Application Dated September 29, 2020

21. The defendant filed the application dated September 29, 2020 seeking the following orders:-

    1) Spent

    2) Spent

    3) Spent

    4) The Order entered on June 19, 2020 against the 1st Defendant be and is hereby set aside.

    5) The 1st Defendant be and is hereby granted leave to defend the Plaintiff's Applications dated December 5, 2018 and February 4, 2019 the said Applications to proceed and be heard de-novo.

    6) This Court be pleased to order that the Applicant be served with both Applications where after the Applicant shall file its Replying Affidavit within the timeline that this Court deems fit.

    7) The costs of this Application be provided for.

22. The application is supported by the affidavit sworn by the 1st defendant's Chief Executive Mr Ben Kiilu and is based on the following grounds:-

1) Sometimes on September 18, 2020, the Applicant herein received an email referenced "Contempt Application in Milimani HCCC E397 of 2018 [Master Power Systems Limited v Civicon & CZI (Kenya) Limited] from the Plaintiff's Counsel apparently serving it with a Contempt Application dated 1September 4, 2020. It is then that the Applicant learnt that there apparently had been other Applications dated December 5, 2018 and February 4, 2019 (hereinafter "the Subject Applications"), which Subject Applications had been heard on April 23, 2020 and allowed by the Court and an Order issued on June 19, 2020, ordering it to deposit a sum of Kshs 66 475 542.21 in Court within 30 days of the said Order.

2) That it is instructive that other than the said email of September 18, 2020, the Applicant has never received any service from the Plaintiff or its advocates of any of the said Subject Applications and Order, which according to the limited information the Applicant gathered from the Annexures accompanying the Contempt Application it would seem proceeded on the basis that it was undefended on the part of the Applicant.

3) That upon service with the contempt application through email on September 18, 2020, the Applicant herein requested the Plaintiffs Advocate to serve its current advocate. The Plaintiff did not serve the 1st Defendant's advocate as advised. The 1st Defendant's advocate nevertheless proceeded to gather information on the said file and Subject Applications with the information shared with the 1st Defendant's by the Plaintiffs advocate on September 18, 2020.

4) That the Advocate discovered that the Subject Applications were dismissed for nonattendance on March 13, 2019. Consequently, the Plaintiff filed another Application on March 14, 2019 to have the Subject Applications reinstated. The said Application was never served on the Applicant.

5) That sometimes in August 2019, the Applicant moved from its previous offices at Naushad Merali Drive in Lavington and relocated to its present premises. Further, it fell out with its internet provider hosting its email domains who issued a notice to disconnect its email domains for failure to renew the same in September, 2019.

6) That the Court granted their said application for reinstatement on October 3, 2019. The Applicant was never served with the ruling notice and was therefore absent during the said ruling.

7) That subsequently it would seem that the Subject Applications were given a fresh hearing date and a ruling was scheduled for the April 23, 2020. This hearing date was also not served upon the Applicant. It therefore proceeded without the essential participation of the Applicant. Further, the Applicant was never served with the ruling notice and therefore was absent during the delivery of that ruling.

8) That subsequent to the said ruling, it appears that the Plaintiff extracted an Order on the June 19, 2019 which orders again were never served upon the Applicant as according to the affidavit dated September 14, 2020 sworn by the Plaintiff's process server.

9) That it was not until the September 18, 2020 when the Applicant had gotten the internet services back when it received the Plaintiff's Advocate's email and instructed its current advocates.

10) That there is no unreasonable delay as the about10 days' lapse between service of the said email and this Application has been applied in gathering the contents of the file as the Court's file could not be accessible due to the Covid-19 situation and the file was in the Honourable Judge's Chambers. Further, on the e-filing portal, the files uploaded of pre-December 2019 cannot be opened. the Honourable Judge's Chambers. Further, on the e-filing portal, the files uploaded of pre-December 2019 cannot be opened.

11) That from a cursory reading of the ruling dated 23rd April, 2020, the main reason why the Court allowed the Subject Applications in the terms it did was the fact that the same were not opposed by the Applicant, which left the Court with no choice other than finding that the Plaintiff had on a balance of probabilities satisfied the Court to grant the Orders sought.

12) That the law on granting of security before the hearing of a suit as provided for under order 39 rule 5 imperatively require the Applicant/ Plaintiff to satisfy two preconditions;

    i. With intent to obstruct or delay the execution of a decree that may be passed against it, the Defendant is about to dispose of the whole or any part of his property

    ii. With intent to obstruct or delay the execution of a decree that may be passed against it, the Defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

13) That in addition to the fact that the Plaintiff never demonstrated the above through an affidavit against the Applicant, had the Applicant been served and participated in the said Subject Applications, it would have demonstrated that;

    a. The contract within which the Plaintiff locates its case was between the Applicant and the 2nd Defendant and the Plaintiff was just but one of the subcontractors in the said contract.

    b. The amount claimed to be owed to the Plaintiff is in fact misleading there having been a fundamental breach of the Contract subject of the Plaint.

    c. That there is absolutely no intention let alone evidence of the Applicant disposing any of its properties to defeat any decree that would emanate from this case.

d. There is absolutely no intent let alone evidence that the Applicant is in the process of removing any of its properties outside the jurisdiction of this Court in order to defeat any decree that would emanate from this suit.

14) That the overriding objectives of the *Constitution* and the governing statutes cited above tilts in favour of substantive justice arrived at after a meritorious hearing of applications as the one that the Applicant herein seeks to be heard on merits.

15) That there is absolutely no prejudice to be suffered by the Parties herein for the following reasons;

a. It is in the interest of the all the that there be just and conclusive determination of the Subject Applications.

b. The Plaintiff itself has benefited from a similar application wherein it had the Subject Applications reinstated. It would be highly unfair and self-serving for it to be seem to deny the Applicant of a similar benefit.

c. The case for the 2nd Defendant is conjoined on the hip with that of the Applicant and therefore it would not be prejudicial to it at all.

16) That it is highly unfair and unjust in such a period of economic distress precipitated by the Covid-19 pandemic for this Court to disallow such an application with the drastic effect of not only putting the operations of the Applicant as a going on concern in great risk but also risking the life and limb of the Directors of the Applicant who now risk being cited and punished for contempt.

17) That it is in public interest and in the interest of justice that before such drastic and punitive actions befall the Applicant and its director's, an opportunity to be heard in order to at least balance the scales of justice.

18) From the foregoing, it is demonstrable that the Applicant has demonstrated that it was not served and that it did not deliberately fail to defend the Subject Applications and it has now come at the earliest opportunity possible with this Application.

19) The unless this application is certified urgent and the orders sought granted, the Applicant will essentially have been thrown out from the temple and seat of justice where their last hope of defending against this case that has exponential economic ramifications on the Company, in addition to being condemned unheard contrary to article 50(1) as read together with article 25 of the *Constitution of Kenya 2010* which decrees the right to fair hearing as illimitable and non-derogable.

20) The right of the Applicant to a fair hearing based on merits weighs more given that this right is non-derogable and illimitable and this Application has been brought at the earliest possible opportunity without any undue delay.

23. The plaintiff opposed the application through the replying affidavit dated October 13, 2020 wherein it states that its application dated December 10, 2020 was duly served upon the 1st and 2nd defendants by registered mail. He further states that the 1st defendant entered appearance on January 11, 2019 and that a hearing notice was further served on January 16, 2019. He states that the 1st defendant did not respondent to the applications despite service and that setting aside the ruling delivered on April 23, 2020 would occasion it great injustice.

24. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to orders to the orders sought.

25. The law governing the setting aside of ex parte orders can be found under order 12, rule 7 of the *Civil Procedure Rules, 2010* which provides that:-

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

26. Order 51 rule 15 provides that the court may set aside an ex parte order. The defendant's case is premised on the ground that it was not served with the subject applications. It was further averred that the mention notice dated September 18, 2018

27. The plaintiff, on its part, maintained that the 1st defendant was duly served with the applications and that it entered appearance and filed its statement of defence. The plaintiff submitted that the defendant did not dispute the stamp on the documents but instead argued that the same was made by a person without capacity.

28. I have perused the record and I note that both the affidavits of service dated April 8, 2019 and June 17, 2019 are accompanied by hearing notices that were received by the 1st defendant as they bear its stamp. I further note that the applications were also served upon the defendant who entered appearance and filed its defence. I am convinced that the 1st defendant was properly served with the pleadings and notices.

29. This court has the discretion to set aside the orders sought upon being satisfied that the service was not effected and that the 1st defendant failed to appear at the hearing due to sufficient cause. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:-

> " This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

30. In view of the foregoing, I find that the orders granted were regular as proper service was effected by the plaintiffs. I find no merit in the application dated September 29, 2020

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

WA OKWANY

JUDGE

In the presence of: -

Mr Githui for plaijntiff.

Mr Mwangi got Kitoo for 1st defendant

Mr Kawaji for Mbaluto for 2nd defendant.

Court Assistant- Sylvia