



Alpha Dynamics Limited v Super Mega Construction Ltd (Civil Case E064 of 2022) [2022] KEHC 16406 (KLR) (Civ) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E064 OF 2022**

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

ALPHA DYNAMICS LIMITED PLAINTIFF

AND

SUPER MEGA CONSTRUCTION LTD APPLICANT

RULING

1. The subject matter of this ruling is the motion dated 14th September, 2022 taken out by Super Mega Construction Ltd, the defendant herein whereof it sought for the following orders:
 - i. That this honourable court be pleased to certify this application as urgent and place the same to be heard ex-parte on priority basis and service of the same be dispensed with in the first instance.
 - ii. That this honourable court be pleased to set aside/and or vacate the ex parte judgment entered for the plaintiff against the defendant/applicant on the 24th June, 2022 only in default of entering appearance and filing a defense together with all consequential orders of the court as the court may deem fit and just.
 - iii. That this honorable court be pleased to stay execution of the judgment entered on 24th June, 2022 and any further proceedings thereof and for the avoidance of doubt that the garnishee proceedings set for hearing on 19th September, 2022 be stayed pending the hearing and determination of this application.
 - iv. That this honourable court be pleased to issue an order referring the matter to adjudication and arbitration as per sub-clauses 67.2 and 67.3 of the main Contract RWC-097.



- v. That this honourable court be pleased to grant the defendant/applicant leave to defend the matter in arbitration.
 - vi. That in the alternative, this honourable court be pleased to issue an order granting the defendant/applicant leave to file its defence and defend the matter, albeit out of time, as per the draft defence annexed to this application that raises cogent triable issues.
 - vii. That the costs of the application be in the cause.
2. The defendant filed the supporting and supplementary affidavits sworn by Li Shichao in support of the application.
 3. When served, Alpha Dynamics Ltd, the plaintiff herein, filed the replying affidavit sworn by Nicholas Muiyuro Muchiri to oppose the motion.
 4. I have considered the grounds stated on the face of the aforesaid motion plus the facts deponed in rival affidavits. I have also taken into account the oral submissions made by learned counsels. It is the submission of the defendant/applicant that it was served with the summons to enter appearance together with the plaint but it inadvertently failed to enter appearance.
 5. The defendant further stated the delay was not deliberate but was occasioned by the defendant's active efforts to reconcile its accounts and collate pertinent records to enable it instruct an advocate and mount a good defence against the plaintiff's claim. The defendant attached the supporting affidavit a draft defence to show that it has a defence with triable issues.
 6. The plaintiff opposed the defendant's application stating that the delay to enter appearance and file a defence has not been explained. It is also argued that the delay is inordinate and inexcusable. The plaintiff further stated that the defendant's draft defence discloses no triable issues hence it lacks merit.
 7. Having considered the material placed before this court plus the rival oral submissions, it is not in dispute that the defendant was served and failed to enter appearance nor file a defence prompting the plaintiff to obtain judgment in default of appearance against the defendant.
 8. In the case of *Shah vs Mbogo and another* (1967) EA 115 the court held inter alia

“Applying the principle that the court's discretion to set aside ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”
 9. In the instant application the defendant admits that it was served with the pleadings plus the summons to enter appearance. The defendant also admits that it neither entered appearance nor file a defence. The record shows that on 24th June 2022, judgment in default of appearance and defence was entered in favour of the plaintiff and against the defendant as prayed in the plaint.
 10. The defendant filed the instant application on 14th September, 2022. The defendant avers that the delay to enter appearance and file a defence was not intentional. It stated that it took time to reconcile its accounts and collate the important records to enable it instruct an advocate. The defendant further stated that it has a good defence with triable issues hence it should be allowed to defend the claim.
 11. The plaintiff strenuously opposed the application stating that the delay was inordinate and not explained hence inexcusable. The plaintiff avers that the defence raises no triable issues. What emerges



from the arguments put forward is that the defendant's failure to enter appearance and file a defence within the requisite period was explained.

12. It would also appear that the explanation appears to be plausible. The main reason put forward is that the defendant was bogged down in the process of reconciling accounts and in obtaining relevant documents to instruct an advocate. The plaintiff's response to the aforesaid assertion to appear to suggest that the dispute in this matter revolves around the question of accounts ascertain the actual amount due.
13. The draft defence also raised other issues relating to purchase of materials and whether the contract was fully performed. In my humble view I find that the defence raises triable issues which should be interrogated in a trial. There is no evidence to show that the defendant deliberately sought to defeat of justice by delaying to enter appearance and file a defence. Though the default judgment was regularly obtained, this court finds that it is in broad interest of justice to have the same set aside to for the doors of justice to be opened so that the defendant can get a chance to be heard.
14. It is also clear in my mind that the plaintiff will not be prejudiced in any way if the defendant is given a chance to defend the claim. The plaintiff can sufficiently be compensated by an award on costs.
15. In the end, the motion dated 14.9.2022 is allowed. Consequently, the default judgment entered on 24th June ,2022 is set aside. The defendant is granted leave to file a defence within 7 days from the date of this ruling. In the circumstances of this case it is only fair to award the plaintiff costs of the application. I hereby award the plaintiff costs of the motion assessed at ksh.50,000/= payable by the defendant within 30 days failure to which the plaintiff should be at liberty to take execution proceedings to recover the same.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

