REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 629 OF 2015

KITOLOLO CONSULTANCY LTD.....PLAINTIFF

-VERSUS-

MOHAMMED A.M. WAMWACHAI

FRANCIS NGARIUKI

ANDREW OKWACH (being sued as the National Chairman,

Secretary General and National Treasurer of

KENYA CIVIL SERVANTS WELFARE ASSOCIATION.....DEFENDANT

MOHAMMED A. M WAMWACHAI.....APPLICANT

R U L I N G

1. Before me is a Notice of Motion dated 2/11/2020 brought under ***Order 10 Rule 11, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.*** In the Motion, the applicant sought the setting aside of the judgment made on 6/5 2016 and leave to defend the suit.

2. The grounds upon which the application was predicated upon were set out in the body of the Motion and his supporting affidavit sworn on 2/11/2020. These were; that the applicant was the Chairman of the Kenya Civil Servants Welfare Association, the defendant Association (hereinafter "the KCSWA") until 2011 when he resigned; he was unaware of any suit pending against KCSWA during his term as Chairman. He only became aware of the suit when he received the Notice to Show Cause on 14/10/2020.

3. He further contended that the summons in the suit was received by the Secretary General of KCSWA, **Mr. Francis Ngariuki**, who never informed him about it; that the suit was lodged and summons served in 2015, 4 years after he had resigned from KCSWA. He had resigned in 2011 but the Secretary General did not effect the changes with the Registrar of Societies as per his instructions.

4. He alleged that, the aforesaid **Mr. Francis Ngariuki,** the Secretary General was the reason for his resignation as Chairman as he continued to enter into contracts with third parties without his consent as Chairman. As a result of his constant warnings to the said Secretary General, bad blood developed between the two as a result of which the latter did not inform him of the suit when it was filed.

5. The respondent opposed the application through the replying affidavit of **Eng. Austin Salmon Kitololo** sworn on 24/11/2020. It contended that the application was an abuse of the court process as the suit was filed against KCSWA through its registered office bearers. The Attorney General's office had confirmed that the applicant was one of the office bearer's officer's at the time the suit was filed.

6. That the applicant was duly served with the summons through the Secretary General who acknowledged service of summons by signing a copy of the summons. That despite being duly served, the KCSWA failed to enter appearance nor file a defence which necessitated the entry of the ex-parte judgment. The failure by the Secretary General to inform the applicant of the suit was an internal management issue which did not concern the plaintiff as a third party.

7. The Court has considered the depositions on record as well as the submissions. This is an application to set aside an interlocutory judgment, famously known as judgment in default.

8. In **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another [2016],** the Court of Appeal held that where a judgment in

default is entered after summons have been properly served but for one reason or the other, the defendant fails to enter appearance nor defend the suit, the court has unfettered discretion in determining whether or not to set aside the default judgment.

9. In the aforesaid case, it was held that in such circumstances, the court will consider; the reason for the failure to enter appearance or file defence; the length of time that has lapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice that either party is likely to suffer and whether on the whole, it is in the interest of justice to set aside the default judgment.

10. In **STEPHEN NDICHU v MONTY'S WINES AND SPIRITS LTD [2006] eKLR**, it was held: -

> ***"The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs- E.A. Cargo Handling services Ltd (1974] E.A.75). The discretion is intended 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 cause of justice (see Shah –vs- Mbogo [1969] E.A.116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration – vs- Gasyali [1968] E.A. 300). It also goes without saying that the reason for failure to attend should be considered."***

11. Based on the foregoing settled principles, I will now consider the present matter.

12. The applicant, admitted having been the Chairman of the KCSWA. He contended that he resigned about 4 years before the suit was filed. That he resigned because of differences between him and the Secretary General of KCSWA. That he only came to discover that the latter did not effect the resignation and file the relevant returns with the Registrar of Societies after he was served with a Notice to Show Cause in this matter in Kwale.

13. The applicant further contended that service of Summons was effected upon the Secretary General, who never notified him of the same. That he was never aware of the suit and the ex-parte judgment.

14. On its part, the respondent submitted that there was no evidence that the applicant ever resigned as Chairman of the defendant Association. That the Secretary General, was duly served with the summons and the ex-parte judgment was lawful. That there should be an end to litigation.

15. There is no dispute that the Secretary General of the defendant association was duly served with the summons. What is in dispute is whether the applicant was an officer of the Association as at the time the suit was filed. The applicant alleges that he resigned in 2011 but the Secretary General failed to effect the changes at the Registrar of Societies. That his copy was destroyed by fire in Nairobi when his house got burned.

16. It is not clear as of now who the officers of the defendant Association are. The respondent was content in producing a search carried out in 2014. It is clear that the defendant Association is not a body corporate with perpetual succession. That is why it was sued in the names of the officials who were in office at the time the suit was filed.

17. In **Free Pentecostal Fellowship in Kenya vs KCB NRB HCCC 5116/2002 (OS) (UR**) **Bosire J** held:-

> ***"The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules…"***

18. The Court has considered that the applicant has denied being involved in the negotiations that culminated in the ''contract'' the subject matter of the suit. The Court has also carefully considered the record. It is clear from the record that the applicant was not personally served with the summons. The respondent has admitted that the Association has no assets that can satisfy the decretal sum herein. It is for that reason that the respondent resorted into invoking the process of summoning the officials who were then in office to show cause why execution should not be proceeded with against them.

19. The Court is alive that, since the Association does not have personal liability for the contracts or transactions it entered into, its officials may be called upon to satisfy the same. This depends on the defendant's Association's Constitution, which is not before the Court. Otherwise liability may befall all the membership thereof.

20. However, before Court are the then officials of which the applicant has vehemently denied being one. He contended that he resigned 4 years prior to the time the suit was lodged. That he had resigned because of serious differences between him and the Secretary General. All the documents on record show that the dealings that resulted in the current suit were between the respondent and the aforesaid Secretary General. There is evidence that at some point the applicant had warned the said Secretary General from binding the Association in dealings the other officials were unaware of.

21. Further, the Secretary General allegedly never disclosed to the applicant the existence of this suit. He is the one whom the respondent served the summons and has not summoned him in these proceedings. The applicant has vehemently denied any knowledge of the alleged contract between the defendant Association and the respondent.

22. For reasons that the issue will turn on the personal liability or otherwise of the officials of the defendant Association, now that the respondent has confirmed that the said Association has little, if any, assets that can satisfy the decree herein, it is imperative that the Court looks at the personal positions of the officials of the defendant Association.

23. In **Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] eKLR**, the Court of Appeal held: -

> ***"The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim."***

24. Further, in **First Community Bank v Ready Consultancy Limited & 3 others [2020] Eklr,** the court cited with approval the holding in **Patel v E.A Carge Handling Services Ltd (1947) EA 75** where the Court at page **76 C and E** held: -

> ***"That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is an issue which raises a prima facie defence which should go to trial for adjudication."***

25. The applicant's draft defence raises serious triable issues. They cannot be wished away. There is no evidence that he ever dealt with the respondent or was aware of the circumstances leading to this suit. Neither is it alleged that he was aware of the existence of this suit. He has shown that there existed bad blood between him and the Secretary General with whom the respondent exclusively dealt with in relation to the alleged contract and this suit. That Secretary General has not been summoned as the applicant has.

26. In my view, where liability is likely to attach on the officials of an unincorporated body such as in this case, it is imperative that all the officials of the Association are served with the summons.

27. In this case, all the communication between the respondent and the Association was with the Secretary General. It is the Secretary General whom the respondent served with the summons. The applicant is being jostled from his retirement in rural Kwale to come and answer to issues he swears he knows nothing about.

28. Notwithstanding the length of time, the applicant has demonstrated he was not aware of the current suit or judgment until execution proceedings were served upon him. The Court is satisfied that the ex-parte judgment cannot stand.

29. On prejudice, the Court is alive to the length of time since 2015 to-date that has taken the respondent to wait for the fruits of its claim. However, considering that the applicant is about to be made liable to settle a liability he contends he is unaware of, that he was not an official at the time the dealings leading to the subject suit were entered into, he will suffer extreme prejudice unless he is allowed to defend the same.

30. Accordingly, I allow the application. The judgment entered herein on 6/5/2016 be and is hereby set aside to the extent that it relates to the applicant and **Andrew Okwach**. The applicant do file and serve own defence within 14 days of this ruling. Fresh summons be issued and be served upon the said officials of the defendant Association.

31. The costs of the application be in the cause.

It is so ordered.

DATED and DELIVERED at Nairobi this 27th day of January 2021.

A. MABEYA, FCI Arb

JUDGE