REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. 166 OF 2014

BETWEEN

AFRICA MANAGEMENT COMMUNICATIONS LIMITED..... PLAINTIFF/RESPONDENT

AND

AIRTEL NETWORKS KENYA LIMITED.....DEFENDANT/APPLICANT

R U L I N G

1. Before me is a Notice of Motion dated 23/6/2020 brought under ***Order 1 Rule 1, Order 2 Rule 15(1)(d), Order 5 Rules 1 and 2, Order 10 Rule 11, Order 22 Rule 18 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A, 34 and 94 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.***

2. In the motion, the defendant has sought the following orders: -

> ***"1. Spent****
>
> ***2) THAT pending the hearing and determination of this Application inter-partes there be a stay of execution of the Garnishee Order Nisi made by Honorable Lady Justice M. Kasango J on 11th June 2020;***
>
> ***3) THAT the Garnishee Order Nisi issued herein on 11th June 2020 be set aside ex debito justitiae.***
>
> ***4. THAT there be an Order staying all proceedings herein pending the hearing and determination of this Application.***
>
> ***5. THAT this Honorable court be pleased to strike out the Plaint herein dated and set aside all consequential orders issued herein.***
>
> ***6. THAT in the alternative, the Decree issued herein as a result of a default judgment be set aside ex debito justitiae.***
>
> ***7. THAT the costs of this Application and these proceedings be provided for.***
>
> ***8. THAT this Honorable Court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case.***

3. Prayer Nos. 1, 2, 3, and 4 are spent. What is before me for consideration is prayer Nos. 5, 6 and 7.

4. The application is supported by the affidavits of **Joy Nyaga,** the Director, Legal and Regulatory Affairs of the defendant. The application was opposed by the plaintiff through a Notice of Preliminary Objection dated 21/7/2020 and a replying affidavit of **Emmanuel Chola Mwaba**, the plaintiff's Managing Director sworn on 17/8/2020. The application was canvassed by way of written submissions with the parties advancing their respective positions.

5. The background to the application is that; by a plaint dated 8/6/2014, the plaintiff claimed against the defendant a sum of US$ 250,000 as damages for loss of business arising out of a Corporate Voice E1 Service Level Agreement with the defendant. The defendant appeared but failed to file any defence. On 23/6/2014, the plaintiff applied for judgment in default which was entered on 30/6/2014 by the Deputy Registrar. Due to the loss of the original court file, the request for judgment and the endorsement thereon, if any, cannot be noted from the proceedings. The entry of judgment is only deducible from the decree issued on 25/7/2014.

6. Pursuant thereto, the defendant applied for the said judgment to be set aside, which application was allowed on 11/7/2016 by Ochieng J. The plaintiff challenged the said decision in the Court of Appeal which appeal was allowed vide a judgment of that court made on 8/5/2020. After delivery of that judgment, the plaintiff demanded that the decretal sum be settled and garnished the defendants accounts.

7. It is on the backdrop of the foregoing that the present application is brought. The defendant contends that the appellate Court had held, *inter alia,* that Ochieng J ought not to have considered the application made ***under Order 36 Rule 10 of the Rules*** as but under ***Order 10 Rule 11 of the Rules.*** That the defendant has a good case but there were mistakes made by its Counsel. The defendant therefore contends that the instant application is now compliant as it is made under the said ***Order 10 Rule 11 of the Rules***.

8. That the entire proceedings are a nullity and/or illegal as there is no legal entity by the name **Africa Management Communications Limited.** That the court has no jurisdiction to receive, process issue and supervise proceedings founded by a party not capable of suing or being sued and that these proceedings are therefore an abuse of the process. That there is no judgment on record on the basis of which the decree sought to be executed was extracted.

9. The defendant further contends that the decree was issued on account of a non-existent default judgment which was irregular as there was a duly filed and served Memorandum of Appearance. That unless the orders sought are granted, the Court process would be thrown into disrepute for sanitizing acts of fraud and/or illegality. The defendant urges that the application be allowed.

10. On its part, the plaintiff contends that the application ought to be struck out with costs for being an abuse of court process. That the court has jurisdiction as the issues being raised have been determined with finality by the Court of Appeal in ***Civil Appeal No. 211 of 2016*** wherein the defendant's challenge to the summary judgment was dismissed. That the matter is therefore *res judicata.*

11. Further, that the matter is *sub judice* in that, the defendant has since lodged an application in the Court of Appeal seeking the Certification of the matter in ***Civil Application No. Sup 10 of 2020 Airtel Networks Limited V Africa Management Communications Limited*** to pursue the issue in the Supreme Court of Kenya.

12. As regards the plaintiff's existence, **Mr Mwaba** deposes that the plaintiff was incorporated on 8/10/2010 with **Registration Number CPR/2010/33 211.** That it carries on its activities in Westlands, Nairobi and he is its founding director holding 199 Ordinary Shares. He clarifies that **AMC** is an abbreviation for **Africa Management Communications** and also trades as **AMC International** by virtue of its trade mark No. 83051.

13. He further deposes that he did sign the agreement dated 29/4/2013 on behalf of the plaintiff. That he has been in charge of attempts to resolve the dispute between the parties whereby there was communication between him and officers of the defendant. That at no point have the said officers denied knowledge of him, the debt and/or these proceedings.

14. That in any event, the defendant is estopped from denying the existence of the plaintiff as, it had admitted its description in the defence, the subsequent pleadings and the application for stay of proceedings pending reference to arbitration. That in the entire proceedings before this Court and in the Court of Appeal, the defendant never raised any issue regarding its identity. He denies that he did not appear before the Commissioner for Oaths as contended by the defendant.

15. In a rejoinder, the defendant denies that the matter is *res judicata* because; this Court has jurisdiction as the court executing the decree to interrogate all matters regarding the decree. That the application seeks to undo a mistake by the defendant's previous advocates. In any event, none of the issues raised now have been the subject of inquiry by either this Court or the Court of Appeal. That the plaintiff cannot seek at this stage to amend its pleading.

16. I have considered the record and the submissions of Learned Counsel which have been extremely helpful. The issues for determination are; *whether the suit ought to be struck out for being brought by an entity that is non- existent and whether the application is res judicata and/or res sub judice.*

17. It is contended by the defendant's contention that after the Court of Appeal delivered its Judgment, the defendant received a demand to settle the decree from an entity different from the plaintiff. A search at the Companies registry confirmed that the plaintiff does not exist. That in the premises the suit was an abuse of the process of the Court as a non-existent entity cannot sue or be sued. Various authorities including, **Bakery Supply Co. v. Fredrick Muigai Wangoe [1959] EA 474** and **Sietco (K) Ltd v. Fortune Commodities Limited & Another NRB HCCC No. 1264 of 2002** were cited in support of those submissions.

18. There is no dispute that all the pleadings on record were filed and prosecuted in the name of **Africa Management Communications Limited** as the plaintiff. On 29/5/2020, the Registrar of Companies confirmed that there is no such a Company registered with that registry. The Plaintiff confirms that the entity that entered into the contract the subject matter of the suit is known as **Africa Management Communications International Limited.**

19. No doubt an entity that is not a juristic person cannot maintain a law suit. See **Housing Finance of Kenya v. Embakasi Youth Development Project [2004] 2KLR.** See also the cases relied on by the defendant.

20. In **Fubeco China Fushun v. Naiposha Company Limited & 11 Others,** Gikonyo J delivered himself thus: -

> ***"The use of FUBECO CHINA FUSHUN as the plaintiff, at worst, is a misdescription of a party, that is, China Fushun No. 1 Building Engineering Company Limited. Such misdescription of the plaintiff is not fatal to the proceedings and does not defeat a party's cause of action. In taking this decision, the court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the court. ... I hold and find that this is not a case of non-existent or faceless entity that would be invariably***

be incapable of suing or being sued. It is a case of pure misdescription of a party and it is governed by the law on misdescription of parties in a contract".

21. In the present case, both the advocates for the defendant as well as the defendant itself knew who had sued. They knew all along who was the plaintiff. In their pleadings, they admitted the subject contract as well as the plaintiff. This left no doubt both in the minds of the parties involved and the Courts that have been dealt with this case that the parties were addressing the contract between the parties.

22. In my view, as was in the **FUBECO Case,** this is a case of pure misdescription. The plaintiff is known. Only that one word, **International,** in its name was omitted at the time the suit was filed. That is why the defendant all along was dealing with the plaintiff. The plaintiff is not a faceless non-existent entity but rather a misdescription. An amendment can, in my view, cure the mistake. Estoppel would arise to prevent the defendant from denying the plaintiff having for over 6 years represented otherwise.

23. Accordingly, I hold that the plaintiff is not a non-juristic person. It was only misdescribed. It exists and the defendant and its legal advisers have all through dealt with it as such. The omission of one word, **International,** from its name is not fatal. All that is required is a simple amendment so that once the decree is executed, there is finality on the issues between these two parties. The Court cannot sacrifice substantive justice at the altar of technicality. I reject that contention.

24. The plaintiff contends that the matter is *res judicata.* That both this Court and the Court of Appeal having determined an application for setting aside the summary judgment, this Court lacks jurisdiction to entertain the present application. That the matter is in any event *sub-judice* as one of the issues pending before the Court of Appeal for certification to the Supreme Court is the issue of the plaintiff being a non-entity. The cases of **Kenya Hotel Properties Limited** v **Attorney General & 5 Others (2018) Eklr** and **Jetlak Foods Limited & 10 others v Cabinet Secretary, National Treasury & Others (2019) Eklr** were cited in support of those submissions.

25. On his part, Counsel for the defendant submitted that the application is not *res judicata* as the plaintiff had not met the threshold set by the Court of Appeal in **Suleiman Said Shabhal v. Independent Electoral Boundaries Commission & 3 Others [2014] Eklr.** That to constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

26. It was further submitted for the defendant that neither this Court nor the Court of Appeal had determined; the lawfulness and/or regularity of the default judgment, the state of the court record given that there is no judgment on record, neither has the plaintiff furnished the Request for Judgment and a receipt to confirm the filing thereof and the jurisdiction of the court to admit and act on a pleading or proceedings commenced by a non-existent entity.

27. It was further submitted that the no application to set aside default judgment under ***Order 10 Rule 11 of the Civil Procedure Rules, 2010*** has been determined. That the present application has invoked the jurisdiction of this Court under **Section 34** of the ***Civil Procedure Act, Chapter 21 Laws of Kenya*** being the execution Court.

28. I have seen the Judgment of the Court of Appeal. That court was dealing with an appeal from a Ruling made to set aside a default judgment. The defendant had failed to file its defence within time. The judgment that was therefore entered was one under ***Order 10*** and not under ***Order 36 of the Civil Procedure Rules.*** The defendant was therefore wrong to try and set aside a default judgment as if it were a summary judgment. All the same, both courts dealt with the merit of the setting aside of that judgment by whatever name called.

29. There is no doubt that the doctrine of *res judicata* is applicable to applications as it does to suits. (See **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others [1996] Eklr).** In the matter that went to the Court of Appeal, what the defendant had sought to challenge was the alleged wrongful entry of judgment. It does not matter whether it was referred to as summary judgment instead of judgment in default of defence. Those are mere semantics.

30. ***Explanation (4)*** of ***Section 7 of the Civil Procedure Rules*** provides as follows: -

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such a suit".

31. That being the case, it was open to the defendant to raise the issues it seeks to raise currently in the original application that was heard. These include; the lawfulness and/or regularity of the default judgment, the state of the court record as to the alleged absence of judgment or request for judgment including the issue of the standing of the plaintiff. The name of the plaintiff as well as the entity the defendant entered into contract with were always there for the defendant to confirm and challenge. There is nothing novel or new that has arisen that can circumvent the provisions of ***section 7 of the Civil Procedure Act.***

32. In view of the foregoing, I agree with the decision in **Mohamed Dado Hatu v. Dhadho Gaddae Godhana & 2 Others [2017] Eklr,** wherein the court expressed itself as follows: -

"The law is thus clear on the principle of res judicata. Parties cannot litigate in instalments and cannot give their cases a cosmetic uplift by having new parties reopening issues that have already been heard and determined by courts of competent jurisdiction. … The doctrine aims at bringing litigation to an end and affords parties closure and respite from the specter of being vexed by issues and suits which have already been determined by a competent court".

33. In the present case, all the issues sought to be raised could and should have been raised in the original application. It is no defence that a party prosecuted its case incompetently. The application that sought to set aside the judgment was dismissed. It was not struck out for any reason. Once it was dismissed the issues raised therein or capable of being raised therein were determined. That being the case and in view of

Explanation 4 of section 7 aforesaid, all those issues raised now are barred by dint of *res judicata.*

34. I have also seen the averments in the application for certification that is pending before the Court of Appeal. One of the issues to be litigated is the plaintiff's non-existent. Clearly that is a live issue in that Court. This Court cannot venture thereto without breaching the provisions of ***section 6 of the Civil Procedure Act.***

35. In view of the forgoing, I am satisfied that the defendant's application is ***res judicata*** as well as ***sub judice.*** The same lacks merit and is dismissed with costs.

DATED and DELIVERED at Nairobi this 25th day of February, 2021.

A. MABEYA, FCI Arb

JUDGE