REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.245 OF 2011

STEP UP HOLDINGS (K) LTD............................PLAINTIFF/RESPONDENT

VERSUS

MT. KENYA UNIVERSITY.................................DEFENDANT /APPLICANT

RULING.

1. In its Notice of Motion dated **6th December 2018**, the applicant prays for the following orders;

> **a) Pending the determination of this application the court be pleased to order stay of execution of the interlocutory judgement entered on 17th October 2011 herein**
>
> **b) The interlocutory judgement entered on 17th 0ctober 2011 against the defendant /applicant be set aside and the defendant /applicant be granted leave to defend the case.**

2. The application is supported by the affidavit of **Lawrence Macharia Karanja** counsel for the applicant dated the even date and the grounds on the face of the application. What is contained and factual from the said affidavit is that interlocutory judgement was entered against the applicant on **17th October 2011** after a request for judgement by the respondent on **11th October 2011** after failing to enter defence.

3. The interlocutory judgement was for the sum of **Kshs. 511,169,953**. The reason for the failure to file the defence was due to the desire of the applicant to file an application for the matter to be referred to arbitration according to a contract agreement between the parties.

4. What is factual as well is that this court vide the ruling of Ouko J (as he then was) dated **27th January 2012** refused the applicants application to refer the matter to arbitration for the reason that it was no longer tenable after the applicant had taken other procedural steps which run contrary to **Section 6 of the Arbitration Act.**

5. The applicant then filed its appeal against the above ruling and on **22nd November 2018** the Court of Appeal rejected the appeal and agreed with the findings of the high court. This left the applicant with no other option but to file this application to be allowed to defend the suit.

6. The applicant in the premises prays that it be allowed to defend the suit as it has a plausible defence as per the draft defence attached to the supplementary affidavit of Lawrence Macharia Karanja sworn on **4th December 2019.** The deponent has also stated that the applicant was willing to meet all the conditions by this court to be allowed to defend the suit.

7. The application is opposed by the respondent vide the replying affidavit of **Bernard Gikundi Mwarania** dated **14th November 2019**. He states that the application should be denied for the reason that the applicant was duly served with the plaint and the summons but it chose not to file any defence despite entering appearance.

8. He further went on to state that the inadvertence by the applicant’s counsel has not been explained and thus this court should not allow the application. The respondent went ahead to narrate some issues concerning the genuineness of the application as it seems the same was backdated and there was some element of fraud by the applicant in filing the application.

9. The respondent further went on to state that the applicant is guilty of *laches* as the application is filed 8 years after interlocutory judgement was entered. In essence he prayed that the application be dismissed and the respondent be allowed to enjoy the fruits of the judgement.

10. The parties were directed to file their written submissions which they did and the court has had time to go through them.

11. The applicant on its part submitted on three areas namely whether it was in the interest of justice to stay execution of the interlocutory judgement; whether the court should set aside the said judgement and allow the applicant to defend the suit and finally the issue of costs.

12. On the first issue the applicant submitted that the amount in question was colossal and that should the respondent be allowed to proceed it stands to suffer serious loss and damage. He relied on the case of **ANTONIE NDIAYE VS. AFRICAN VIRTUAL UNIVERSITY (2015) eKLR** where Gikonyo J extensively expounded **Order 42 rule 6 of the Civil Procedure Rules.**

13. The applicant on the second ground submitted that the applicant should not be chased away from the justice seat as the failure to file the defence was not out of negative or deliberate intention but explainable. It desired that the matter be referred to arbitration and now that the same was disallowed then the only logical thing is to be granted a chance to present its part of the story.

14. The respondent in its lengthy submissions has argue the court to dismiss the application for being totally unmeritorious. The respondent has attacked the same on the ground among others that the supporting affidavit has been sworn by the applicant's counsel which runs contrary to legal practice. In other words, the affidavit contains factual issues which ought to have been deponed by the applicant's directors or persons well versed with the same.

15. The respondent has further submitted that the applicant has not advanced any plausible reasons why it failed to file its defence and the inadvertent reason has not been explained. That the period it has taken for the application to be filed speaks volumes. The same was filed several years after the interlocutory judgement had been entered without any reasonable explanations.

16. The respondent has relied on several legal authorities which I have perused and I do not see the reasons to reproduce them here for want of time and space. In essence the respondent urged this court to dismiss the application and award it costs.

ANALYSIS AND DETERMINATION.

17. The court has perused the application, the affidavits and the annexures thereof as well as the lengthy rival submissions by the parties. What is apparent is that the parties have spent considerable time in the corridors of justice. Much water has gone under the bridge but that is what happens to our slow grinding judicial system.

18. There is no doubt that the interlocutory judgement dated **17th October 2011** was lawfully entered. The applicant entered appearance but did not file any defence as it wanted the matter to be referred to arbitration. This court however vide the ruling of Ouko J (as he then was) refused to allow the matter to be referred to arbitration as the same was procedural since the applicant had taken other precipitate steps which rendered arbitration no longer tenable.

19. Dissatisfied with the above ruling, the applicant proceeded to the Court of Appeal which dismissed the appeal and agreed with the findings of the high court, namely that the matter could not be referred to arbitration.

20. The court in **PATEL V. E A CARGO HANDLING SERVICES LTD (1974) E.A. 75** stated as follows on the issue of courts unfettered discretion to set aside interlocutory judgement.;.

> ***"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

21. The court as well in the now famous case of **SHAH V. MBOGO (1967) E.A. 166** stated as follows;

> ***"The discretion 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."***

22. It then appears that the whole idea is to allow substantial justice to be done to both parties. The basic reason in my view which caused the applicant not to file its defence was an erroneous thought that it was necessary to have the matter be adjudicated by way of arbitration, a fact which this court and the court of appeal found it untenable.

23. Justice Ouko (as he then was) stated when dismissing the application that;

> ***"For the above reasons, I do not find any purpose in considering the respondent's second ground that the MOU has been rendered inoperative. Suffice to state, finally that the applicant has submitted to the jurisdiction of the court and must go the full length. The application is dismissed with costs."***

24. The said learned judge said again on **3rd May 2012** that there was no need to disallow the applicant's application for stay pending appeal as the issue of jurisdiction would ultimately be determined. He thus allowed the applicant to move to the Court of Appeal.

25. The Court of Appeal vide its ruling date 22nd November 2018 in **NAKURU CIVIL APPEAL NO. 186 OF 2013, MT KENYA UNIVERSITY V. STEP UP HOLDING (K) LTD** stated as follows when dismissing the appeal.;

"We have construed section 6 of the Arbitration Act on our own and considered it in light of the case law highlighted above. We adopt the position taken by the Court in the above pronouncements as in our view; they represent a correct interpretation of the provision. Considering the above in light of the findings of the trial Judge, it is our finding that the trial Judge correctly exercised his discretion and properly appreciated both the facts and the law and arrived at the correct conclusion on the matter. We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."

26. As can be deduced from the above decision the applicant's application sought to refer the matter to arbitration which was its waterloo. Less than a month after the above Court of Appeal decision the applicant file the current application.

27. It is the humble view of this court that there is some merit in the application for the following reasons. First of all, it is apparent that much of the time was spent between this court and the Court of Appeal. Obviously that explains the 8 years' period complained of by the respondent.

28. Secondly the spirit and the tenor of Oukos J ruling was denying the applicant the chance to have the matter referred to arbitration after failing to meet the threshold. What the applicant would have done had it known the possible outcome of the appeal was to file this application to set aside the interlocutory judgement. In essence the appeal to the Court of Appeal was wasteful to say the least.

29. What then is the law? Is the application completely unmeritorious and ought to be dismissed as prayed by the respondent.? **Order 10 rule 11 of the Civil Procedure Rules** states as follows;

30. The above is actually in line with the above earlier cited authorities which permits the court to exercise discretion whether to allow the application or not. Looking at the decisions by this court and the Court of Appeal the issue which the applicant had pursued was whether the matter ought to have been referred to arbitration. Now that the same has been denied, the logical thing to do is to go through the motion of the normal trial.

31. This position was well captured in my view when Ouko j intimated that the issue of whether the matter should be referred to arbitration or not was a jurisdiction question and thus permitted the applicant to test it at the Court of Appeal. By the Court of Appeal agreeing with the ruling of Ouko J, it meant that the arbitration route was closed to the applicant and the only remaining route was through the rigours of the normal civil procedure route.

32. For the above reasons therefore this court finds merit in the application. It is of course agreed as clearly submitted by the respondent that much time has been wasted in this matter. About 10 years when it was filed the matter is still in court. However, it is obvious that the same was not necessarily the making of the appellant but the long process at the high court and the Court of Appeal which has the usual constrains of time.

33. The provisions of **Order 42 rule 6 of the civil procedure rules** stipulates that stay of execution may be conditional. In this case the applicant is seeking stay pending the determination of the application. In this case however the applicant desires that it be given a chance to defend the claim.

34. Taking into consideration the genesis of this matter which it appears was based on some contract, and the fact that the respondent is already holding a judgement validly obtained it is necessary that it be cushioned. The applicant has stated that it is able to provide any security so demanded by this court.

35. The other periphery issues raised by the respondent concerning the affidavits in support of the application being sworn by its counsel and not the directors are not very germane as the issues in my view were legal in nature. The same applies to the issues surrounding the filing of the application, namely, that there may have been some impropriety on the part of the applicant or his counsel. These are small technicalities which may not go into the major issue at hand.

36. The application is therefore allowed as follows;

a) The interlocutory judgement entered against the applicant /defendant on 17th November 2011 is hereby set aside.

b) The applicant is hereby granted leave to file its defence and serve within 14 days from the date herein.

c) The applicant shall within 30 days from the date herein deposit the sum of Kshs, 511,169,953 in a joint interest earning account in the names of both counsels for the applicant and the defendant pending the hearing and determination of the suit.

d) Alternatively and without prejudice to paragraph (c), above the defendant /applicant shall within 30 days from the date herein provide a Bank guarantee from a reputable bank, for the sum of Kshs. 511,169,953 pending the hearing and determination of the suit.

e) In default of (c) and or (d) above the *status quo ante* shall apply and the respondent shall be at liberty to execute.

f) The applicant shall pay to the respondent within 30 days from the date herein thrown away costs of Kshs. 200,000 and in

default execution to issue over the same.

g) The respondent shall have the costs of this application.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF APRIL 2021.

H K CHEMITEI.

JUDGE