



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL DIVISION**

**HCCC NO. 36 OF 2020**

**TANGA INVESTMENTS (K) LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**N.F METALS CORPORATION.....DEFENDANT/APPLICANT**

**RULING**

1. The application before me is a Notice of Motion dated 2<sup>nd</sup> November, 2020 brought under the provisions of Articles 50 and 159(2)(d) of the Constitution of Kenya, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 10 Rule 11, Order 51 Rules 1 & 4 of the Civil Procedure Rules and any other enabling provisions of the law. The defendant seeks the following orders-

(i) Spent;

(ii) Spent;

(iii) That the interlocutory Judgment delivered on 9<sup>th</sup> October, 2020 together with the consequential decree and all *ex parte* proceedings be set aside and the defendant leave (sic) to defend this suit and be heard *de novo*; and

(iv) That the costs of this application be provided for.

2. The application is premised on the grounds in support of it and on the affidavit sworn on 2<sup>nd</sup> November, 2020 by Atal Singal.

3. That the defendant deposed that it entered appearance under protest and filed a Notice of Preliminary Objection contesting the jurisdiction of this Court on account of the plaintiff's failure to comply with the provisions of Order 5 Rules 21 and 27 of the Civil Procedure Rules which ought to have been heard first before the Court could make any adverse orders against the applicant.

4. The defendant averred that if granted leave to defend the suit herein, it shall argue that this Court lacks jurisdiction to entertain it and that the plaintiff had agreed to pay it the outstanding balance and even agreed to provide an appropriate security against the amount in issue.

5. The defendant further averred that it not only has a good defence to the plaintiff's case but that the said defence raises triable issues. That it would amount to a great miscarriage of justice for the *ex parte* Judgment to continue subsisting and to be executed in any way against the defendant, who was not heard.

6. The plaintiff filed a replying affidavit sworn by Rajender Kumar Premchand on 13<sup>th</sup> November, 2020 in opposition to the said application.

7. The plaintiff averred that no reason and/or excuse had been advanced by the defendant for failure to file a defence. It further averred that the application is fatally defective as it was supported by a fatally defective supporting affidavit which purports to have been notarized in India by a Notary on 30<sup>th</sup> October, 2020, whereas the said supporting affidavit shows that it was sworn on 2<sup>nd</sup> November, 2020.

8. The plaintiff stated that the defendant was served with summons to enter appearance, plaint, verifying affidavit, list of witnesses, witness statements and list of documents on 11<sup>th</sup> June, 2020 through the defendant's last confirmed and used e-mail address. It further stated that on 12<sup>th</sup> June, 2020 the defendant's Counsel notified the plaintiff's Counsel that she had received instructions to act for the defendant, to accept service of summons and pleadings on its behalf and that the same was confirmed by a letter dated 15<sup>th</sup> June, 2020

9. The plaintiff asserted that its Advocates on record served Mrs. Jane Onyango with all the pleadings in the suit herein and she accepted service and signed on their copies on the fore side. The plaintiff further asserted that by a letter dated 25<sup>th</sup> June, 2020, the defendant's Advocate requested to be allowed to file their memorandum of appearance by close of business of 25<sup>th</sup> June, 2020 and to file their defence by 1<sup>st</sup> July, 2020.
10. The plaintiff also stated that the defendant filed a Notice of Preliminary Objection and a memorandum of appearance dated 1<sup>st</sup> July, 2020 on 2<sup>nd</sup> July, 2020 on behalf of the defendant. It also stated that on 1<sup>st</sup> July, 2020, the defendant wrote to the Deputy Registrar expressing its wish to withdraw the memorandum of appearance filed under protest together with the Notice of Preliminary Objection. That the plaintiff on the other hand requested for Judgment on 17<sup>th</sup> July, 2020 in line with the provisions of Order 5 Rule 8(2) and Order 10 Rule 10 of the Civil Procedure Rules.
11. The plaintiff also averred that the Deputy Registrar entered an interlocutory Judgment and that the said Judgment was properly entered. That the claim herein being a liquidated one, a commensurate decree was lawfully and properly issued. It was asserted by the plaintiff that the preliminary objection has no basis and cannot replace the mandatory strictures of the law requiring the filing of defence within a limited time period.
12. The plaintiff prayed that the decretal sum be deposited in Court as a condition for grant of the orders sought by the defendant. It contended that it should not be unfairly deprived of the fruits of its Judgment for the indolence of the defendant. The plaintiff urged this Court to dismiss the defendant's application with costs as it was guilty of laches, as equity aids the vigilant and not the indolent. The plaintiff averred that it shall suffer great prejudice if the orders sought are granted.
13. On 18<sup>th</sup> November, 2020 directions were taken for parties to file written submissions. The defendant's submissions were filed by the firm of Onyango Onunga Advocates on 15<sup>th</sup> December, 2020 while the plaintiff's submissions were filed by the firm of Opolu & Co. Advocates on 27<sup>th</sup> January, 2021.
14. Ms. Onyango submitted that the affidavit in support of the application cannot be subjected to the laws applicable to affidavits sworn in Kenya such as Section 88 of the Civil Procedure Act since it was drawn in Mombasa, Kenya but notarized in India and as such, it is a foreign document in the eyes of the law. She submitted that this Court has to determine whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by whom and in what form, if any, it should take.
15. She relied on the case of **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi** [2001] KLR 470, where the Court in dealing with the issue of admissibility of an affidavit taken in England held that documents which would be admissible in the English Courts of Justice are admissible in Courts in Kenya without proof of the seal or stamp or signature authenticating the same. Ms. Onyango submitted that it would not be in the interest of justice to dismiss the application herein on the ground that the supporting affidavit was dated in Mombasa but notarized in India, since the said defect does not go to the jurisdiction of this Court and is a curable omission.
16. It was submitted by Ms. Onyango that the striking out of an application is a drastic measure that should only be resorted to in the clearest of cases such as where a pleading is a complete sham. She further submitted that the Court in exercising discretion on whether or not to order striking out of any pleading that is non-compliant with the rules ought to be alive to its obligations under Article 159 of the Constitution of Kenya, 2010 which is to see that justice is administered without undue regard to procedural technicalities. Counsel relied on the case of **Kenya Commercial Finance Company Limited v Richard Akwesera Onditi** Nairobi Civil Application No. 329 of 2009.
17. She also submitted that even if the Court were to find that the affidavit in question is defective in form, such a defect cannot warrant the striking out of the application as such would be draconian, yet the aspect of procedural technicalities can be corrected.
18. Ms. Onyango relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules and on the case of **Remco Limited v Mistry Jadva Prabat & Co. Ltd & 2 Others Nairobi** (2002) 1 EA 233 where the Court set out the guiding principles in setting aside *ex parte* Judgments. She submitted that the defendant's case falls under the second limb of the aforementioned case since the defendant was served with summons to enter appearance and filed a memorandum of appearance and preliminary objection, therefore the *ex parte* judgment in contest is a regular one.
19. She relied on the case of **Shanzu Investments Limited v Commissioner of Lands** Civil Appeal No. 100 of 1993 and **Tree Shade Motors Ltd v DT Dobie & another** (1995-1998) 1EA 324 and submitted that triable issues are derived from the draft defence annexed to the application as well as vast documents produced by the defendant in respect of their application. She further submitted that the draft defence by the defendant raises triable issues such as the plaintiff having agreed to pay the defendant the outstanding balance and to provide appropriate security for the mentioned amount.
20. In regard to the letter attached to the defendant's affidavit, Counsel for the defendant stated that the defendant requested to be supplied with the summons and the plaint and that thereafter they filed a memorandum of appearance under protest and a Notice of Preliminary Objection in which it contested the Court's jurisdiction due to the manner in which service was done. She submitted that once the issue of jurisdiction had been raised, the Court ought to have dealt with it at the earliest time possible. She stated that Order 5 Rule 22B of the Civil Procedure Rules provides for leave of the Court when service of summons is to be effected outside the jurisdiction of the Court. Counsel urged this Court to give a chance for the defendant's case to be heard on merits by invoking the provisions of Article 159(2)(d) of the Constitution of Kenya, 2020.
21. She also submitted that the provisions of Article 50 of the Constitution provides the right to a fair hearing and trial. She relied on the case of **Signature Tours & Travels Limited v National Bank of Kenya Limited** [2018] eKLR, which cited with approval the holding in **Sebei District Administration v Gasyali** (1968) EA 300, where the Court in dealing with an application similar to the one herein, was of the view that to deny the subject a hearing should be the last resort of a court.

22. Ms. Onyango indicated that he who comes to equity must come with clean hands and that the defendant had come to this court with clean hands. She stated that the defendant had demonstrated its willingness to defend the suit herein. She urged this Court to allow the application as prayed in the interest of justice.

23. Mr. Opolu submitted that Section 88 of the Civil Procedure Act allows documents admissible in England to be used in Kenyan Courts. Counsel submitted that the affidavit in support of the application is defective since some pages of it were never notarized in India. Further that the affidavit was notarized in India but the Jurat says that it was sworn by Atul Singal at Mombasa, thus exposing the fatal mistake on the supporting affidavit. He was of the view that since it could not be amended, it leaves this Court with no other option but to strike it out. He further submitted that this being a Court of precedent, it should not allow such a fatal defect on the supporting affidavit as it will expose the Court to sham practice and ridicule.

24. Mr. Opolu submitted that Order 10 Rule 11 of the Civil Procedure Rules empowers the Court to vary and/or set aside any Judgment, decree or order upon just terms, he submitted that even though the discretion is on the Court, it should consider whether it is prejudicial to a party or whether a party is using this discretion to delay justice. He cited the case of **Shah vs Mbogo** (1967) EA 166, where the Court dealt with the issue of discretion and set conditions for setting aside *ex parte* Judgments.

25. He further submitted that the defendant had time to file its defence in good time but opted not to do so as to ensure the plaintiff's claim was derailed. He stated that if the defendant was allowed to set aside the Judgment, the plaintiff would suffer more prejudice as the defendant had defaulted in making good its promise to pay, thus setting aside the *ex parte* Judgment would expose the plaintiff to further financial stress resulting in miscarriage of justice.

26. Counsel for the plaintiff submitted that vide a letter dated 5<sup>th</sup> June, 2020, the defendant's Counsel stated that she had instructions to accept service of summons and other pleadings. He stated that she could not back track as she even filed a memorandum of appearance. He submitted that the claim herein is liquidated in nature and it was mandatory for the defendant to file a defence since service was effected as provided for under Order 5 Rule 22B of the Civil Procedure Rules which does not require leave of Court. Counsel further submitted that amendment of the Civil Procedure Rules brought about service by e-mails, while the development of technology and the outbreak of Covid-19 had given parties other modes of service through e-mail and WhatsApp.

27. He submitted that where a defendant has been served with summons to enter appearance, he is required unless some other order be made by the court, to file his defence within fourteen days after he has entered appearance and serve it on the plaintiff within fourteen days of filing. Counsel further submitted that under the Civil Procedure Rules, once a party has filed summons, the statement of defence is not filed within the time required, an interlocutory Judgment is entered. He submitted that in the present case service was effected properly under Order 9 Rule 2 of the Civil Procedure Rules and that under Order 5 Rule 22B of the said Rules, service through a recognized agent and electronic mail services, respectively, is permitted.

28. Counsel for the plaintiff also stated that Order 7 Rule 1 of the Civil Procedure Rules is clear that by failing to comply with the said provisions, a party loses his right to be heard on account of his own personal volition. Mr. Opolu contended that the defendant's actions have been characterized by delaying tactics and urged this Court not to grant leave to the defendant to file its defence as it will result in miscarriage of justice. He prayed for dismissal of the application dated 2<sup>nd</sup> November, 2020.

#### **ANALYSIS AND DETERMINATION**

29. I have considered the issues raised in the application, the pleadings, the written submissions and I have also considered the oral submissions by Counsel. The following issues arise for determination-

**(i) Whether the supporting affidavit to the application dated 2<sup>nd</sup> November, 2020 is fatally defective; and**

**(ii) Whether the *ex parte* Judgment should be set aside and the defendant granted leave to defend the suit herein.**

#### **Whether the supporting affidavit to the application dated 2<sup>nd</sup> November, 2020 is fatally defective.**

30. The plaintiff prayed for the supporting affidavit and the entire application dated 2<sup>nd</sup> November, 2020 to be struck out on grounds that the first page of the affidavit was not notarized in India. He stated that it was a strange document to the second page which was purportedly notarized in India. He pointed out that the affidavit was notarized in India yet dated in Mombasa. The plaintiff averred that on these grounds, the supporting affidavit herein is fatally defective.

31. The defendant on the other hand averred that the supporting affidavit was drawn in Mombasa, Kenya but notarized in India, therefore it is a foreign document in the eyes of the law. It stated that it would not be in the interest of justice to dismiss the application on the ground that it was dated in Mombasa but notarized in India since that is a curable omission that does not go to the jurisdiction of this Court.

32. Section 5 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya provides for particulars to be stated in the Jurat as hereunder:

***“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”***

33. I am guided by the provisions of Order 19 Rule 6 of the Civil Procedure Rules, 2010 which provide for instances when the court may strike out an affidavit. It stipulates that an affidavit cannot be struck out merely on technicalities as set out in Order 19 Rule 7 of the Civil

Procedure Rules, 2010. The said provision states as follows-

***“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”***

34. The plaintiff’s Counsel contended that the supporting affidavit bears a Notary Public stamp dated 30<sup>th</sup> September, 2020 yet it is dated 2<sup>nd</sup> November, 2020. I find that this defect and/or omission is a matter of form and not substance, it does not in any way affect the correctness and admissibility of the supporting affidavit. It is my finding that in line with the provisions of Order 19 Rule 7 of the Civil Procedure Rules, 2010 and Article 159(2)(d) of the Constitution of Kenya, 2010, it would not be in the interest of justice to strike out the supporting affidavit on mere technicalities.

35. I have gone through the pleadings and the submissions by Counsel and it is noteworthy that it is not in dispute that the supporting affidavit was drawn and dated in Mombasa, Kenya but signed and notarized in India. In light of the above, I find that this is a foreign document in the eyes of the law and can therefore not be subjected to the same procedure as affidavits sworn in Kenya. This issue was dealt with by the court in **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi [2001] KLR 470** where it was stated thus-

***“ .....the Oaths and Statutory Declarations Act, Cap 15, gives Commissioners for Oaths appointed under the provisions thereof jurisdiction throughout Kenya (section 4). It also commands the Commissioner to indicate in the jurat the place where he took the affidavit. Obviously a Commissioner for Oaths appointed under Cap 15 cannot take an affidavit in England. Accordingly, the provisions of section 5 of the Act or indeed any other section in Cap 15 cannot apply to an affidavit taken out of Kenya by a foreign person. In the premises I think the issue of whether the affidavit complained of complies with section 5 of Cap 15 raised by counsel for the first defendant is misconceived and is a mere moot point in the instant matter. The real issue and which issue was not debated ought to have been whether an affidavit for use in Kenyan Courts can be taken out of jurisdiction and by who and what forms, if any, should it comply with. In that regard, I am not aware of any Kenyan legislation directly to the point. However, section 88 of the Evidence Act, Cap 80 of the Laws of Kenya, does seem to allow for the admissibility in Kenya Courts of documents which would be admissible in any Court of Justice in England under the law in force for the time being in England. (emphasis added).***

36. Section 88 of the Evidence Act states as follows:

***“When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed—***

***(a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and***

***(b) the document shall be admissible for the same purpose for which it would be admissible in England.”***

37. The court in **Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumia Sugar Company Limited [2016] eKLR**, stated the following-

***“I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya.” (emphasis added).***

38. While dealing with a similar issue, the Court in **Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited [2013] eKLR** observed as follows-

***“In other words, a party that acquiesces that a Verification Affidavit is properly drawn cannot in the same vein object to subsequent affidavit that were notarized in the same manner as being irregular and of no consequence. In the circumstances, in the absence of any proof by the Defendant that the said Replying Affidavit would not have been admissible in a court in the United Kingdom and the Netherlands where it was notarised, the court finds that the irregularity was more on form and not substance which would not go to the substance of the matter herein.”***

39. In the present case, the supporting affidavit was sworn by the deponent in India before a Notary Public who affixed his stamp and another stamp that reads ‘attestation identified’ on the page where the deponent signed. The plaintiff has not tendered any evidence and/or demonstrated the inadmissibility of the affidavit in India where it was notarized. In view of the above, I find that since India is a commonwealth country, the said supporting affidavit is admissible in this Court in line with the provisions of Order 41 Rule 12 of the Rules of the Supreme Court of England. The first page cannot be said to be a stranger to the second page for failing to have been notarized since the notary public was attesting to the deponent’s signature which does not appear on the first page of the affidavit.

**Whether the default judgment should be set aside and the defendants granted leave to defend the suit herein.**

40. This Court is empowered under Order 10 Rule 11 of the Civil Procedure Rules to set aside an *ex parte* Judgment for default of appearance and defence. Despite the fact that the Court has discretion to set aside and/or vary *ex parte* Judgments, the said discretion must be exercised judiciously and with extreme caution.

41. In the present case, the defendant averred that it filed a memorandum of appearance under protest and thereafter filed a Notice of Preliminary Objection challenging this Court's jurisdiction on account of the plaintiff's failure to comply with the provisions of Order 5 Rules 21 and 27 of the Civil Procedure Rules therefore, the Court should have first dealt with the preliminary objection before dealing with the plaintiff's claim.

42. This court notes that Summons to enter appearance were initially served to the defendant without leave of Court through e-mail on 11<sup>th</sup> June, 2020. Thereafter, the defendant's Counsel wrote to the plaintiff's Counsel indicating that they had instructions to come on record for the defendant in the matter herein and requested for Summons and plaint in relation to other matters touching on their client, including Case Nos. 35 and 38. The defendant's Counsel received Summons to enter appearance on 15<sup>th</sup> June, 2020 and signed on the face of the said Summons that they had received the same. From the record it is clear that the defendant's Counsel does not deny having requested for and having been served with the Summons to enter appearance, the plaint and its accompanying documents.

43. I also note that vide another letter dated 25<sup>th</sup> June, 2020, the defendant's Counsel informed the plaintiff's Counsel that they had received instructions to enter appearance on behalf of the defendant in HCCC No. 35, 36, and 38 of 2020. The defendant's Counsel thereafter filed a memorandum of appearance under protest and a Notice of Preliminary Objection to the said matters.

44. The Court of Appeal when dealing with a similar issue in **Prabhadas v Standard Bank** [1968] EA 679 held as follows:

***“(i) even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.***

***(ii) any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing.”***

45. This Court is alive to the Civil Procedure (Amendment) Rules, 2020 which introduced service of summons by way of e-mail to the defendant's last confirmed and used e-mail address. It provides that service shall be deemed to have been effected when the sender receives a delivery receipt to be attached to the affidavit of service to be filed. In the present case, the defendant was first served through its last confirmed and used e-mail address which led to it instructing an Advocate to come on record on its behalf. The said Advocate was consequently served with the summons to enter appearance and the pleadings. Thereafter she filed a memorandum of appearance “*under protest*”, in view of the foregoing, I hold that the irregularity in service (if any), was waived by acquiescence when the defendant's Advocate wrote to the plaintiff's Advocate saying that they had received instructions to enter appearance.

46. Having established that the defendant was duly served with the Summons to enter appearance, this Court has to determine whether it shall be in the interest of justice to set aside the *ex parte* Judgment and allow the defendant to file its defence. In so doing, the Court has to consider whether the defendant's defence raises triable issues or if it is only meant to frustrate the plaintiff. In **Continental Butchery Limited v Nthiwa [1978] KLR** the Court held that:

***“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”*** (emphasis added).

47. Looking at the plaint, the plaintiff avers that it supplied and shipped various consignments of scrap metal worth US Dollars 5,280,748.94 to the defendant in India at the defendant's request. That the defendant paid US Dollars 4,559,429.86 leaving a balance of US Dollars 721,319.08 which is due and owing.

48. In the defence annexed to the application herein the defendant avers that the plaintiff induced it and made false promises therefore taking advance money without even having the licences or permission from the concerned authorities to export the scraps. That on realizing the plaintiff's ill-deeds, the defendant lodged a complaint with the Commissioner of Police Faridabad, Haryana (India). The defendant avers that the plaintiff owes it some money. In view of the foregoing, it is my finding that there exist *bona fide* triable issues between the parties herein.

49. It is my finding that Article 159(2)(d) of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities, as such it would not only be in the interest of justice to allow the present application, but also fair and just to have the suit proceed to full hearing and determination on merit. It has been held time without number that an arguable case need not be one that must eventually succeed at the end of trial. In light of the provisions of Article 50(1) of the Constitution, it is appropriate to give the defendant the right to be heard.

50. For the reasons set out above, I make the following orders:

(i) The interlocutory Judgment dated 9<sup>th</sup> October, 2020 together with the consequential decree and all *ex parte* proceedings be and are hereby set aside;

(ii) The defendant is at liberty to file an unconditional appearance and file its statement of defence and all compliance documents within 30 days from today;

**(iii) The defendant shall pay thrown away costs of Kshs. 50,000/- to the plaintiff within 30 days from today failure to which the interlocutory Judgment of 9<sup>th</sup> October, 2020 together with the consequential decree and all *ex parte* proceedings shall remain in force; and**

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 23<sup>rd</sup> day of April, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

**Mr. Opolu for the plaintiff/respondent**

**Ms Onyango for the defendant/applicant**

**Mr. Oliver Musundi – Court Assistant**