REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO.89 OF 2016

DEACONS (EAST AFRICA) PLC LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

MODERN TECHNO FITNESS GYM LIMITED.....1ST DEFENDANT/APPLICANT

DK REAL ESTATE LIMITED.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. This court is called upon to determine three applications and a Notice of Preliminary Objection. Each of the three parties have applications as follows:-

a) Notice of Motion by the 1st defendant seeking: an injunction to forestall formal proof, stay of execution of the default judgment on counter-claim and setting aside of the default judgment;

b) Notice of Motion dated 12/07/2019 by the 2nd defendant, D.K Real Estate Ltd, seeking provision of security for costs by the applicant and the 1st respondent in form of payment of special damages of Kshs 1,507,290 in terms of the default judgment, accrued auctioneer charges of Kshs 373,333.33 plus throw away costs amounting to Kshs 60,000.

c) Notice of Motion dated 06/12/2019, by the plaintiff, Deacons (East Africa) PLC Ltd, seeking the setting aside interlocutory judgement on the counter claim together with all consequent orders and proceeding taken thereafter from 27/11/2018; the striking out and/or expunging from record the 2nd respondent's amended defence and counterclaim filed on 27/11/2018; leave to extract a preliminary decree along the terms of the ruling delivered on 23/06/2017; leave to execute said decree prior to the determination of the residue of the 1st respondent's claim and/or taxation of costs and an order that the suit be fixed for formal proof on the residue of the 1st respondent's

d) A Notice of Preliminary Objection dated 8.5.2019 contending that the firm of Mwamuye Mzungu Solomon advocates LLP, deserves no audience having come on record after judgment and without leave and that an application filed by the said firm be struck out.

2. The first application as aforesaid is by the 1st defendant, Modern Techno Fitness Gym Ltd, (henceforth, "**the 1st defendant"**) seeks to injunct further proceeding by way of formal proving the; stay of execution of the default judgment of 26/01/2019 and the setting aside the said judgment and the concomitant leave to file a defence to the 2nd respondent's counter-claim. It is expressed to be brought under Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 & 15 of the civil procedure Rules and all enabling provisions of the law.

3. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Didacus Shyamwama, the applicant's director, sworn on 23/04/2019. That affidavit asserts that the failure to file a defence to the 2nd respondent's counter-claim was occasioned by the indisposition of the applicant's then counsel, Mr Ohuru Nyamboye, Advocate, from November 2018 to February 2019, which was publicly announced to all advocates by the local bar Association. The court was then urged not to visit the mistake of an advocate upon an innocent litigant and to exercise its powers under the overriding objective and Article 159 of the constitution to facilitate the just and expeditious resolution of disputes by setting aside the default judgment. It was contended that the applicant would be prejudiced for lost business and its inability to take care of the assorted gym items that continue to depreciate and waste if the orders sought herein are not granted.

4. The application is opposed by the replying affidavit of Mark Munge, the 2nd defendant's manager, sworn on 28/05/2019 which contends that the application is fatally defective and an abuse of the court's process as it does not attack the counter-claim which is separate and

distinct from the main suit. That the 2nd respondent was on 31/07/2017 granted stay on condition that it pays the auctioneers charges with respect to the gym equipment during the period of stay commencing 23/06/2017. That the firm on record for the applicant when the summary judgement was entered was Mburu Nyamboye & Company Advocates and the purported appointment of the firm of Gichana Bw'Omwando & Company Advocates ought to have followed due process. It is contended that the current law firm of Mwamuye Mzungu Solomon LLP having failed to serve the 2nd defendant with any document to prove it was properly on record cannot purport to take over from an advocate who was not properly on record in the first instance. That on 10/12/2018 when the matter was mentioned in court, one Ian Moseti holding brief for Mr.Nyamboye for the applicant told court that counsel was indisposed but he would endeavour to have the documents filed within the requisite time. That on the said date the court directed Mr. Mohamed holding brief for Mr. Tollo for the applicant to comply and file its defence within the procedural timelines which the applicant blatantly failed to file despite having even been served with the 2nd respondent's counter-claim. That the case ought to proceed for formal proof as the applicant has contrary to procedure failed to include a draft defence to ascertain whether there are triable issues with prospects of success. That the court should order for payment of costs together with the auctioneer's charges by the applicant as a condition for setting aside the interlocutory judgement and lastly that the applicant has displayed its financial inability by admitting that it has been in rent arrears with its previous landlord and that it subsequently closed its business and that the 2nd defendant has filed a Notice of Preliminary Objection seeking to have the applicant's application struck out and that there has been a significant delay of 5 months in filing this application after being served with the amended defence and counter-claim. That the 2nd defendant will suffer prejudice if the application is allowed as it will continue being held liable for the accruing auctioneer's charges since the applicant is intentionally causing delays due to its failure to comply with court orders.

5. The applicant/ 1st defendant filed a supplementary affidavit on 08/08/2019 reiterating the averments in its affidavit in support of its application while the respondent 2nd defendant filed a further affidavit in response to the applicant's supplementary affidavit and maintained that the applicant's application should be dismissed as the interlocutory judgement was lawfully and regularly entered.

Application by Notice of Motion Dated 12/07/2019

6. This application is by the 2nd defendant, D.K Real Estate Ltd, and seeks in the main that the plaintiff and the 1st defendant do provide security for costs in form of payment of special damages of Kshs 1,507,290 awarded by the default judgment, accrued auctioneer charges of Kshs 373,333.33 plus throw away costs amounting to Ksh.60,000, which sum be ordered deposited in court or in bank interest bearing account in the names of the advocates for the parties; that the 1st defendant be ordered to pay auctioneers charges accruing since 24.07.2019 till determination of the suit and in the alternative that such sums be paid directly to the auctioneers and in default to pay the sums, if ordered the application dated 24.04.2019 stands dismissed.

7. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of Mark Munge, the 2nd defendant's manager, sworn on 12/07/2019. In the ground, the 2nd defendant essentially reiterates the averments in its replying affidavit in opposition to the application dated 24/04/2019 sworn on 28/07/2019.

8. The application is opposed by the 1st defendant on the grounds of opposition dated 06/02/2019 and the replying affidavit of, sworn by Didacus Shyamwama, the applicant's director, on 07/02/2020. The 1st defendant contends that its failure to file a defence to the 2nd defendant's defence and counter-claim was due to its then counsel's indisposition and that it only came to learnt of entry of the interlocutory judgement after their now counsel Mwamuye Mzungu Solomon Advocates perused the court file on March 2019. It is further contended that the claim for costs cannot be pursued before being subjected to taxation and the claim for auctioneer's fees is also subject to formal proof as indicated in the order issued on 26/02/2019. That after the building hosting the gym equipment collapsed, the defendant incurred costs of Kshs 60,000 in hiring personnel to relocate the said equipment to the basement of the said building and Kshs 600,000 for paying salaries for security guards and therefore it owes no rent arrears or outstanding auctioneer's charges.

Notice of Motion Dated 06/12/2019

9. This application by the plaintiff is expressed to brought under various provisions of the constitution, Civil procedure Act and the Rules and seeks orders the setting aside, *ex debito justitiae*, the interlocutory judgement as well as all and any orders, process and all proceedings consequent or incident thereto and in particular the entirety of proceedings taken herein with effect from 27/11/2018; the striking out and/or expunging from record the 2nd defendant's amended defence and counterclaim filed on 27/11/2018; leave to the plaintiff to extract and execute a preliminary decree along the terms of the ruling delivered on 23/06/2017 prior to the determination of the residue of the 1st respondent's claim and taxation of costs; the suit be fixed for formal proof on the residue of the 1st respondent's (by original action) claim.

10. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Peter Obondo Kahi, the plaintiff's joint administrator, sworn on 06/12/2019 which asserts that on 27/11/2018, the 2nd respondent lodged an amended statement of defence and counterclaim without express leave of the court and after closure of the pleadings contrary to the mandatory provisions of the law and that the court *became functus officio* as regards the parties respective claims in respect of the judgement of Kshs 23,528,032. That the subsequent service of the amended defence and counterclaim was defective *ab initio* and similarly the request for judgement was irregular, null and void and ought to be set aside ex *debito justiciae.* To the plaintiff, the entirety of proceedings after the entry of judgement pursuant to the ruling delivered on 23/06/2017 as well as any process consequential thereto are irregular and ought to be set aside as of right in that it would suffer irreversible prejudice if the orders sought herein are not granted and it was in the interest that the application be allowed.

11. The application is opposed by the replying affidavit of the 1st defendant, sworn by Didacus Shyamwama, the applicant's director, on 07/02/2020. It is asserted in that affidavit that the plaintiff having intentionally failed to disclose to court that it had been placed under receivership on 23/11/2018, any document filed by it stands null and void and further that the 2nd defendant's counterclaim, having been filed without seeking proper leave, as proceedings had long closed, ought to be dismissed. The court is urged to stop execution from proceeding as the applicant has always been willing to put the subject gym equipment for joint auctioneer and realize the funds to settle the issues herein in entirety. That the applicant will suffer substantial loss if the application is allowed.

12. This application is further opposed by the replying affidavit, sworn by Mark Munge, the 2nd defendant's manager, on 28/02/2020 in which affidavit it is asserted that the application was an abuse of the court process aimed at delaying the expeditious determination of the counter-claim dated 27/11/2018, because, the summary judgement was entered only against the 1st defendant and the same does not affect the determination and the outcome the main suit. It is further asserted that on 10/12/2018 the applicant's counsel sought leave to respond to the counterclaim but no response has ever been filed to date necessitating the request for interlocutory judgement. That the plaintiff having been, at all material times, represented by an advocate, was duly served with the counterclaim but neglected to respond to it thus it is undeserving of the orders sought. The entry of the interlocutory judgement was termed regular and in line with Order 10 Rule 3 and Rule 10 of the Civil Procedure Rules and therefore the reasons advanced by the plaintiff do not disclose an inadvertence or excusable mistake or error warranting the exercise of the court's discretion in its favour. On the need for leave to amend the defense and introduce a counterclaim, the 2nd defendant asserted sought and obtained leave to amend its pleadings prior to instituting the counterclaim and therefore the applicant is estopped from disputing the legality of the proceedings herein. The court was urged to be guided by the provisions of Article 159(2)(b) & (d) of the constitution in dismissing the application.

13. The applications were directed to be heard together and canvassed by way of written submissions and all sides have filed composite submissions addressing all the applications. Because all the parties have each an application, and to avoid possible confusion in identifying each with its application, I will refer to each party according to their standing in the main suit and not necessarily as an applicant or respondent.

Submissions

14. In its submissions, the 1st defendant asserts that the application dated 12/07/2019 was prematurely filed as the matter was to proceed for formal proof so that the 2nd defendant could adduce evidence in regard to the reliefs sought in the counterclaim. That the applicant's current counsel only came on record on March 2019 way after the 2nd respondent's counterclaim had been filed in November 2018. The court is implored to set aside the interlocutory judgement and grant the applicant leave to file its defence to the counterclaim as the inadvertent failure to file one was occasioned by its previous counsel's indisposition. That the Preliminary Objection should be dismissed as the firm of Mwamuye Mzungu Solomon is properly on record for the 1st defendant.

15. With regard to the application for the provision of security for costs, it was submitted that payment of security for costs is only applicable where an appeal has been lodged and in this case none has been filed by the 2nd respondent therefore the application dated 12/07/2019 should be dismissed because the applicant has cleared all auctioneer's charges and therefore the claims by the 2nd respondent that it has been paying the auctioneers charges are falsified.

16. In response to the questioned standing of the plaintiff and its application to set aside it was submitted that the after being placed under administration, the plaintiff did not regularize its status by re-appointing its joint administrators and lodging the relevant documents in court therefore which default made the application a nullity and void ab initio. It was additionally asserted that the plaintiff ought to have sought consent from the appointed administrator or from court to enable it continue the legal proceedings against the 1st defendant with a conclusion that the application dated 12/07/2019 ought to be struck out as it is contrary to the Insolvency Act which governs companies under administration. The 1st defendant cited the decisions in **Richard Murigu Wamai v Attorney General & anor(2018) eKLR, Desbro(Kenya) Ltd v Polypipies Limited & anor (2018) eKLR,Nginyanga Kavole v Mailu Gideon (2019) eKLR, Mugo Muruachimba alias Mugo Nyaga v Moffat Nyaga Kagau & 2 others (2019) eKLR and Bake 'N' Bite Mombasa Limited(under administration) v Janendra Raichand Shah & 3 others (2018) eKLR** in support of its composite submissions on the three applications.

17. The 2nd defendant submitted that the court ought to dismiss the application dated 24/04/2019 as the interlocutory judgement was entered regularly after the applicant who was properly served failed to file its defence to the counterclaim. That the request for default judgement was filed after the 30 days window sought by Mombasa LSK and after the court had granted the applicant further time to file its defence. That the 1st respondent's failure to annex a draft defence makes it even harder to ascertain whether it has a meritorious defence to warrant the grant of the orders sought. That the application having been filed with inordinate delay, the 2nd respondent will suffer prejudice if the application is allowed as it has since incurred costs. It was concluded that the applications dated 24/04/2019 and 06/12/2019 should be dismissed. The 2nd respondent cited the cases of **Protea Chemicals Kenya Limited v General Plastics Ltd(2019) eKLR, Mark Macauley v Rob De Boer & anor (2002) eKLR, Haco Industries Ltd & anor v Doshi Iron Mongers Ltd & anor (2018) eKLR, Ecobank Kenya Ltd v Minolta Ltd & 2 others (2018) eKLR, K-Rep Bank Ltd v Segment Distributors Ltd(2017)eKLR, Westmont Holdings SDN BHD v Central Bank of Kenya (2017) eKLR,** among others in support of its submissions.

18. For the plaintiff, submissions were made all grounded on lack of leave to file an amended defence and counterclaim and to the effect that the amended defence having been filed without the leave of the court was contrary to law and thus null and void and could not support the subsequent default judgment sought and obtained which thus falls for setting aside as of right. The submissions also underscored the fact that after the entry of summary judgement and the same having not been challenged, the dispute between the parties has been resolved and the court rendered *functus officio* hence the counter claim and the application founded on it are not due for adjudication by the court. To counsel the two motions by the defendants don't lie and deserve no attention by the court. Counsel then cite to court several provisions of the Act and the decisions in **Motor Vessel 'Lilian S' vs. Caltex Oil (K) Ltd [1989] KLR, Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR, Stephen Kimani Kibe =Vs= Kimani Kinuthia & 2 Others (2018) (Eklr), Icea Lio General Insurance Co. Ltd =Vs= Julius Nyaga Chomba (2020) (Eklr) Suleiman Said Shabhal =Vs= The Independent Electoral & Boundaries Commission & 3 Others (2014) (Eklr), Macfoy V United Africa Co Ltd [1961] 3 All Er, 1169 and Phoenix Of E.A Assurance Co. Ltd =Vs= S.M. Thiga T/A Newspaper Service (2019) (Eklr)** for the position that the court is *functus officio* and the counter claim is a nullity**.**

Analysis and Determination

19. In this decision, I appreciate both the plaintiff's application as well as that by the 1st defendant to seek setting aside of the default

judgment in favour of the 2nd defendants in terms of the counter claim. The only difference between the two however is that the plaintiff further seeks leave to extract a preliminary/interim decree and execute same prior to hearing of the remainder of the claim and even taxation of costs. The 2nd defendant on the other side seek provision for security for costs and deems that to entitle it to have all its claims in the counter claim secured by deposit of the sums at its disposal pending determination of the suit and counterclaim. With that appreciation I will handle the two applications for setting aside together first then embark on the 2nd defendant's application for provision of security last. In doing so, I have identified the following as the issues that stand out to be resolved by the court: -

a) Should the application by the 1st defendant be dismissed or struck out on the basis that the counsel is not properly on record?

b) Should the default judgment on the counter-claim be set aside?

c) Has a case been made out for provision of security for costs?

d) What orders should be made as to costs?

The Notice of Preliminary Objection

20. The Notice of Preliminary Objection asserts that the firm of Mwamuye Mzungu Solomon Advocates should not be granted audience as it is not properly on record. I have noted from the record that the said firm and the firm of Gichana Bw'Omwando & Company Advocates jointly executed a consent dated 15/04/2019 in strict conformity with the provisions of Order 9 Rule 9(a) & (b) of the Civil Procedure Rules. The allegation by the 2nd respondent that it was not served with any document by the applicant to prove it was properly on record is an issue that requires evidence to be adduced and cannot be the reason to deny a party audience in the manner sought. It is also of note that a preliminary objection, in law, needs to be clear and self-evident requiring no minute scrutiny of facts[1]. Here the facts are clear that there is on record a Notice of Change of advocate filed. To this court Order 9 Rule 9 was intended to shied advocates from those clients keen to avoid payment of legal fees to their advocates, after enjoyed legal services by such advocates, by changing advocates or seeking to act in person, but not as a tool to be used by an opponent in litigation to dictate to the adversary the choice of this advocates. I take the view that the provision cannot be a tool to defeat an application at the instance of an opponent. See ***Doshi iron mongers -vs- KRA & Another [2019] eKLR***.

21. The Kenyan superior courts have in innumerable decisions underscore the need for apt application of a preliminary objection as an attack tool and the suitable situations for such tools. It ought not be invoked routinely and on matters that invite the court to an in-depth investigation of some convoluted facts or position of the law. Maybe it is important to be reminded of the words of the Supreme court in the case of ***Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR*** as follows:-

"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

22. I therefore hold the view that the objection was improperly taken with no justifiable reason at all and I order that it be dismissed.

Should the default judgment on the counter-claim be set aside?

23. That the court, on 18/10/2018, granted Mr. Gikandi, for the 2nd defendant leave to amend its statement of defence and introduce a counterclaim cannot be in doubt because that order was given in the presence of Mr. Okwaro holding brief for Mr. Nyamboye for the 1st defendant. The plaintiff and the 1st defendant were equally granted corresponding leave to file any desired pleadings but none of such pleadings had been filed by the time the defendant request for interlocutory judgement that. It thus cannot be true that the counter claim was filed without leave so as to make it subject to attack of being contrary to the dictates of the law and thus null and void.

24. Based on the court records, I do find the counterclaim was filed with leave of the court and that the plaintiff and the 1st defendant had more than adequate time to file their respective defenses, if any, to the counterclaim. There is also an affidavit of service on record which is not contested and therefore the service is not in contest and it follows that the judgment, is on the face of it, a regular judgment.

25. However, the judgment subject of this application was one on the counter-claim and its request was founded upon the provisions of Order 10 Rule 3, Civil Procedure Act. The debate continues whether a counter-claimant whose counter claim is not met by a defence to counter claim is free to ask for judgment on default or sets down the suit for hearing. There is no procedure for requesting for judgment in default of a Reply to a counter claim and Order 10 Rule 3 is certainly inapplicable. I hold that, for a counter claim, unlike a plaint, there is no procedure for requesting for judgment in default of a defence. Where the plaintiff fails to file a defence to counterclaim, the remedy is for the defendant to fix the matter for formal proof and not request for judgment. Way back in 1979 ***Harris, J*** in ***Kahuru Bus Service v. Praful Pate***l [1979] KLR 213 took the same position and said

"Neither Order VI nor Order IXA of the Civil Procedure Rules gives the Court jurisdiction to give judgement on a counterclaim, in default of the filing of a defence to the counterclaim."

26. I take note that despite several amendments to the rules the position of the law remains the same. It must be for a good reason. I find that good reason to have been adverted to by Onyango Otieno J, as he then was, in **BOC Kenya Ltd. v. Chemgas Ltd., HCCC No. 935 of 1999**, when he said and held: -

> **"…I do find that the counterclaim and the main suit are inseparable and should be heard together…[T]he drafts defence to counterclaim raises a reasonable defence, even if I were wrong in my holding that interlocutory judgement cannot be entered in default of a defence to counterclaim…**"

27. In this matter, the counter claim as pleaded reveals the liquidated sum claimed to be auctioneer's accrued and accruing cost together with the costs of this very suit. There is also a claim for damages for defamation on the allegations made in the pleadings herein. It baffles me if costs of a suit can be claimed in the same suit as a counter claim just as it baffles me if the 2nd defendant is in these proceedings on behalf of the auctioneer. It would also be interesting to know how legal proceedings can found a cause of action in defamation. I raise these issues to demonstrate my appreciation that the claim needs to be proved by evidence and at trial. It follows that I find the applications for setting aside to be merited and I therefore set aside the judgment in default of a defense to counterclaim requested on the 22.01.2019 and entered on 20.02.2019. In coming to this conclusion, I have appreciated the concerns by Prof J B Ojwang, j (as he then was) in **Susan Njuguna v B. K. Terer & 2 others [2005] eKLR.** In **Haco Industries Ltd & another v Doshi Iron Mongers Limited & another [2018] eKLR** this court took cognizance of the fact that the lacuna in the law may encourage indolence upon defendants to a counter claim and left it to the Rules committee to do the needful.

28. Even on the merits, I would still have set aside if the judgment was regularly entered on the same basis that even though service was effective, the nature of the counter claim as pleaded was intrinsically intertwined with the suit and it is best heard with the remainder of the suit.

Has a case been made out for provision of security for costs?

29. An order for provision for security for costs being one of the supplemental proceedings in a litigation is designed to bolster and further the administration of justice. Its purpose is to secure the interests of a defendant who may be faced with the prospects of total failure to recover costs duly ordered after a successful defence of a plaintiff suit. A reading of Order 26 Rule 1 Civil Procedure Rules is clear that only the defendants' and a subsequent party's costs need to be secured by security ordered by the court at the instance of such defendant or subsequent party. I see no window by which a plaintiff may request for security for costs. Here it is the counterclaimant seeking security for costs on the basis of the counterclaim. In addition, what is sought to be availed is in fact not the costs of the suit, but the sums claimed in the counter claim and which a default judgment had been sought and obtained together with auctioneers cost that continues to accrue. I find that request to go beyond the realm of provision for security for costs. Instead it takes the nature of an application for execution before taxation and settlement of a decree. The request for auctioneers accruing fees on the other hand takes the character of an application for attachment before judgment. I am not in any doubt that the application is wholly misconceived and the kind that serves no purpose towards the just determination of the litigation but rather serves to delay and obscure the real dispute in the suit. It is the kind of an application that would have deserved summary dismissal but the law dictates that parties be given a hearing on their cases.

30. In the end, I do allow the two applications to set aside but dismiss the application for security for costs. On costs I do order each party to bear own cost. This I do even though the plaintiff and the 1st defendants have succeeded because in reality they constructed the circumstances inviting the two application and should not be rewarded for their undoing. On the same note having excused them from costs arising from their own default, I find it just that I do not call upon the 2nd defendant to pay them the cost of the dismissed application.

Dated signed and delivered at Meru virtually via Microsoft teams this 21st day of May 2021

Patrick J O Otieno

Judge

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[1] ***Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR***