**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 14 OF 2020**

**DOA DOA TENTED CAMPS AND LODGES LIMITED ....................... PLAINTIFF**

**VERSUS**

**JUBILEE INSURANCE COMPANY OF KENYA LIMITED ............. DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Kilonzo Advocate for the plaintiff**

**Hamilton Harrison & Mathews Advocates for the defendant**

***R U L I N G***

The defendant, herein **Jubilee Insurance Company of Kenya Limited** is aggrieved with the Judgment of this Court and orders passed on 17.5.2021, whereby the plaintiff was granted various favorable orders. The grounds on which the notice of motion is based are stated in the face of it to include:

> ***(a). The defendant became aware of this suit on 3rd June 2021 upon being served with a Judgment notice by the plaintiff's advocate.***
>
> ***(b). The defendant was not aware of this suit because the plaintiff has never served them with the summons to enter appearance and/or any copies of the pleadings filed in this matter. It was therefore not possible for the defendant to enter appearance and defend the case.***
>
> ***(c). The defendant has approached the court seeking stay of execution of the decree, setting aside of the ex parte Judgment and for leave to defend the suit.***
>
> ***(d). The defendant has a good defence to the plaintiff suit which raises plausible issues for trial.***
>
> ***(e). The defendant has an inalienable constitutional right to be heard on its defence and will suffer.***

In addition to those grounds is an affidavit sworn by **Nancy Kasyoka**, as the Assistant Legal Claims Manager filed in Court on 8.6.2021. In essence the defendant is seeking leave of this Court to have the Judgment entered against them set aside to facilitate the claim to be heard *denovo.*

The main cause being alleged by the defendants which made them not participate in the trial was the failure by the plaintiff not to effect service of summons to enter appearance to the filed suit. That in the matter, the defendant has a valid defence to be ventilated in answer to the plaint initiated which culminated in the award of damages for loss and damage under the policy instrument.

The plaintiff Director **Philemon Mwakilulu Mwavala** in opposition to the grant of orders being prayed for setting aside the Judgment swore a replying affidavit filed in Court on 14.6.2021. The lengthy affidavit raised a number of issues, but the main ones referred to challenge the motion include paragraph 6 to the effect that the plaintiff filed this suit vide a plaint dated 19.8.2020. This honourable Court issued summons to enter appearance to the defendants which summons were dated 25.8.2020, marked as **Exhibit PMM1, PMM2** and **PMM3.** That the summons to enter appearance, the plaint, list of documents, list of witnesses were served upon the defendant through its Nairobi offices through last known email of one the principal officer (**philomena.theuri@jubileekenya.com**). That the email was issued to the process server by the secretary who declined to receive summons and other suit papers for reason of the Covid-19 pandemic protocols. That evidence of affidavit annexed as **annexure PMM-4**. That further, the defendant was also served by the plaintiff with the summons to enter

appearance by the plaintiff via an email letter dated 31.8.2020 vide **legal@jubileekenya.com** and the **department@jubileekenya.com** in accordance with the electronic case management practice directions 2020. That therefore, the issue of non-service of the claim upon the defendant does not arise. The plaintiff prayed for the dismissal of the notice of motion.

At the end of the responses, both counsels filed brief written submissions with regard to the perspectives they take of the issues raised in the notice of motion.

**Determination**

Has the defendant satisfied the criteria of sufficient cause for this Court to set aside the ex-parte Judgment? The provisions of the Law which governs the setting aside of a default Judgment are clearly stipulated under Order 10 of the Civil Procedure Rules in Subsection (11) ***"where the Judgment has been entered under this order, the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just."***

In the case of **Departed Aseans Property Custodian Board v Issa Bakuya The Supreme Court of Uganda in Civil Appeal No. 18 of 1991** held that:

> ***"An application to set aside an ex-parte Judgment cannot succeed if no good or substantial reasons are given to justify the setting it aside."***

Looking at the arguments in the affidavit by the defendant's in support of the quest for leave to defend the suit is a total sum of the statement that there was no effective service of summons; secondly, are matters or issues which directly and substantially competent to be ventilated before the trial Court as pleaded in the draft defence. What is before me is a matter heard and determined in absence of the defendant participation. The authority of the Court to proceed with the trial was a presumptive evidence contained in the affidavit of service that the defendant was properly served as conditioned by the Law. That affidavit of service refers, the mode effectuated to serve the defendant was vide email to one **philomena.theuri@jubilee.com** a principal officer to the defendant company.

The question is does the principle of proper service apply to the circumstances of the case heard and determined ex-parte against the defendant. Looking at the tenor and the meaning of what constitutes proper service of summons to enter appearance in this specific suit, the answer lies from the trace of email communication from **Philomena Theuri** sent **Sue Cherono** on 23.10.2019 on the subject Re-Declined claim settlement for policy **P/MSA/10/10/2014/14578 – Doa, Doa Tented Camps and Lodges.** There were also further subsequent emails on 31.10.2019, 11.12.2019 on the same subject matter touching on the claim lodged by the plaintiff.

With respect, this criticism levelled against the process server is unjustified and should be rejected. The fact of matter being agitated by the defendants on the absence of the generated delivery report by itself does not render service through email defective. I see no cogent argument or evidence advanced by the defendant to impugn the mode of service of summons to enter appearance and other supporting suit papers as maintained by the defendant representative.

In the face of these facts, I think, with respect the defendant fell into error, mistake or blunder for not entering appearance or filing defence to the claim. It is not in dispute therefore that the plaintiff had every right to exercise the right to access Court to ventilate the claim to prove it on a balance of probabilities. This claim as it turned out on his evidence was out of a valid Judgment obtained from the Court albeit without the defence on the part of the defendant.

I must now consider whether the mistake of the company principal officer should be visited against the defendant to constitute affirming the impugned Judgment of the Court. I must now consider the applicable case Law that impacts on the notice of motion and the counterclaim raised by the plaintiff. In the case of **Lucy Bosire v Kehancha D. V. Land Dispute Tribunal & 2 Others**:

> ***"In this case, the blame is placed at the doorstep of the applicant's erstwhile advocate. It is true that where justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on his merits."***

If one can draw an analogy from **Kehancha case**, it would seem that no one should be condemned unheard by any Court of Law at the time of passing Judgment with enormous consequences over his rights. In the case of **Sangram Singh v Election Tribunal Kotch (AIR 1955 SC 664)** the Court remarked:

> ***"There must be ever present to the mind; the fact that our Laws of Procedure are guided on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that not be precluded from participating on them."***

As already indicated also in the case of **Republic v Speaker Nairobi City County Assembly & Another ex-parte {2017} eKLR**:

> ***"It has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on the merits."***

It should also be noted that the discretion of the Court is as prescribed within Order 10 Rule 11 of the Civil Procedure Rules. It mandates the Court to consider whether to refuse leave to defend or to grant the relief of setting aside the ex-parte Judgment; it would likely cause substantial hardship to or substantially prejudice the rights of any person affected by that order or Judgment or it would be detrimental to fair

administration of justice.

The discretion of the Court to endeavor to do complete justice is unfettered. It is everything in the legal system that believes in the rule of Law and proper harmonious relationship between the warring parties to the dispute. Justice is a process of giving and protecting the rights and liberties of persons approaching the Court to get what belongs to them. Therefore, the Courts while tempering justice with mercy has to be conscious of the doctrine on equality of arms founded on a just and fair society in conformity with the Law. It is this situation which the constitution strengthened under Article 50 on the right to a fair hearing.

The essential question herein, is what happens where one has an obligation to answer a claim but goes to slumber until the final Judgment is pronounced by the Court. It has been noted that the word **complete justice** rather **substantive justice** as the constitution manifest it under Article 159 (2) (d) is a wide amplitude for the Courts to meet myriad of various situations in adjudication of cases. It is beyond the concept of giving justice to one party in exclusion of the other for whatever mistakes, omissions, blunders or dilatory conduct. Equipped with such discretionary powers is a twin tool of a right to a fair hearing as a whole principle universal application. The Court in **George v Secretary of State for the Environment {1979} 77 LGR 689** held interalia as follows:

> ***"On the other hand it must be a flexible principle. The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice."***

In exercise of such powers there can be no straight jacket formulae nor can be any fetters to limit the jurisdiction of the Court to ensure no injustice is caused by the rigors of the Law. In relation to framing the guidelines the Court in **Patriotic Guards Ltd v James Kipchirchir Sambu {2018} eKLR,** where the Court stated:

> ***"It is settled Law that whenever a Court is called upon to exercise its discretion, it must do so judiciously, - judicious because the discretion to be exercised is judicial power derived from the Law and as opposed to Judges private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the Court to do real and substantive justice to the parties to the suit."***

Under Order 10 Rule 8, 9, 10 & 11 of the Civil Procedure Rules this Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause of action or subject matter pending before it, including setting aside a valid ex-parte Judgment or one which is void *ab initio*.

What is being asked for by the defendant is the leave to challenge the decision by way of an interpartes hearing of ventilating the issues in the draft defence. In accordance with the overriding objective under Section 1A and 1B of the Civil Procedure Act, as a general principle, it can be said that the real dispute ought to be adjudicated in a fair, just and proportionate manner. The essence of this matter at this stage is that the defendant needs to raise the issues in the contract of insurance which the impugned decision was considered forthwith by this Court.

During, that hearing the issue of the terms of the policy and their invocation following the occurrence of the risk may very well, be relevant. It may therefore be, that the defendant needs this leave to defend for the purposes of any such evidence being presented to the Court. The defence as framed as such *primafacie* cannot be said to be a bad defence.

As I conclude on this matter, I am fortified by the principles in **Shah v Mbogo {1967} E. A. 116 at 123 B** where the Court stated:

> ***"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the Courts of justice."***

Considering all the circumstances of the matter, I allow the notice of motion dated 7.6.2021. My orders therefore will be as follows:

> ***(1). The ex-parte Judgment be set aside and the consequential decrees thereof.***
>
> ***(2). The matter be re-opened for the defendant to have it heard on the merits simultaneously with the claim in the plaint.***
>
> ***(3). The defendant shall pay throw away costs of Kshs.35,000/= to the plaintiff before the next scheduling hearing of the suit.***

***The costs of this application to abide the outcome of the suit.***

It is so ordered.

**DATED, SIGNED ON 19TH DAY OF AUGUST 2021 and DISPATCHED via email ON 19TH DAY OF AUGUST 2021**

**..................................**

**R. NYAKUNDI**

**JUDGE**

**(maurice.kilonzo@yahoo.com, marymulwa@yahoo.com, litigation.kenya@dentons.com)**