REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 224 OF 2019

LANDMARK FREIGHT SERVICES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

ZAKHEM INTERNATIONAL LIMITED..... DEFENDANT/APPLICANT

RULING

1. The application for consideration is the defendant's Notice of Motion dated 18th December 2019, brought under Order 10 rule 2(2), Order 51Rule 1 of the Civil Procedure Act and Sections 3A,1A and 1B of the Civil Procedure Act. The application seeks the following orders:

i. Spent

ii. That this Honourable Court be pleased to set aside and/or vacate the exparte judgment dated 26th November 2019 herein and consequential orders and the defendant/applicant be allowed to defend the plaintiff's suit on merit.

iii. That the defendant be granted leave to file its defence out of time and the annexed draft defence be deemed as duly filed and served upon payment of the requisite court fees.

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

2. The application is supported by the grounds on its face plus the sworn affidavit of Asli Osman the advocate representing the defendant/applicant. He averred that the plaintiff/respondent filed the plaint on 17th October 2019 and served the defendant/applicant on 24th of October, 2019. The defendant entered appearance vide memorandum of appearance dated 30th October 2019 (annexed and marked AO-01). That the subject matter of the suit is a colossal sum of Kshs.514,686,710/= which the plaintiff/respondent claims against the defendant/applicant a company registered in the Republic of Cyprus where the directors are based. That the instructions pertaining to the suit are remitted via courier services hence causing the delay in filing the defence and communication with its advocates.

3. He avers that he attempted to file the defence on 9th December 2019 only to be informed that the file was in chambers pending the request for judgment (annexed and marked AO-02). He further avers that he came to learn of the exparte judgment after its entry on 13th December 2019 after several attempts to peruse the file in vain. Further that the mistake or omission of counsel should not be visited upon a litigant more so where it occasions great injustice.

4. In opposition to the application, the plaintiff's director Mr. Samuel Mburu Kamau swore a replying affidavit on 27th of January 2020.He deposed that the defendant's application is misconceived, incompetent, in law and an abuse of the process of court and ought to be dismissed.

5. He avers that the applicant was duly served with summons to enter appearance and the notice of entry of judgment on 24th October 2019 and 28th November 2019 respectively were served. SKM -1 (a) and (b) are copies of the affidavits of service sworn on 21st November 2019 and 10th December 2019 by Benson Mutinda and Kiplangat advocate respectively. He depones that the applicant's counsel has deliberately misrepresented to the court the actual domicile of the applicant and has not mentioned that they have a local branch office in Kenya situated along Outering road, opposite G.S.U Headquarters Nairobi. He adds that its director namely Mr. Adrian Ibrahim Annous and the senior management are based there.

6. The deponent avers that there is no proper reason and plausible explanation for the failure by the applicant to file its defence within the prescribed period and that the delay in making the application is inordinate so it ought to be dismissed.

7. He annexed SMK-2 which are copies of the relevant correspondences in which the applicant has expressly and equivocally admitted the plaintiff's claim. He further avers that the applicant has no reasonable defence on the merits and the purported draft defence does not raise any triable issues.

8. Further, he avers that the said application has been brought solely for purposes of obstructing and delaying the cause of justice to the prejudice of the respondent. He therefore urges this honourable court to dismiss the application with costs.

9. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

10. The defendant/applicant through its advocate Ahmednasir Abdikadir and company advocates filed the submissions dated 8th July 2021. Counsel identified the issues for determination to be as follows:

a. Whether the judgment in favour of the plaintiff/respondent was obtained regularly, and if so, whether the same can be set aside.

b. Whether the applicants have a defence on the merits raising triable issues.

11. Counsel submitted that the basis for an application for setting aside an exparte judgment is provided for under **Order 10 Rule 11 of the Civil Procedure Rules,2010** which provides that;

"Where 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."

12. He further submitted that the above rule has been interpreted as affording the court unfettered discretion to set aside such a judgment on terms that the court deems fit but which discretion must be exercised judiciously. On this he relied on the case of **K-Rep Bank Limited v Segment Distributors Limited (2017) eKLR** paragraph 9 where the court stated:

"Thus, the provision aforestated does bestow on the Court unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations."

13. On the first issue Counsel relied on the case of **K-Rep v Segment case** (supra) where the judge quoted the case of **Patel v East Africa Cargo Services Ltd [1974] EA 75** where it was held that before exercising such jurisdiction the court must ask and answer the question whether the impugned judgment was regular or irregular. In the said case the court stated as follows:

"accordingly, it is imperative for the court to ascertain, first and foremost, whether the impugned default judgment was regularly entered or not, for, if it be the case that the judgment is an irregular judgment then the court would be obliged to set it aside ex debito justitiae. This distinction was well expounded in the case of **Fidelity Commercial Bank Ltd v Owen Amos Ndungu & Another, HCC No.241 of 1998 (UR)** where the court stated as follows

"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the exparte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right"

14. He further relied on the following authorities:

a. Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others (2017) eKLR

b. W.M Muiruri w/a Senior Deputy Registrar, High Court of Kenya v O.P Ngoge t/a O.P Ngoge & Associates Adv. (2008) eKLR

15. Counsel submits that the applicant was served on 24th October 2019 and entered appearance on 30th October 2019 and as such the default judgment was entered regularly, therefore the question that follows is whether in such circumstances the court may set aside the exparte judgment. On this he relied on the case of **James Kanyitta Nderitu & Another v Marios Philotas Ghikas & Another (2016) eKLR** where the Court of Appeal held that:

"In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgement,and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence as the case may be ;the length of time that has lapsed since the default judgement was entered ;whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among other"

16. It is his submission that despite judgment being regular the same can be set aside and the matter proceeds to be heard and determined on merits. The applicant therefore seeks to establish that the circumstances meet the threshold to warrant the judgment being set aside. He urged

the court to set aside the default Judgment upon such terms as are just under the circumstances to allow the defendant file its defence. On this he relied on the case of **Richard Nchapai Leiyangu v IEBC & 2 Others (2013) eKLR** where the court opined that:

> "We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"

17. Counsel submits that the plaintiff has not demonstrated that it would suffer any prejudice which can not be adequately compensated by payment of costs. On the other hand if the plaintiff was to proceed and execute, the applicant is apprehensive that it will have no recourse of recovering the judgment award. He has referred to the case of **Shah v Mbogo (1974) E.A** in which it is stated that the main concern of the court must always be to do justice to all parties where a mistake had been inadvertent provided that no irreparable damage was suffered by the opposing party.

18. On the second issue, on whether there are triable issues he urged that it is not subjective but depends on the facts. On this he relied on the Court of Appeal case of **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR** in defining what a triable issue is observed that:

> "A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

19. Counsel argues that the defendant has established that indeed their defence raises triable issues, and it should be offered an opportunity to be heard. On this argument he relied on the case of **Lalji t/a Vakkep Building Contractors v Casousel Ltd (1989) KLR** Nyarangi, JJA, Platt JJA and Kwach, Ag JA) held:

> "A trial must be ordered if a triable issue is found or one which if fairly arguable is found to exist"

20. Counsel submitted that the applicant denies the contents of paragraph 6 of the plaint dated 11th October 2019 and avers that it is not liable to the plaintiff for the sum of Kshs. 514,686,710/= as claimed on the face of it. He relied on the Court of Appeal cases of

i) Fredrick Chege Kamenwa vs Aron K Kandie (2001) eKLR

ii) *In* **Winnie Wambui Kibinge & 2 Others v Match Electricals Limited (2012) eKLR** the court held that:

> "**….**it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit…"

He urged the court to allow the application in the interest of justice.

21. Mr. Kiplagat for the plaintiff/respondent submitted that the applicant has conceded in his written submissions that the default judgment entered was regular and the same can be set aside in exercise of the court's discretion and not as a matter of right. In opposing the application, he identified 4 principal grounds namely:

i. The intended defence does not raise any triable issues

ii. No prejudice to the applicant

iii. There is no explanation for the failure to file a defence

iv. Alternatively, and without prejudice the court to impose terms for setting aside the regular default judgment.

22. On the first ground, counsel submitted that the draft defence annexed to the application does not disclose any bonafide triable issue in view of the clear admissions of indebtedness by the defendant/applicant expressly and unequivocally vide four (4) preaction uncontested letters (*Exhibited as SKM2.). He* argues that the draft defence is a mere denial and a sham which is calculated to cause undue delay in the settlement of an admitted debt to irrevocable prejudice to the respondent who is entitled to the fruits of its regular default judgment. Further, it is his contention that whether the admitted decretal sum is colossal or not is not a valid ground to set aside a regular default judgment.

24. In support of this argument, he relied on the cases of **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another (2016) eKLR; Job Kilach v Nation Media Group Limited & Others (2015) eKLR.**

24. He further relied on the following authorities;

a. Abdalla Mohammed & Another v Mbaraka Shoka (1990) eKLR where the Court of Appeal held as follows: -

> "The tests for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merits; secondly whether there would be any prejudice; and thirdly, what is the explanation for any delay"

b. In Iseme Kamau & Another v Kenya Airports Authority (2019) eKLR the court held as follows; -

> "Similarly, I find no valid grounds have been advanced to warrant the setting aside of the regular default judgment entered in this case in view of the clear admission by the defendant/respondent of the amount of 36 million inclusive of VAT"

25. On the second ground, counsel submitted that there will be no prejudice occasioned to the applicant if the regular default judgement is not set aside in view of the clear admissions that would be tantamount to assisting the applicant to obstruct or delay the course of justice in this matter.

26. On the third ground, he submitted that there was no plausible and candid reason given as to why the defence was not filed within the timelines since the applicant has a place of business in Kenya and the directors were served with summons in Kenya as per the affidavit of service sworn on 21st November 2019. He contends that the submissions that the management is based in Cyprus and the alleged denial to peruse the court file is not supported by evidence. Counsel further contends that no explanation has been given for the inordinate delay in filing the defence and so the applicant is undeserving of the exercise of judicial discretion in its favour.

27. Lastly in the alternative and on a without prejudice basis, counsel submitted that if the court is inclined to set aside the regular default judgment then it ought to do so on terms that the entire decretal sum be deposited in court or alternatively the defendant to furnish a bank guarantee for the said decretal sum. He further submitted that it would be unjust to set aside the regular default judgment unconditionally in view of the clear admissions and the fact that the defendant is by its own admission a foreign company whose assets are probably outside the jurisdiction of this honourable court.

Analysis and Determination

28. I have considered the application, affidavits, submissions and cited authorities by both counsel. The issue for determination is whether the defendant has made out a case for the exercise of this court's discretion to set aside the ex-parte judgment entered on 26th November 2019.

29. The law applicable for setting aside an ex-parte interlocutory judgment in default of appearance or defence is Order 10 Rule 11 of the Civil Procedure Rules which is set out at paragraph 11 of this Ruling.

30. The well-established principles of setting aside interlocutory judgments were laid out in the case **of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per Duffus P. who stated as follows:

> "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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on 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."

31. In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-1988) KAR page 1036**, the Court of Appeal while dealing with an appeal against refusal to set aside exparte judgment in default stated:

> "The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. **Kimani v MC Conmell (1966) EA 545** *where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue".*

32. It is the defendant/applicant's case that some of the issues that made them not able to file the defence on time were that the defendant company is based in Cyprus thus making it hard for the directors and management at large to be served on time. Counsel for the defendant/applicant further stated that he had tried to file its defence but was informed that the file was in chambers pending the request for judgment. The applicant later learnt that an ex parte judgment had already been entered.

33. On the other hand the plaintiff/respondent insists that the defendant/applicant had been duly served as they have an office in Kenya which has a director who was served. Counsel for the plaintiff has also argued that no plausible reason/explanation has been given for the failure to file a defence in time.

34. The plaintiff/respondent has stated that the defendant/applicant has expressly and equivocally admitted the plaintiff's claim vide letters they produced in court and that they have not denied the same.

35. It is not in dispute that summons to enter appearance were served upon the defendant who entered an appearance on 31st October 2019. Later on 10th December 2019, the defendant 's counsel tried to file its defence but was unable to do so on time due to the various reasons already stated above.

36. A perusal of the copy of defence (A02) shows that the defendant has denied owing the plaintiff the sums of money claimed as well as ever entering into any contract or sub contract with the plaintiff. These are issues to be determined at a full hearing.

37. Considering the huge sums of money involved in this matter, the draft defence annexed and the fact that the defendant has explained its

challenges and the reasons for being late in filing its defence it would be an injustice to allow the ex parte judgment to remain at this point without letting the parties bring out all issues for the court to determine after hearing both sides. The alleged communication between the parties is a matter of evidence to be adduced.

38. Furthermore, the defendant acted without undue delay upon realizing that an exparte Judgment had been entered against it.

39. In the case of **Jomo Kenyatta University of Agriculture and Technology V Musa Ezekiel Oebal (2014) e KLR CA 217/2009,** the Court of Appeal stated that the object of clothing the court with discretion to set aside judgment obtained exparte has been pronounced in many decisions and sampled the following:

> "To avoid injustice or hardship resulting from accident; inadvertence or excusable error; not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice……." See **Shah v Mbogo & Another (1967) EA 116.**

40. Further in the case of **Sebei District Administration v Gasyali & others (1968) EA 300** Sheridan J remarked:

> "The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

41. After due consideration of all I have stated above, I find merit in the defendant's application seeking to set aside the exparte Judgment.

42. I therefore allow the application and set aside the exparte Judgment entered on 26th November 2019 plus any consequential orders.

ii) The defendant is granted leave to file its defence out of time and the annexed draft defence is deemed as duly filed and the same to be served upon payment of the requisite court fees.

iii) Parties to move with speed to have the matter heard.

iv) Costs in cause.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2021 AT MILIMANI NAIROBI

H. I. ONG'UDI

JUDGE