



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL CASE NO. 4 OF 2020**

**EMERGENCY PLUS MEDICAL SERVICES LIMITED.....APPLICANT**

**VERSUS**

**MANDERA COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The Plaintiff/Applicant, **Emergency Plus Medical Services Limited** filed suit against the Defendant, **Mandera County Government** on the 19<sup>th</sup> of September 2020, seeking for an outstanding amount of Kshs.18,997,545.86 arising from a contract entered into by the said parties on the 19<sup>th</sup> of May 2014 and renewed from time to time so that the said claim arose between September 2016 and June 2018.

along side the claim, the Plaintiff/Applicant sought for interest at commercial rate until payment in full, and costs.

2. The plaint, supporting documents and summons to enter appearance were served upon the Defendant/Respondent on the 11<sup>th</sup> of September 2020, the same were received and duly stamped and an Affidavit of service filed in court.

3. The defendant/respondent failed to enter appearance or file a defence within the stipulated time.

4. It appears that the inaction of the Defendant/Respondent is what caused the application by the Plaintiff/Applicant dated the 1<sup>st</sup> of October 2020 and brought pursuant to Order 10 rule 4 (1) & 8 of the Civil Procedure Rules, seeking leave for a default judgement to be entered against the Defendant/Respondent.

And upon issuance of leave for a default judgement to be entered in the sum of Kshs.18,997,545.86.

5. The said application was supported by the affidavit of **Susan Ng'ong'a**, the Managing Director of the Plaintiff/Applicant. In the said affidavit she reiterates the contents of the contract between the parties and non-payment of the sum being claimed despite demand.

Further she stated that the summons to enter appearance and the plaint were duly served upon the Defendant/Respondent on 11<sup>th</sup> September 2020, however despite service no appearance or defence had been filed.

6. The Defendant/Respondent appears to have were woken from slumber, a defence on their behalf was filed on 9<sup>th</sup> of June 2021 and at the same time a replying affidavit in response to the application subject matter was filed.

7. In the replying affidavit sworn by **Aden Kullow** dated 8<sup>th</sup> June 2021 there is an attempt to explain the delay in filing an appearance and a defence. He blames the lateness to the effects of the Covid-19 Pandemic explaining that most of the Respondent's/Defendant's staff worked from home slowing business and they now seek to file the defence out of time.

8. In the said affidavit the contract between the two parties is admitted. It is also admitted that the parties have engaged in correspondence and met over the issue in a bid to settle the same.

9. It is the Defendant's/Respondent's position that the sum initially claimed was large and they settled the claims that were supported by evidence. However, they are unable to pay the outstanding amount as the alleged services offered were not supported by necessary documents. Further the Plaintiff breached the contract by stalling services due to late payment, at the same time claiming for payment for services not rendered. Briefly put they are disputing the sums being claimed.

10. Notable is that no notice of appointment nor memorandum of appearance are on record and the defence was filed 11 months after service of the plaint and notice to enter appearance.

11. The issues for consideration are; -

(i) Whether the defence was filed inordinately late.

(ii) Whether or not to grant leave and to enter the default judgement.

12. Courts have severally held that no party should be condemned unheard as much as possible.

In Trust Bank Ltd vs Amalo Company Ltd [2003] EA at 350 the Court of Appeal held

**“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible, disputes shall be heard on their own merit (Essenji & Another vs Solanki [1968] EA 224). The spirit of the law is that as far as possible in the exercise of Judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for not doing so. The appellant had the right to be heard on the documents he had put before the court and were on record.”**

13. In Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR Gikonyo J addressed the issue of delay in filing court documents in the following words

**“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given of the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.**

**Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”**

14. In Peter Kariuki Waweru vs Kiambu County Government & Another [2015] eKLR Onguto J (as he then was) stated inter alia

**“...The discretion thus ought to be exercised whilst basically taking into account the same related factors. Firstly, it would be appropriate to know the reason for the delay in filing the defence statement whilst also considering the period of delay. The court must then also consider the nature of the claim as well as the defence proposed to be tendered.”**

15. In Patel vs East Africa Cargo Handling Services Ltd [1974] EA it was stated

**“The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to it by the rules.....where it is a regular judgement.....the court will not usually set aside the judgement unless it is satisfied that there is a defence on merit.....defence on merit does not mean.....that a defence must succeed, it means.....a triable issues, “that is an issue that raises a prima facie defence and which should go to trial for adjudication.”**

16. In Moi University vs Vishva Builders Ltd [2010] eKLR the Court of Appeal had this to say

**“We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one trial issue would be sufficient – see H.D Hasmani vs Banque Du Congo Belge [1938] 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs E.A Cargo Handling Ltd [1974] E.A at 75.....**

**The law on Summary Procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs Devshi & Co. Ltd [1952] 19 E.A 77 and followed in the Court of Appeal of Eastern African in the case of Souza Fiqueredo & 10 Others vs Moorings Hotel [1989] E.A 435, that if the Defendant shows a bonafide triable issue he must be allowed to defend without condition.....”**

17. The year 2020 and indeed till now work was slowed down by the Corona Virus pandemic. Many companies and institutions were engulfed with uncertainty, business came to a standstill and some almost shut down. This uncertainty was experienced in the entire world. In other words, the entire world came to a standstill. Legal processes were not spared either. The court finds the delay in the circumstances of the Covid situation well explained and excusable.

18. Further the Defendant/Respondent has raised triable issues in its defence and the court having found the delay of 11 months excusable in the circumstances, considering the amount involved, the fact that the monies will be coming from public coffers and against the issues raised, the court forms the opinion that the defence filed out of time ought to be admitted in order for the case to be heard on its merit.

19. For the above reasons the court declines to grant the application for leave to enter a default judgment and directs that the matter proceeds to full hearing.

20. And devoid of technicalities the Court further directs counsel on record for the Respondent/defendant to file his notice of appointment if at all this was not done.

21. Costs of the application in any event to the Applicant/Plaintiff.

**DATED, SIGNED AND DELIVERED IN GARISSA THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021**

**ALI-ARONI**

**JUDGE**