



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL CASE 262 OF 2017

PARKENG AGENCIES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL/COUNTY.....DEFENDANT

RULING

PLEADINGS

By Certificate of Urgency application filed on 13th June 2018, the Defendant/Applicant sought orders of stay of execution of the Court's judgment of 11th May 2018 and the decree arising thereof; that the Interlocutory judgment of 31st August 2017 and consequential orders of 11th May 2018 be set aside; the Applicant is granted leave to appear and file defence and costs be borne by the Plaintiff/Respondent.

The Applicant relied on the following grounds;

- a) The Default Judgment was irregular as it was/is contrary to **Order 10 Rule 8 CPR 2010** which provides that an application for leave to enter default judgment against County Government ought to be sought.
- b) The Applicant was not served with Notice of Formal Proof or assessment of damages and was not aware that Interlocutory judgment was entered against the Defendant.
- c) The subject-matter of the suit involves the pecuniary jurisdiction of the Magistrate's Court, the matter ought to have been transferred to the Magistrates' Court for hearing and determination. The matter was dealt with contrary to **Section 11 of CPA**.
- d) The Defendant/Applicant had/has a Draft Defence that raises triable issues; and ought to be given an opportunity to be heard on merit.
- e) The 1st contract was frustrated because the National Government without consulting the Defendant/Applicant installed through Kenya Power & Lighting Company under lighting up Nairobi towards 24 hour economy before the Plaintiff/Respondent could perform the Contract. The termination of the contract was legal as streetlights were already installed.
- f) The 2nd Contract was also terminated by the Applicant as there was failure to avail a site for the building of pit latrines. The Applicant contends that the termination was lawful and legal as the tenders could not be awarded because of unavailability of the site for works.

The Respondent by the Replying Affidavit filed on 3rd July 2019 replied as follows;

- a) The Applicant failed to disclose the name and details of the alleged associate who left office and locked the relevant file in the drawers and the Applicant's advocate was not aware that defence was not filed within the statutory timelines.
- b) The Applicant also claimed that he had failed to obtain relevant documents from the client to assist in defending the suit and yet was well aware of mandatory provisions of **Order 5 Rule 1 CPR 2010** to file Defence within 15 days after filing of memorandum of appearance/Notice of Appointment.
- c) Applicant's Counsel filed Notice of Appointments dated 10th July 2017 on 2nd August 2017 and subsequently failed to raise

Preliminary Objection jurisdiction of the Court. The High Court has original jurisdiction.

d) The Applicant was served with Plaintiff and Summons for appearance and after Interlocutory judgment was served with Notice for Formal Proof and after Judgment was served with Notice of Judgment.

e) **Order 10 Rule 8 CPR 2010** does not apply to County Government but National/Central Government as governed by Government Proceedings Act.

f) The Applicant is not contesting the award of 2 contracts to the Respondent/Plaintiff except that they were according to the Applicant, legally terminated.

DETERMINATION

The Applicant filed written submissions on 27th August 2019 and the Respondent filed written submissions on 17th October 2019. After consideration of pleadings and submissions I find the following issues for determination;

1) Was/is the Interlocutory/Default judgment of 31st August, 2017 regular, lawful and valid or should it be set aside and the *ex parte* judgment of 11th May 2018?

2) Does the applicant's Draft Defence raise triable issues that warrant *inter partes* hearing?

ANALYSIS

The Applicant contested service of entry of Interlocutory judgment and/or notice for formal proof proceedings. I have perused the Court record and confirmed that the Defendant was served with Plaintiff and summons and affidavit of service filed on 23rd August 2017. The Defendant failed to comply with **Order 7 Rule 1 CPR 2010** to file Defence within the requisite period. Hence, the Interlocutory judgment was entered. The only other Affidavit of Service is one filed on 10th January 2019 for taxation of Bill of Costs Party to Party Costs. The Defendant was not served and/or no evidence of service to confirm that the Defendant was served with Notice of Formal Proof Proceedings. What is relevant and important is that the Defendant was duly served with Plaintiff and Summons and failed to file Defence resulting in the Default judgment. Service was sufficient.

The Applicant raised various reasons that curtailed filing of Defence within the statutory period, this Court finds the only plausible reason is that after General Elections in August 2017, there was change of guard/personnel/ officers in the Nairobi County. Therefore, it is natural and expected in the circumstances that new officers upon taking office took time to settle down and/or familiarize with ongoing matters so as to give proper instructions and documentation on the matter. The process took time and in turn caused delay in filing Defence.

The Applicant annexed to the application, a letter to Director of Legal Services Nairobi County of 18th August 2017 seeking instructions to the claims which was replied on 18th October 2018, a letter also annexed to the application. The Defendant delayed in giving instructions to the advocate to file the defence within the stipulated period.

Does the Draft Defence raise triable issue(s)? The Applicant denied and contested that the termination of the 2 contracts was unlawful and relied on the doctrine of frustration of contract in the 1st contract. In the 2nd contract, the Defendant/Applicant contended that the Plaintiff failed to conduct due diligence as a site for works to commence had been identified and handover for the construction to commence.

In the case of *Patel Vs E.A. Cargo Handling Service [1974] E.A.75* where it was held;

“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 is a regular judgment as is case here the Court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means an issue raised a prima facie defence and should go for trial for adjudication so that the defence may be weighed upon the scale that they may succeed. They only need to raise issues that merit consideration in full Trial.”

The issue of whether termination of 2 contracts awarded to the Plaintiff was legal, valid and regular is a triable issue for determination in an *inter partes* hearing. Similarly, whether the Plaintiff is entitled to general and/or special damages arising out of mobilization of performance of contracts and resulting loss is another triable issue.

The Applicant raised the issue of compliance with Order 10 Rule 8 CPR 2010

8. Judgment in default against the Government [Order 10, rule 8.]

“No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”

The Applicant contended that as the County Government of Nairobi, it ought to have been served with notice of leave to enter judgment as required by law. The Respondent submitted that the legal provision applied to the National /Central Government but not County

Governments.

I have found **Article 6(2) & 189 COK 2010** explicitly outline the form of Government as National and County Governments that are distinct and interdependent.

Republic Vs AG & Anor Exparte Stephen Wanyee Roki[2016] eKLR Justice Onduga had this to say;

“...Article 189(1) a of the Constitution provides that the Government at either level shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of the government at the other level and in case of County Government, within the county level. In my view a holistic approach would lead to the conclusion that there is only one government being exercised in two different levels, both levels complimenting each other and operating in the spirit of co-operation and complementariness”.

“...It follows that the provisions of the Government Proceedings Act a legal instrument enacted before the effective date must be construed with the alterations. Adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution”

These Constitutional provisions include County Governments as part of Government in both Government Proceedings Act and the Civil Procedure

Rules. Therefore, the mandatory requirement to serve the application for leave was not served to the Defendant.

The Applicant raised issue with the jurisdiction of this Court in hearing and determining a matter whose pecuniary jurisdiction is one that gives jurisdiction to the Magistrate’s Court.

The Applicant made reference to **Section 11 of CPA** which provides; for the Court in which suit should be instituted

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it,”

The value of the Plaintiff’s claim as outlined in the Plaint filed on 23rd June 2017 is Ksh 6,704,482/- and the value of the *exparte* judgment is Ksh 1.5 m.

The pecuniary jurisdiction of the Chief Magistrate’s Court is now Ksh 20 million.

The Respondent contended that the High Court has unlimited original jurisdiction in both Civil and Criminal cases. This fact is conceded as it is prescribed by **Article 165 (3) (a) COK 2010**. However, practically, the matter begins from the lowest Court clothed with jurisdiction so as to allow opportunity for appeal if need be in the next Court. In the absence of any compelling reasons, the matter ought to be heard in Magistrate’s Court. Jurisdiction of the Court is not negotiable to be reached by Consent of parties; either a Court has or has no jurisdiction, and it is not donated by parties but by law.

This matter rightfully ought to be heard and determined before the Magistrate’s Court.

DISPOSITION

- 1. The Applicant’s Application filed on 13th June 2018 is upheld in the following terms;**
- 2. The Interlocutory judgment entered on 31st August 2017 and consequential final judgment of 11th May 2018 on condition;**
- 3. The decretal sum of Ksh 1.5m is deposited in a joint Account by Defendant within 90 days from date of delivery of Ruling.**
(Taking into account the current Corona Virus Pandemic Lockdown)
- 4. The amount shall be held jointly in the said account by the Applicant’s advocate; Meraka & Company Advocates and the Respondent’s advocate S. Ogeto Ongori & Co Advocates, pending hearing and determination of the matter.**
- 5. Only then may the Applicant file and serve the Draft Defence.**
- 6. Only then may the matter be heard and determined upon transfer by the Deputy Registrar Commercial Division to the Magistrates Court**
- 7. The Hearing in the Magistrate Court shall commence after the Government announces resumption of normalcy after the current Corona Pandemic and lockdown.**
- 8. Each party to bear own costs.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 28TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MEREKA & COMPANY ADVOCATES FOR APPLICANT

S. OGETO ONGORI & CO ADVOCATES FOR RESPONDENT