IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A MUGAMBI & COMPANY ADVOCATES...........1ST PLAINTIFF

BEATRICE KARIUKI T/A BEATRICE KARIUKI & ASSOCIATES .....2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED...DEFENDANT

RULING

1. The application before the court is the Defendant's Amended Notice of Motion dated 8th June 2020 made under **sections 1A, 1B** and **3A** of the ***Civil Procedure Act*** and **Order 51** of the ***Civil Procedure Rules*** and it seeks the following orders:

> [1] That this court be pleased to grant leave to file the Defendant out of time and/or alternatively extend time for filing the Defence to be deemed properly on record.
>
> [2] That this court be pleased to set aside the judgment and partial decree of the 15th October 2019 and all consequential orders thereto.
>
> [3] That the court do issue a Stay of Execution on the decree issued on 15th October 2019 pending hearing and determination of the Application.
>
> [4] That the costs of the application be borne by the firm of Kidenda, Onyango, Anami and Associates.

2. The application is supported by the affidavit of Francis Muhoro Gachanja, a director of the Defendant, sworn on 8th June 2020. The Defendant also relied on the supporting affidavit of Diana Wangui Ndirangu, an advocate in the firm of *Kidenda, Onyango, Anami and Associates,* sworn on 5thNovember 2019. The grounds of the application set out on the face of the application and deposition is that Mr Gachanja was never served with Summons to Enter Appearance ("the Summons") and it was served on the Defendant's advocates on record at the material time, *Kidenda, Onyango, Anami and Associates* who did not inform him and who did not have instructions or authority to enter appearance in the matter. Mr Gachanja states that he only got to know the about the suit when he was served in **Insolvency Petition No. 172 of 2019 (Re: Showcase Properties Limited)** on 8th January 2020. He stated that the firm of advocates then proceeded to file an application dated 5th November 2019 to set aside default judgment without informing or involving him. He therefore accused the firm of negligence in the manner it dealt with the matter and urged the court to set aside judgment on that basis as the Company was not guilty of any omissions by the advocates on record at the time. The Company urged that the defence raises triable issues.

3. According to the deposition of Diana Wangui Ndirangu, the firm of *Kidenda, Onyango, Anami and Associates* was instructed by the Defendant to defend the suit and did so expeditiously responding to an application filed under certificate of urgency by the Plaintiffs. It filed replying papers and attended court several times culminating in a ruling delivered by Tuiyott J., on 13th July 2019 dismissing the Plaintiffs' application. She deponed that at all material times she believed that the statement of defence which had been attached to the other documents had been filed. She only discovered that the defence had not been filed on 9th October 2019 when the matter came up for directions. Shortly thereafter she learnt that judgment had been entered. Ms Ndirangu deponed that failure to file a defence was an honest and innocent mistake

as the firm would not have taken a hearing date for 20th and 21st January 2020 had it known that the defence was not on record. She further deponed that even after Tuiyott J., delivered the ruling, parties sought time to amend the pleadings. She also stated that the defence annexed to the deposition raised triable issues.

4. Since the Defendant sought direct relief against the firm of *Kidenda, Onyango, Anami and Associates*, I allowed the firm to respond to the allegations against it. It filed a replying affidavit of Kevin Mambiri Anami, a partner in the firm, sworn on 2nd July 2020. He stated that the firm at all times acted in the best interests of the Defendant and defended it robustly including dealing with interlocutory applications. Mr Anami deponed that the accusation against it was intended to evade payment of fees to it and that at all material times the firm had written instructions to act for the Defendant in this matter and other matters.

5. The Plaintiffs filed a replying affidavit of John Mugambi, the 1st plaintiff, sworn on 6th February 2020. The thrust of his deposition was that his firm was instructed by the Defendant to file **HC COMM No. 577 of 2011 (Showcase Properties Limited v Bamburi Special Products Ltd)**. The 2nd Defendant was later instructed to act alongside him and the instructions were reduced in a retainer agreement dated 3rd December 2015. After filing suit and in due course, the Plaintiffs were granted leave to cease acting for the Defendant on 31st March 2017 whereupon they filed this suit to recover their fees in accordance with the retainer. Mr Mugambi deponed that the Defendant was duly served with summons and judgment entered against it on request. The Plaintiffs also contended that the proposed defence does not raise any triable issues as the claim is based on a retainer agreement and should the court find it necessary to set aside judgment, the same should be conditional.

6. The parties filed written submissions which mirrored the positions taken in their respective depositions I have outlined above. Although the Defendant has not invoked it, the application is one to set aside interlocutory judgment entered against it on 9th October 2019 which would ordinarily be set aside under **Order 10 rule 11** of the ***Civil Procedure Rules***. I do not consider failure to cite the applicable rule prejudicial as the parties were content to submit on the substance of the application and address the court on the applicable principles. Although the parties have cited several cases, I would be content to state that under **Order 10 rule 11** of the ***Civil Procedure Rules***, the general principle is that the court has unfettered discretion to set aside judgment on such terms as it deems fit and just. This principle was summarized as follows in ***Shah v Mbogo and Another* [1967] EA 116**:

> The discretion to set aside an exparte judgment 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

More recently the Court of Appeal in ***Richard Nchapai Leiyangu v IEBC & 2 others* NYR CA Civil Appeal No. 18 of 2013 [2013] eKLR** expressed itself as follows:

> 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.

7. In their submissions, the parties formulated similar issues for determination in resolving the application. First, whether Summons to enter appearance were served on the Defendant. Second, whether the Defendant has given sufficient reasons for failing to file its defence and third, whether the Defendant has a defence that raises a bona fide triable issues.

8. The issue of service implicates the relationship between the Defendant and its previous advocates on record, *Kidenda, Onyango and Anami Associates* ("*KONAN Associates*"). The firm filed a Notice of Appointment dated 2nd November 2017 on 3rd November 2017 to act for it and receive, *"all correspondence, processes and other matters"* on behalf the Defendant in relation to the suit. This means for all intents and purposes, the firm represented it and had ostensible authority to act on its behalf including the instructions to receive Summons and plead on its behalf. It is on this basis that the advocates were able to participate in opposing the Plaintiffs' application which was subsequently dismissed.

9. The mode of service upon an agent is provided for in **Order 5 rule 8** of the ***Civil Procedure Rules*** which provides as follows:

> 8(1) Wherever, it is practicable, service shall be made on the Defendant in person, unless he had an agent empowered to accept service, in which case service on the agent shall be sufficient.
>
> (2) A summons may be served upon an advocate who has instructions to accept service and to enter appearance to the summons and judgment in default of appearance may be entered after such service.

10. The logical consequence of Notice of Appointment was that *KONAN and Associates* signaled to the other parties that it had authority to accept service of process. According to the affidavit of service sworn by Boniface Kyalo, a process server, on 29th July 2019, the summons was served on the firm on 17th January 2019 and the same were duly acknowledged by signing and stamping the original summons on its face. Following a Request for Judgment dated 3rd September 2020, the Deputy Registrar entered default judgment.

11. Since the **Order 4 rule 8** of the ***Civil Procedure Rules*** permits service on the authorised agent and an advocate who has filed the Notice of Appointment is duly authorised to accept service of court process, the judgment entered against the Defendant was regular. I reject the Defendant's argument that its advocate was not authorised to accept summons on its behalf.

12. Even when the judgment is regular, a defendant may be required to explain the failure or delay in filing the defence and demonstrate that it has a bona bona fide defence. ***James Kanyiita Nderitu& Another vs. Marios Philotas Ghikas & Another* MSA CA Civil Appeal No. 6 of 2016 [2016] eKLR** the Court of Appeal had this to say:

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 judgment, and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment 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. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

13. The Court of Appeal in ***Tree Shade Motors Ltd v DT Dobie & Another*** **[1995-1998] 1 EA 324** observed that:

Even if service of summons in valid, the judgment will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the Defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.

14. According to the deposition by Ms. Ndirangu, the failure to file the defence, was an inadvertent was mistake or oversight. I have perused the court record and I note that the Defendant's statement of defence dated 3rd January 2019 is annexed to the Replying Affidavit of Francis Muhoro Gachanja sworn on 31st January 2019. Although the defence was stamped on 1st February 2018, it does not appear to have been paid for. The reason why this is important is that it supports Ms Ndirangu's contention that failure to file the defence was inadvertent as the defence was presented for filing as part of the bundle. Moreover, that the defence was a distinct document is confirmed by the fact that it was not an annexture to the affidavit as it was not referred to. By the time judgment was entered on 9th October 2019, the hearing dated was fixed by consent before Tuiyott J., on 26th July 2019 for 20th and 21st January 2020 and for the Case Management Conference on 9th October 2019. On this basis I find that failure to file the defence by *KONAN Associates* was neither deliberate nor intended to obstruct justice. The application to set aside was filed barely a month after the judgment which time I do not consider inordinate.

15. At this point, I would state that the while the Defendant relies its previous advocate's affidavit to prosecute its case, it accuses *KONAN Associates* of negligence. The issue of negligence is a matter between it and its advocates. In this case though and in regard to its conduct of the suit on behalf of the Defendant, I can only say that based on the facts, the advocates acted reasonably by being candid and acting with alacrity to set aside the judgment. Their conduct, as explained by Ms Ndirangu, would not be a ground for refusing to grant the application to set aside the judgment. For this reason, there is no ground for the firm to be condemned to pay costs of the application.

16. In **Hilary Rotich v Dr Wilson Kipkore NRB CA Civil Appeal No. 232 of 2010 [2018] eKLR**, the Court of Appeal accepted that, *"Under Order IX A Rule 10, the learned judge had discretion to impose conditions that she considered just in the circumstances, taking into account the interest of both the appellant and the respondent."* In this case, Mr Gachanja, in his deposition appeared to disavow the action of his previous advocates on record first to accept summons and second to even file the application, he however accepts the defence they presented as one raising triable issues. He cannot blow hot and cold.

17. The case against the Defendant is for fees arising out of the retainer agreement whose validity is neither disputed not denied. Nor is the fact that the Plaintiffs did some work toward prosecution of **HC COMM 577 of 2011** disputed until they were granted leave to withdraw from acting for the Defendant in that case on 31st March 2017. What I see to be the dispute is whether the full instruction fee or part thereof was due or whether the instruction fee was due until work was done to completion or upon withdrawal of instruction. In fact, by a letter dated 10th November 2017, counsel for the Defendant made the following proposal to the Plaintiffs:

[5] Alternatively, if your clients are not willing to tax their bill of costs, our client is willing to pay an all inclusive sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) as follows Kenya Shillings Ten Million (Kshs. 10,000,000/=) to Messrs Beatrice Kariuki & Associates Advocates and Kenya Shillings Five Million (Kshs.5,000,000/=) to Messrs Mugambi & Co. Advocates as full and final remuneration for work done to the point of your clients unilateral withdrawal from acting fro out clients at the conclusion of the Nairobi HCCC 577 of 2011 Showcase Properties Limited v Bamburi Special Products Limited which is currently at hearing stage.

18. The offer was obviously not accepted but I have set it out the and excerpt of the Defendant's advocate's letter to show that the Defendant does not deny issuing instructions to the Plaintiff. It admits liability under the remuneration agreement albeit not for the full amount hence I will only grant conditional leave to the Defendant to defend the suit.

19. Based on the reasons I allow the Amended Notice of Motion dated 8th June 2020 on the following terms:

a. The default judgment entered against the Defendant be and hereby set aside.

b. The Defendant shall file and serve its defence within 14 days from the date hereof.

c. As condition for (a) above the Defendant shall deposit Kshs. 5,000,000.00 in a joint account in the names of the parties advocates or in court or provide a bank guarantee in favour of the Plaintiffs for the said amount from a reputable bank within 30 days from the date hereof.

d. In the event of default of any of the conditions aforesaid, the default judgment shall be deemed reinstated.

e. The Defendant shall bear the costs of the application.

DATED and **DELIVERED** at **NAIROBI** this **24th day of AUGUST 2020.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the plaintiff

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.