REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CSE NO. 384 OF 2018

THE COUNTY GOVERNMENT OF TURKANA.....PLAINTIFF

-VERSUS-

WINSTON INTERNATIONAL LIMITED.....DEFENDANT

RULING

The Applicant (herein **"the Defendant")** by a Certificate of Urgency Application filed together with a Notice of Motion and Supporting Affidavit dated 22nd October 2019, urged the court to be heard on priority basis for reason;

> a. That any execution herein and/or the taking out of any form of execution proceedings before the hearing and determination of this application would cause the Defendant to suffer substantive and considerable loss and deny the Defendant the right to challenge the default judgment and indeed the entire suit herein on its merits despite the fact that the Defendant has a strong case and a meritorious defense.

In the notice of motion brought pursuant to **Order 22 Rule 22(1), Order 10 Rule 10 and 11 of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act, Section 6 of the Arbitration Act** and all other enabling provisions of the law. The Applicant sought orders;

> a. That there be a stay of execution of the decree dated 15th May 2018 pending the *interpartes* hearing of the application.
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> b. That the default judgment entered in this suit on the 13th of May 2018 as against the Defendant be set aside.
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> c. That consequent to the grant of prayer (4) supra the proceedings herein be stayed thereafter and the matter be referred to Arbitration in terms of **Clause 15.4.1** of the Agreement entered into by the parties on the 20th May 2016.
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> d. That in the alternative to Prayer (5) above the Defendant to be at liberty to enter appearance and file a Defence to the Plaintiff's claim within such period as the Court may direct.

The Application was based on grounds;

> a. That the Plaint and Summons were never physically served on the Defendant despite the Plaintiff being aware of the location and Postal Address of the Defendant.
>
> b. That a perusal of the Court file herein shows that the Summons were apparently served on the Defendant by advertisement in the Press (**The Standard of 26th February 2019**) though the Defendant never had sight nor knowledge of this Advertisement.
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> c. That the Defendant only became aware of these proceedings when a copy of the Decree herein was supplied to the Managing Director of the Defendant by an Officer of the Ethics & Anti-Corruption Commission (EACC) on 15th October 2019 when the said Managing Director was summoned by the said EACC to make a statement relating to the transaction that is subject of these proceedings.
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> d. That from a perusal of the file, it was affirmed that on 13th May 2019, the Plaintiff obtained a judgment in default of entering

appearance in the sum of Ksh 21,280,780/- with interest compounded at 13% p.a. from 6th June 2016.

In the supporting affidavit sworn by Mohamed Akram Khan, the Managing Director of the Defendant/Applicant Company, he stated that sometimes in the year 2016, the Defendant company learnt of a Tender floated by the Plaintiff for the supply of a Fire Engine that the Plaintiff was interested in purchasing for use within the County. The Contract sum was Ksh 42,561,560/-

That the Defendant bid for the said Tender and was successful and was issued a letter from the Plaintiff- Turkana County Government dated 13th April 2016 from its Director of Procurement, Mr. Richard Emoru awarding the Tender to the Defendant; a copy of the letter dated 13th April 2016 in respect of Tender Number TCG/L&UP/160/2015-2016

That the Defendant company thereafter wrote a letter of acceptance dated 15th April 2016 in respect of the said Tender; a copy of the letter of acceptance dated 15th April 2016 is marked **C**.

That the parties thereafter executed a Contract on 20th May 2016 in respect to the transaction above. The Contract was prepared for execution by the Plaintiff and in the Contract the Fire Engine was to be supplied in a period of between 8-12 weeks; a copy of the Contract **No. TCG/L&UP/160/2015-2016** of 20th May 2016 is marked **D** and **D-1** is a copy of the local purchase order issued by the Defendant on 20th May 2016.

That to secure the Contract and in furtherance of its intention to carry out its obligations under the said Contract the Defendant secured a Bank Guarantee dated 6th June 2016 whose face value was a sum of Ksh 21,280,780/-. A copy of the Bank Guarantee by Diamond Trust Bank dated 6th June 2016 is marked **E**.

That an invoice for the Contract sum was issued by the Defendant to the Plaintiff on 7th June 2016; a copy of the Proforma invoice by Winston International Limited dated 7th June 2016 is marked **F**.

That on 28th September 2016, a Director of the Defendant Company under authority of the Defendant Company wrote a letter dated 28th September 2016 requesting for an advance payment to facilitate payment of deposits with the Manufacturer of the Fire Engine/Truck, to cover accrued expenses and further in line with the provisions of the Contract which allowed for an advance drawdown. A copy of the letter dated 28th September 2016 issued by the Defendant to the Plaintiff is marked **G**.

The deposit requested above was fully secured and covered by the Bank Guarantee and the Plaintiff was entitled to call in the Guarantee in default.

That the Defendant secured a supplier for the Fire Engine/Truck namely **Kiev International Pty Limited** of Australia who sent an Invoice to the Defendant.

That the said supplier emailed the Defendant Company on 16th November 2016 advising that they would only start working on the Fire Engine, which was custom made and fabricated on order, upon payment of a deposit. Marked **H(i)** is Invoice dated 14th November 2016 and **H(ii)** is email from the supplier dated 16th November 2016.

In compliance with the communication from the supplier and to ensure that the Fire Engine was made available for delivery the Defendant Company remitted an amount of Australian Dollars 300,000/- on 18th November 2016, the equivalent of which was Ksh 22,890,000/-. A copy of the SWIFT remittance report dated 18th November 2016 is marked **I(i)** and a copy of our Bank Statement from Diamond Trust Bank is marked **I(ii)**.

That the payment from the Plaintiff County eventually reached the Defendant Company's IFMIS Account at Kenya Commercial Bank on 30th November 2016 some twelve days after the supplier had been paid by the Defendant Company. The amount paid by the Plaintiff County was Ksh 20,180,050/-. A copy of Defendant bank statement at Kenya Commercial Bank is marked **J**.

He averred from the foregoing, it is evident that there was an excess payment of Ksh 2,709,950/- paid to the supplier of the Fire Engine as at 18th November 2016 over and above the amounts paid by the Plaintiff County. The advance payments by Applicant /Defendant was as a mark of good faith.

RESPONDENT'S REPLYING AFFIDAVIT

The Application was opposed vide a Replying Affidavit dated 28th November 2019, sworn by Richard Emoru, Director –Economic Plaining in the Plaintiff County. He stated that in the year 2015-2016 he was the Director of Procurement for Turkana County Government.

That from the onset, it is apparent the Application is glib, roving and aimed at deliberately misleading the Court. It is an afterthought after judgment was entered 5 months earlier.

In response to paragraphs 27, 28,29,30 31 32 & 33, the Respondent deposed that the Applicant was duly served with the Plaint and Summons to enter appearance but refused and failed to do so. The Interlocutory judgment was regularly entered/obtained as follows;

a. The High Court issued Summons to enter Appearance on 11th October 2018

b. The Respondent's advocate instructed their Court Clerk Mr Mark Okinda who proceeded to 6th Floor, Soin Arcade, the Defendant's place of business and found it locked and no one was inside.

c. The Clerk made 3 other visits to the said premises but still found it locked with nobody inside.

d. Having not found anyone, the Clerk affixed the Summons on the Applicant's door pursuant to **Order 5 Rule 15 CPR**.

e. After 2 months, the Clerk visited the Defendant's business premises again and found it locked and with no one inside.

f. The Respondent had no choice but to employ private investigators who were also unable to trace the Applicant.

g. Unable to trace the Applicant, the Respondent filed an application dated 11th January 2019 seeking leave to serve the Summons to the Applicant by way of Substituted service through advertisement.

h. The application was allowed and on 26th February 2019, the Respondent caused the publication of the service notice in Standard Newspaper At Pg 39 (copy Annexed)

After 3 months from service, the Defendant/Applicant was yet to enter appearance and on 7th May 2019 filed request for judgment and the Court on being satisfied the Applicant was duly served with Summons entered judgment.

In response to paragraphs 11, 19, & 20 the Respondent paid the Applicant advance payment of Ksh 21,280,780/- and not Ksh 20,180,050/ as claimed and the Applicant in breach of the contract failed to deliver the equipment.

With regard to paragraphs 12 & 13 of the Supporting Affidavit, the primary contract was entered into on 20th May 2016 between the parties. The Defendant was to deliver the Fire Fighting truck and the Plaintiff to pay for it in full upon delivery.

The Defendant's allegation that the Plaintiff ought to have called up the Bank Guarantee and recovered the advanced amount was/is not tenable; the guarantee expired on 2nd December 2016.

The Applicant explanation in paragraphs 14,15,16,17,18,21& 22, the Respondent was not a party to and/or privy to the agreement between the Applicant and the Supplier/Manufacturer and is not bound by any terms and/or conditions thereto.

The Applicant was to deliver the fire- fighting truck between 8-12 weeks

According to the contract. The Applicant never confirmed how far it went with purchasing the truck let alone if the truck exists in the 1st place. The manufacturer, **KIEV INTERNATIONAL PTY LTD** gave no confirmation in writing or otherwise that the said truck had been manufactured and is ready for collection.

The Ksh 21,280,780/- belongs to the people of Turkana County, (tax payers money) and the Applicant is setting up the Respondent against Turkana people, Law Enforcement Agencies. It is now a matter subject to public enquiry and investigations by Turkana County Assembly, the Senate, EACC and members of the public.

In response to paragraphs 28 & 29, the Respondent alleged the Applicant deliberately avoided service by keeping away from the registered office

and denied that he saw the advertisement in the Standard Newspaper and realized the judgment was entered after investigations commenced.

The Respondent refused that the Draft Defence raises triable issues to be heard and determined at Trial because;

a. At paragraphs 7(a) & (b) & 8 the Applicant admits receipt of Ksh 21,280,780 and the monies were not paid back todate.

b. Under Paragraph 9 the Defendant admits it has not delivered the firefighting engine/truck to the Plaintiff

c. That at Paragraph 7(c) of the Draft Defence, the Defendant exonerates itself on the basis of bank guarantee which expired.

APPLICANT'S SUBMISSIONS

1. Order 10 Rule 11 CPR 2010, the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

2. William Ntomauta Methanga sued as Mmauta Nkari vs Baikiamba Kirimania [2017] eKLR outlined criteria for setting aside default judgment as follows;

> **"….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…"

The Defendant relied on the similar facts of the case to the instant circumstances outlined as follows;

a. That the Plaint and Summons were never physically served on the Defendant despite the Plaintiff being aware of the location and Postal Address of the Defendant;

b. The Summons were apparently served on the Defendant by advertisement in the Press (The Standard of 26th February 2019) though the Defendant never had sight nor knowledge of this Advertisement;

c. The letter of demand was sent to the wrong Postal Address;

d. That the Defendant only became aware of these proceedings when a copy of the Decree herein was supplied to the Managing Director of the Defendant while appearing before the Commission on 15th October 2019.

3. In **Richard Murigu Wamai vs AG & Anor [2018] eKLR Citing Sebel District Administration vs Gasyali & Others (1968) E.A. 300** where the Court observed;

"…, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstance to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.

4. The Applicant contests the claim by Respondent that there were no triable issues raised by the Draft Defence and they are outlined as follows;

a. What were the payment terms to the Defendant?

b. Whether the Agreement provided for extension of the Delivery period

c. Whether there was an application for extension of the Delivery period and if so on what terms

d. Whether the Defendant made payment to the supplier at a sum over and above the monies advanced by the Plaintiff and the effect of this overpayment to the contract

e. Whether the Plaintiff was entitled in the contract to call in the Guarantee given by the Defendant and what is the legal effect of failing to call in the Guarantee and the subsequent effect on the Contract by the Parties.

f. Whether the Defendant has failed to meet the terms of the Agreement.

5. In **Weld-con Ltd Vs China National Aero –Technology International Engineering Corporation & Anor [2017]** *eKLR* L.Onguto J stated;

"I would first point out that the principles which guide the exercise of discretion to set aside a default judgment are now well settled. The case of Evans v Bartlam [1937] A. C. 473, referred to copiously by counsel to the proceedings set the pace. Lord Atkin (at p. 480] stated as follows in regard to the principles.

One is that, where judgment was obtained regularly, there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he had a prima facie defence…. The principle obviously is that unless and until the court has pronounced a judgment upon merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

6. On whether or not the matter should be referred to Arbitration the Applicant submitted **Clause 15.4.1.** of the Contract entered into by parties on 20th May 2016 shows an Arbitration Agreement/Clause that;

"All disputes arising in connection with [the] Agreement shall be suited under Rules of conciliation and arbitration in Nairobi for International Commercial Arbitration, by one or more Arbitrators appointed in accordance with the said Rules."

7. Section 6 (1) of the Arbitration Act Cap 49 provides for matters where there is an arbitration clause ought to be referred to arbitration.

8. In the circumstances of this case, the Arbitration clause is alive between parties and its validity has not been disputed or challenged. Parties execute Agreements in arbitral clauses for a reason and there is a dispute between the parties, who have not waived or lost the right to rely on the Arbitral clause in their Contract.

9. In **Adrec Ltd vs Nation Media Group Ltd [2017] eKLR** it was observed;

> **"The Constitution of Kenya 2010 recognizes alternative dispute resolution mechanisms including Arbitration. Parties have the freedom of contract and even to resolve their disputes away from the courts subject to supportive court intervention in specific areas of law to ensure fairness in the arbitral process. The Respondent was perfectly entitled to seek and obtain stay of the suit as it did. It is our finding that the learned judge was on point on her decision (in ordering stay)…"**

10. In **Mits Electrical Company Ltd vs Mistubishi Electric Corporation [2018]eKLR observed;**

> **"…once a defendant files an application for stay of suit and seeks for referral of the matter for Arbitration, he/she is not expected to file a defence to the claim, until or unless the court determines that application dismissing it thereby paving way for an opportunity to file defence."**

It is on the basis of the above submissions that the Applicant sought that the proceedings be stayed, the matter is referred to Arbitration as there is a dispute between the parties, a valid uncontested arbitration agreement between the Parties and there is nothing to suggest that the Arbitration clause /agreement is null and void.

RESPONDENT'S SUBMISSIONS

1. Order 5 Rule 1(1) (3)CPR 2010 applied. In *Giro Commercial Bank vs Ali Swaleh Mwangula [2016] eKLR* held;

> **"Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5 6, & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods."**

2. The setting aside of a regular judgment is purely discretionary; the discretion ought to be exercised judiciously and not capriciously.

3. In Philip Keipto Chemwolo & Anor vs Augustine Kubende *[1986] eKLR* it was held;

> **"on the other hand, where a regular judgment has been entered, the court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial. The court adopted the views expressed by the House of Lords in the case of Evans v Bartlam, [1937] ac 473, and while the quotations from Lord Russell's speech were relevant to Mr. Inamdar's particular argument, the views expressed by Lord Atkin at page 480 are of greater relevance to the present appeal – Lord Atkin observed;**
>
> **"The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regards in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."**

4. The Defendant Draft Defence raises no triable issue which is defined in ***Kimani vs McConnell [1966] E.A. 547*** **as**

> **"An issue which raises prima facie defence and which should go to trial for adjudication."**

5. In **Jennifer Mwari vs Peter Mmanja [2007]eKLR** it was held that denying breach of contract was not a serious defence to a claim where the Defendant admitted to entering an Agreement.

6. The Defendant/Applicant seeks to set aside a regular judgment which was entered according to the law. However, in imploring on the Court's discretion, it has not come to Court with clean hands.

7. In **Ecobank Kenya Ltd vs Minolta Ltd & 2 Others [2018] eKLR ,** the court held;

> **"…Accordingly, although Article 159 (2) (d) COK 2010 was waved in the face of the court as an excuse for the omission, it bears repeating, and it is trite, that the court's discretion under Order 10 Rule 11 of the Civil Procedure Rules is not meant to assist those who, by deliberate omission or otherwise have sought to obstruct the course of justice (see Mbogo vs Shah [1968] EA 93). Hence, I would fully endorse the words of Kiage, JA in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013]eKLR that:**
>
> **"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner…were meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice…it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."**

8. The Respondent submitted according to the tenor of **Section 6(1) Arbitration Act,** a party must apply for arbitration not later than the time the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.

9. Section 6(1) b of the Arbitration Act dictates that there must be a dispute capable of being referred to Arbitration.

10. Reference was made to the case of ***UAP Insurance Co Ltd vs Michael John Beckett C.A. 26 OF 2007*** ; **and Ellis Mechanical Services Limited vs Wates Construction [1978]** 1Lloyd Rep 33

DETERMINATION

This Court considered the pleadings and submissions by parties. The Principles of law and interpretation by case-law applied to the instant case and the issues that emerge for determination are;

a. Was service of Plaint and Summons to the Defendant proper under **Order 5 of CPR 2010**

b. Whether the default judgment of 13th May 2019 should be set aside.

c. Whether the matter ought to be referred for Arbitration.

ANALYSIS

Order 5 CPR 2010 governs Service of Court process**.**

3. Service on a corporation [Order 5, rule 3.]

Subject to any other written law, where the suit is against a corporation the summons may be served—

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—

(i) by leaving it at the registered office of the corporation;

17. Substituted service [Order 5, rule 17.]

(1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally……

The Plaintiff /Respondent by Certificate of Urgency filed on 14th January 2019, the Proceedings of 15th January 2019 and Affidavit of Service by Mr Mark Okinda filed on 7th May 2019 explained in detail the efforts by the Plaintiff to serve the Defendant with Court process from 11th October 2018 upto 26th February 2019.The Court Clerk went to the Defendant's office on 6th Floor Soin Arcade and 3 subsequent occasions and found offices locked and no one was inside. Finally, the Summons were affixed on the Defendant's office door. After 2 months, the Clerk visited the Defendant's office and found it locked. On enquiry he was informed they left and no longer conduct business there.

The Plaintiff hired private Investigator(s) and the Defendant was not traced/Located. Hence, the application for service through substituted service which was filed on 11th January 2019 and was granted that service was by advertisement in the daily newspapers. A copy was annexed to the Respondent pleadings. **Order 5 Rule 17 (2) CPR 2010** recognizes substituted service as one of the modes of service of court process and it is as if one was served physically. The Defendant was properly served as per **Order 5 CPR 2010.** The circumstances and processes explained disclose sufficient service.

The Defendant does not deny or contest that the Company official business office is at /in Soin Arcade 6th Floor. This is confirmed by the letterhead of its letters to the Plaintiff dated 2nd March 2018, 1st March 2018, and 29th September 2016 annexed to the Plaint. So the Defendant served the Defendant's registered office as per **Order 5 Rule 3 CPR 2010.** This Court noted that from the Defendant /Applicant's resolution of 18th October 2019 and address in the Recorded Statement of 15th October 2019, the physical address changed to 2nd Floor Office No 3 Mirage Towers**.** Since the Defendant changed its physical address and registered office, it ought to have informed the Plaintiff among other parties of the change of location, so as to effect service at the new address. There is no evidence that the Applicant made such efforts. It is alleged that the parties were in communication but emails attached do not disclose change of location/ venue of the Defendant Company. It ought to have been a deliberate effort to disclose the new location.

With regard to the letter of demand that the Applicant alleged had the wrong address used instead of its address as is in the Contract and other documents, this Court cannot verify this claim as the said letter and its wrong address have not been shown to this Court. But even then the Plaintiff vide letter dated 28th September 2017 wrote legal demand Notice to the Defendant.

On the issue that the Defendant knew of the default judgment while engaged with Law Enforcement Agencies, that may be true and unfortunate. However, the Plaintiff carried out its mandate with regard to proper service as required by law, served to the Defendant Company's registered office as known at the time, visited severally and upon not finding a director, Company Secretary or principal officer affixed the copy of Summons on the door of the office. Again, the Respondent made spirited efforts to locate the Applicant through Private Investigator(s) and was unsuccessful. Finally, the Applicant applied to Court to serve by Substituted Service and served through the daily newspaper Standard 26th February 2019. It is not possible to verify if the Defendant saw the Substituted service advert in the daily or not. All that can be said is that if the Defendant did not see it, that cannot be held against the Applicant as there was nothing more to be done. There was nothing else left for the Applicant to effect proper service under the law. Admittedly, the Defendant changed its registered offices without any information to that effect to the Plaintiff. The Plaintiff did not know of the Defendants whereabouts except the physical address that the Plaintiff served by affixing summons on the door. The fact that the Defendant moved offices cannot be legal basis to set aside default judgment as service was proper under the law. It is a regular judgment. **Order 51 (1)(3) and 17 Civil Procedure Rules** were complied with.

b. Whether the default judgment of 13th May 2019 should be set aside.

Even where a regular judgment is entered, the Court has discretion to set aside if the Discretion is exercised judiciously and not capriciously. When the Applicant raises triable issues or a prima facie defence. See ***Philip Keipto Chemwolo supra.***

In the instant case, the Plaintiff served Court process to the Defendant, although service was proper the Defendant contested service. The Defendant seeks to be heard on merit on the issues raised in the Draft Defence annexed to the application.

In ***James Kanyiita Nderitu & Anor vs Marios Philotas Ghikas & Anor [2016] eKLR*** it was held ;

> **"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 raised 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 vs Sha (supra), Patel vs E. A Cargo Handling Services Ltd (1975) E.A 75."***

The Defendant's Draft Defence raises various issues as issues for determination;

a. What were payment terms to the Defendant?

b. Whether the Agreement provided for extension for the Delivery period

c. Whether there was an application for extension of the Delivery period and if so on what terms?

d. Whether the sum the Defendant made payment to the Supplier at a sum over and above the monies advanced by the Plaintiff and the effect of this overpayment to the Contract

e. Whether the plaintiff was entitled in the contract to call Guarantee given by the Defendant

f. Whether the Defendant failed to meet terms of the contract.

The Applicant in reply was of the view that no issues were triable worth going for trial because;

a. The Defendant admitted having entered into a contract with the Plaintiff of 5th May 2016 signed on 20th May 2016

b. The Defendant pursuant to the Contract it received Ksh 21,280,780 as down payment

c. The Defendant had the contractual duty to deliver the fire engine within 8-12 weeks from the date of execution of the contract and signing LPO

d. The Defendant was aware that latest that delivery of the engine was 20th August 2016

e. The Defendant never delivered the fire engine as contracted nor refunded Ksh 21,280,780 which it received from the Plaintiff.

f. The Defendant tried to apportion blame to a 3rd Party which is not party to these proceedings

g. The Defendant asked the Plaintiff to place a call on an alleged Bank Guarantee dated 6th June 2016 and had expired on 2nd December 2016 a position that is legally untenable.

From the above outline of issues raised by the Applicant and response by the Respondent, the Court finds that the parties have raised various issues relating to performance and enforcement of the contract of 5th May 2016 which would ideally be heard and determined by Arbitrator. This Court is only dealing with whether to set aside or affirm the default regular judgment on the basis of whether there are triable issue (s) to be determined at Trial. The parties executed the Contract and they are bound to the terms of their contract and the Court cannot rewrite the terms. **See *Union Technology Kenya Ltd vs County Government of Nakuru [2017] eKLR.***

On the mode of Payment, the Applicant relied on paragraph 4 of the Contract on Delivery of the equipment (truck) while the Defendant relied on Clause 7.5 of the Contract on Terms of Payment. Both provisions bind the parties as they executed the Contract and are bound by all terms of the Contract.

The Extension of Delivery Period is provided in Clause 5. The Defendant applied for extension and was granted, but it cannot be *ad infinitum* until end of time. The contract was entered in 2016 for delivery of a truck in 8 -12 weeks. It is now, in 2020, there is no confirmation of progress or status of the Fire Engine/Truck by the manufacturer; there cannot be any justifiable extension to deliver the fire truck to the Plaintiff on the basis of Clause 5 which provides for extension, 4 years later.

The Plaintiff contends that the amount paid through IFMIS /KCB Bank was Ksh 20,180,050/- and not Ksh 21,280,780/- The Statements of Account annexed are not certified by the Bank to verify authenticity, there are entries with no indication who the source of funds is/are from and who the recipient is. International business transactions payments usually are by letters of Credit from Issuing bank to the Receiving Bank on behalf of buyer and seller of goods. The statement of Accounts annexed are not proof of monies paid in and remitted to parties as alleged in the pleadings. It is not sufficient to confirm conclusively, the amount sent or not sent and by who to whom. It is strange, in all correspondence between the parties annexed by both parties, the difference in amounts paid and received as advance payment, the Defendant did not raise any query or bring it to the attention of the Plaintiff the alleged shortfall in the remittance until the instant application. Yet by letter of 1st March 2018, the Defendant sought from the Plaintiff further Ksh 12,000,000/- for manufacture of Fire Engine/Truck.

The Bank Guarantee of 6th June 2016 was of Ksh 21,280,780/=. The Guarantee reads in part;

> **"The Advance Payment Guarantee shall remain valid and in full effect from the date of receipt of the advance payment as aforesaid upto and including December 02, 2016."**

The Defendant did not call in the Guarantee in 2016, as it was awaiting delivery of the truck as contracted within the same year, 2016 and this is depicted from correspondence between the parties at the time. Thereafter, it expired and Plaintiff pursued the advance payment from the Defendant. In the absence of any proof of manufacture of Fire Engine/Truck and advance payment already made, there is no triable issue for hearing and determination either in Court or Arbitration.

c) **Whether the matter ought to be referred for Arbitration.**

The main issue that merits urgent attention on the issues raised in Draft Defence is Paragraph 12 of the Defence that the Contract provides for Arbitration Agreement /Clause which provides that all disputes arising out of the contract shall be resolved by Arbitration. The parties contracted their forum of dispute resolution and ought to have the dispute referred to Arbitration.

Section 6 of Arbitration Act mandates;

> **1. A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-**
>
> > **a. That the arbitration agreement is null and void, inoperative or incapable of being performed; or**
> >
> > **b. That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

This Court acknowledges that once a party is served on entering appearance and raises the issue of the Arbitration Agreement /Clause that mandates the proceedings to be stayed and parties move to their choice of forum for dispute resolution of the dispute, then a stay of proceedings is in place for parties to move to Arbitration.

Is there a dispute for determination under Arbitration?

The parties executed the contract on 20th May 2016 on delivery of firefighting truck to the Turkana county Government and in turn the Plaintiff would pay in full the purchase price of Ksh 42,561,560/=. The Defendant sought advance payment of Ksh 21,280,780/- vide letter of 28th September 2016 which was accepted and receipt of Ksh 20,180,050/- was acknowledged by the Defendant at paragraph 19 of the Supporting Affidavit. The Engine/Truck cannot be delivered and awaits payment of the balance of the purchase price sums due. To the extent that there is admission of Ksh 20,180,050/- as advance payment, it is now 4 years since the contract was extended and the truck has not been delivered to date, this amounts to a debt outstanding payable to Turkana County Government. There is no letter or official communication by the manufacturer, on progress or status of the manufacture of the firefighting truck so as to have the Plaintiff directly pursue delivery of the truck. The only communication is by the Defendant vide letter dated 1st March 2018, that the unit specifically manufactured for Turkana County was sold due to delay of payment of more funds and the Defendant sought further Ksh 12,000,000/- to complete the manufacture of the truck now secured at the time.

The Defendant's explanation that the manufacturer demands monies to proceed with assembly of the engine/firefighting truck cannot amount to a dispute between the parties for arbitration. The Arbitration clause is an agreement by the contracting parties on how and where they choose to resolve their disputes arising or connected to the contract to be determined by arbitration. KIEV INTERNATIONAL PTY LTD, manufacturer of the fire fighting truck is not party to the Contract between Plaintiff and Defendant and although may be joined as 3rd party to the proceedings, it cannot be forced to participate in arbitration proceedings. The Plaintiff is not privy to the agreement/ arrangement between the defendant and 3rd Party, the manufacturer. The Defendant retains the legal right to sue and recover amounts paid to KIEV INTERNATIONAL PTY LTD in aid of manufacture of the truck that failed to materialize.

The funds paid by Turkana County Government are public funds subject to audit by statutory oversight bodies and law enforcement agencies. In the absence of any evidence or progress of ongoing fire truck construction with definite delivery dates there is no dispute for resolution in Court or in arbitration. Instead, there is a debt due and owing to the Plaintiff who is held accountable for public funds released for a truck that has not been delivered to date.

Clearspan Construction (A) Limited vs East African Gas Co. Ltd [2008] eKLR, where Justice Sergon had this to say;

> **"it is well settled that a defendant cannot succeed to obtain a stay by relying on an arbitration clause unless there is a dispute. I am convinced that a refusal to pay an outstanding debt cannot by any stretch of imagination amount to a dispute. It is not also in dispute that the Defendant has not filed a defense to resist the Plaintiff's claim.**

In reliance to the following cases; they illustrate the determination of disputes that are directed for Arbitration as follows;

Nanchang Foreign Engineering Co Ltd vs Easy Properties Kenya Ltd [2014] eKLR(pg 9) the Court observed;

> **"…. Referral of a matter to Arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reach an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute.**
>
> **If there is no dispute which can be referred to such for a, the court automatically assumes jurisdiction once a suit is filed in court for its determination. Indeed, Article 50 of the Constitution of Kenya, 2010 provides that every person has a right to have any dispute decided in a fair and public hearing before a court.**
>
> **From the facts that have presented before this court, it has found itself more persuaded by the plaintiff's submissions that its claim against the Defendant was one of recovery of a simple undisputed debt and that it would be in the interests of justice that the Defendant not be allowed to abuse the process of the court with a view to frustrating the Plaintiff from proceedings with the matter in this forum."**

In ***UAP VS Michael John Bennet,*** the Court of Appeal indicated as follows;

> **"In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6 (1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute."**

In **Ellis Mechanical Services vs Waters Construction Ltd [1978] quoted in UAP supra**

"There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or dispute about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration, as indeed the master did here."

DISPOSITION

1. The totality of the evidence on record and applicable law, the Court finds that there was sufficient and proper service of Court process to the Defendant at its registered office and by substituted service and therefore a regular default judgment was entered in favour of the Plaintiff.

2. The Draft Defence raises all and any issue with regard to performance and enforcement of the contract which cannot be heard and determined by the Court as there is a valid Arbitration Agreement Clause in the contract by Parties. However, the issues raised in fact do not disclose a dispute to refer to arbitration as the parties are contesting terms of the contract that bind them and have not complied or not as required under the contract.

3. The advance payment of Ksh 21,280,780/-made by Turkana County to Winston International Limited remains due and owing as 4 years later there is no tangible or cogent evidence that a fire fighting truck/engine is in the process of manufacture.

4. The contested figure of Ksh 20,180,050/- is an afterthought, it features for the 1st time in the instant application and the allegation is not proved to the required standard by section 107-109 of Evidence Act Cap 80.

5. The application Filed on 22nd October 2019 is dismissed with costs and the regular default judgment is upheld

6. Due to Current Corvid 19 quarantine/lockdown and current vacation there will be a stay of execution for 60 days from date of delivery of Ruling.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH AUGUST 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MAKORI & KARIMI ADVOCATES FOR THE APPLICANT – N/A

RACHIER & AMOLLO ADVOCATES FOR THE RESPONDENT – NA

COURT ASSISTANT: TUPET