



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 228 OF 2019

BETWEEN

CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATIONPLAINTIFF

AND

CAPITALAND EAST AFRICA LTD.....DEFENDANT

AND

STANBIC BANK KENYA LTD.....INTERESTED PARTY

RULING

1. The Defendant seeks to set aside judgment entered against it on 13th March 2020. Before I deal with the application for consideration, it is important to set out a brief outline of the matter for context.
2. By the plaint dated 26th September 2019, the Plaintiff, a construction company, claimed that the Defendant fraudulently caused it to apply for a construction tender in which it procured and caused the interested party (“the Bank”) to issue a Bid Bond for Kshs. 120,000,000/= in favour of the Defendant. The Bank issued the Bid Bond for Kshs. 120,000,000.00 in favour of the Defendant; Tender Guarantee No. MD 1923800010. After cancelling the tender, the Defendant called the Bid Bond causing the plaintiff to file this suit in order to arrest the liquidation of the Bid Bond. The plaintiff sought an order that, “*A return and thereafter, cancellation of Guarantee No. MD1923800010 from the Plaintiff to the defendant.*” The Plaintiff sought and was granted an injunction restraining the Bank from paying out guarantee pending the hearing and determination of the suit.
3. The plaint and summons to enter appearance were served on the Defendant and when it failed to file defence, having entered appearance through the firm of *Ndeda and Company Advocates*, interlocutory judgment was entered on 17th January 2020 and the matter fixed for formal proof. The parties appeared before Kasango J., on 11th March 2020 and she confirmed to the parties that this matter was fixed for formal proof on 13th March 2020 before me, as she could not entertain any interlocutory application.
4. The matter was listed for formal proof and the defendant was represented by counsel when the matter was confirmed for hearing but when the matter was called out, the counsel for the defendant was not in court and the matter proceeded for hearing. I delivered an *ex-tempore* judgment on the same day in favour of the Plaintiff. I ordered that the, “*GUARANTEE NO. MD1923800010 dated 26th August 2019 issued by STANBIC BANK KENYA LIMITED to the defendant on behalf of the plaintiff is hereby cancelled*”.
5. Following the judgment, the defendant has filed a Notice of Motion dated 26th May 2020 made, inter alia, under **Order 12 rule 7, Order 40 rule 1, 2 and 4, Order 45 rule 1** of the **Civil Procedure Rules** seeking the following orders:

[1] Spent

[2] Spent

[3] THAT the Honourable Court be pleased to review and/or vacate the judgment entered against the Defendant/Applicant by this Honourable Court on the 13th day of May 2020.

[4] Spent

[5] THAT the Honourable Court be pleased to issue an order restraining the Interested Party from releasing any monies to the Plaintiff/Respondent arising from Tender Guarantee No. MD1923800010 dated 26th August 2019 pending hearing and determination of this suit.

[6] THAT this Application be heard inter-parties on such date and time as this Honourable Court may direct.

[7] THAT costs be in the cause.

6. The application is grounded on the facts set out on the face of the application and the affidavit of Rodgers Omwamba, a director of the Defendant, sworn on 26th May 2020. In summary, the Defendant's case is that when the suit was filed, interlocutory judgment was entered against it on account of the fact that its advocate, *Messrs. Ndeda and Company Advocates* entered appearance and failed to file defence. It contends that failure to file defence was on account of an oversight by its appointed counsel on record as there was miscommunication between counsel and staff of his chambers. Further, that the Defendant should not be condemned unheard in light to its rights to a fair hearing protected under **Article 50** of the Constitution. The Defendant contended that at the time the application was filed the guarantee in issue was set to expire on 26th May 2020 thereby removing the substratum of the suit.

7. The application was opposed by Victor Mailu, the advocate for the Plaintiff who conducted the matter, sworn on 17th June 2020. The thrust of his deposition is that the Defendant has not met the threshold for setting aside or reviewing the judgment. He stated that the substratum of the suit and application no longer exists following the judgment delivered on 13th March 2020 by which the guarantee was cancelled. He deponed that on the date when the matter came up for hearing, the Defendant was represented in court and that when the file was called for hearing, counsel was not present and the matter proceeded for formal proof hence this was not a matter for failure to file a defence. He further contended that the defendant had not given any or any credible explanation why its counsel did not appear for hearing despite being present in court on the material day. The Plaintiff also contended that the Defendant has not explained the delay in filing the application to set aside judgment. In his view and taking in account the totality of the matters, the court should not exercise its discretion in the Defendant's favour.

8. The Bank opposed the application through the replying affidavit of its Senior Legal Counsel, Elisha Nyikuli, sworn on 17th June 2020. He deponed that Tender guarantee issued by the Bank in favour of the Defendant was valid only until 26th May 2020 at 5.00pm. He further deponed that despite the fact that the court had issued an interim injunction restraining it from releasing any money to the Defendant pending the hearing and determination of the suit, it was thereafter discharged upon delivery of the judgment on 13th March 2020 which cancelled the guarantee. It averred that the Bank was thus discharged and as such it had no further interest in the matter.

9. The parties filed written submissions which mirrored the positions taken in their respective depositions I have outlined above. There are two judgments to be set aside. The first is the interlocutory judgment entered against the Defendant in default of defence dated 17th January 2020 which would ordinarily be set aside under **Order 10 rule 11** of the *Civil Procedure Rules*. There is also the judgment delivered after hearing which would be set aside under **Order 12 rule 7** of the *Civil Procedure Rules*. The Defendant also invoked the procedure for review of judgment and decree under **Order 45 rule 1** of the *Civil Procedure Rules*. Although counsel for the Plaintiff has raised technical objections based on those grounds, I will eschew them in the spirit of **Article 159(2)(d)** of the Constitution and the overriding objective and deal with the substance of the defendant's application which is whether I should set aside the judgment delivered on 13th March 2020.

10. Counsel for the Defendant placed heavy emphasis on the right to a fair hearing protected under **Article 50** of the Constitution and **Article 159 (2) (d)** of the Constitution that enjoins the court to determine matters without undue regard to technicalities. Both provisions contemplate a framework of rules and procedures hence **Article 159(2)(d)** of the Constitution lays emphasis on "*undue technicalities*". The use of this phrase underlies the need for rules to fortify procedural rights and fairness of parties involved in the forensic process. For example, the requirement that a party to file its statement defence within a prescribed time is not a mere technicality, it is intended to ensure that a party does prejudice the other party by delaying the prosecution of the case. Further, a fair hearing does not mean a hearing without regard to the rules. It means a party must be given a fair opportunity to present or defend its case. It does not mean the right to walk in and out of court as one pleases waving the **Article 50** flag. It also imposes on the court the duty to ensure that the rules that govern fair play and equality between the parties are maintained and the scarce resource of court time, facilities and resources are optimally utilized to ensure access to justice for all persons guaranteed under **Article 48** of the Constitution. Once the opportunity is given and the party fails to avail himself of it, he or she cannot turn around and say they were denied a fair hearing. The question for consideration then is whether I should set aside judgment entered against the defendant who has failed to avail itself of the opportunity to defend the suit.

11. Whether the application is under **Order 10 rule 11** or **Order 12 rule 7** 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 clearly stated in *Shah v Mbogo and Another [1967] EA 116*, where it was held that:

The discretion to set aside an *ex parte* 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.

12. While I accept that failure to file a defence may have been inadvertent or a mistake or oversight in view of the fact that the matter had come up several times for directions on the Plaintiff's application for injunction when the issue of negotiations was raised, I am unable to accept that failure to attend court on the date of the hearing was a mistake or indeed inadvertent. On the material day, the Defendant's counsel attended court for the hearing and was present when the matter was called out. When the matter was ready to proceed, the Defendant's counsel was nowhere to be seen. No explanation has been given for this conduct by the Defendant and without any explanation, I have no basis to exercise discretion in favour of the Defendant.

13. Notwithstanding the position I have taken, I am still obliged to consider whether the Defendant has a defence that raises triable issues. Mr Omwamba states at paragraph 10 of the supporting affidavit that, "*The Defendants/Applicants have a prima facie case and an arguable one with a probable chance of success.*" No draft defence was attached to this deposition nor facts put to the court to demonstrate the nature of the defence or its cross-claim. Likewise, the written submissions did not set out any argument to demonstrate to the court the nature of the proposed defence.

14. The Defendant's case must also be viewed against the fact that the judgment has already been executed in the sense that the guarantee subject of the suit was discharged once the judgment was delivered on 13th March 2020. Further and as the Bank has pointed out, the guarantee was set to expire and did expire on 26th May 2020. Having been discharged, setting aside the judgment would not reinstate the guarantee automatically.

15. Based on the reasons I have set out aforesaid, it must be clear that the Notice of Motion dated 20th May 2020 is for dismissal. It is hereby dismissed with costs to the Plaintiff and interested party.

DATED and DELIVERED at NAIROBI this 13th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mailu instructed by LJA Associates Advocates for the plaintiff.

Mr Khaduli instructed by Khaduli and Asa Associates Advocates for the defendant.