



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL CASE NO. 7 OF 2019**

**AINUSHAMSI CONSTRUCTION & TRANSPORT**

**LIMITED & 55 OTHERS.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THE COUNTY GOVERNMENT OF GARISSA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**THE GOVERNOR, COUNTY GOVERNMENT OF**

**GARISSA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**THE CEMC FOR FINANCE AND ECONOMIC PLANNING,**

**GARISSA COUNTY.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 5/3/2020 the Applicants principally seek the default judgement entered be set aside and the defendant be allowed to put a reply.
2. Upon service of the summons upon the Applicant/Defendants, the Respondent on 12/2/2020 applied for leave to enter default judgement on 24/2/2020. Respondent put affidavit of service claiming they served defendant the application on defendants avoiding to serve the advocate on record.
3. The application is supported by affidavit of Ismail Aden Dabar sworn on 5/3/2020 and a further affidavit he swore on 28/9/2020 demonstrating payment of Kshs.154,059,037/- to the claimants which is not factored in the claimant's claim in court.
4. The Defendants oppose application via affidavit of Bare Mohamud Abdi sworn on 10/3/2019.
5. The respondent avers that the service they effected was proper.
6. The parties have opted to canvass the application via submissions which they filed and exchanged.

**DEFENDANTS/APPLICANTS SUBMISSIONS**

7. It is submitted that the judgement was obtained irregularly and thus court is urged to exercise its wide discretion to set it aside as it will be just to do so as provided by Order 10 rule 11 of the Civil Procedure Rules.
8. The provision afore-stated bestows on the court unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations.
9. The court cannot ignore the fact that there are 56 Plaintiffs in this suit and each of the Plaintiffs have entered into contracts with the Defendants herein. The contracts submitted by the Plaintiffs are at most three or four leaflets per company.
10. These matters of contract cannot be given a blanket decision, they have to be determined each contract on its own. The court should allow parties to go for arbitration to enable the parties iron out their issues as per the contracts each of the parties entered into.

11. The Defendants have put in their preliminary objection and have done so before putting in their defence so as to not waive their right to have the matter sent to arbitration. -

12. The series of events however leading up to the entry of the interlocutory judgement did not follow procedure and as such should be set aside and allow this honourable court either to send this matter to arbitration should it allow the Defendants' preliminary objection or should the court in its own wisdom decide otherwise, then it should grant leave for the Defendants to file their defence.

13. The Plaintiffs did not serve their application seeking an interlocutory judgement on the Defendants. The Plaintiff's application dated 12<sup>th</sup> February 2012 was not served on the Defendants and was undefended.

14. The Defendant is a government and should be served in accordance with the Government Proceedings Act and in this case the Plaintiffs should have complied with Order 10 rule 8 of the Civil Procedure Code with regard seeking an interlocutory judgement against the government.

15. The plaintiffs were well aware that the Defendants had counsel given that there was a notice of appointment on record and that the Defendant was defended by counsel in the same matter when it was consolidated in Petition 9 of 2019. Avoiding to serve the Defendant's Advocates was merely a tactic to easily get judgment in default and not to have their suit, which is very complicated, be heard on its merit. The Plaintiffs applied to amend their plaint after the judgment in default was entered.

16. After the Plaintiff without following due procedure applied for judgment in default and the same was granted on the 12<sup>th</sup> February 2020, the Plaintiffs then applied to this Honourable Court to amend its plaint and leave was granted on the 24<sup>th</sup> of February 2020 after judgment in default was entered.

17. Therefore, the judgement entered was for the initial plaint before amendment. There is no judgment in default in place after the 24<sup>th</sup> of February 2020 and the Plaintiff has to make a fresh application.

18. It is therefore obvious that the default judgment issued will not subsist as a different set of facts have been entered through the now amended plaint and therefore as it stands there is no default judgment in place.

19. Another issue that comes to play is the fact that sums of money have been paid in settlement by the Defendants to the Plaintiffs, therefore the same cannot be ignored. This completely alters the amount sought by the Plaintiffs in their plaint.

20. *The applicant have relied* on the case of **Shah vs Mbogo [1967] EA 166** which held that:

**“This 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....”**

21. Time and again, courts, in the spirit of promoting the right to fair hearing which is non-derogable and illimitable under Article 25(c) of the Constitution, 2010, have acknowledged and held that even where the service of summons is valid and proper, the judgment will be set aside if the defence raises triable issues which the Defendants have in their preliminary objection.

22. They also rely on the case of **Sebel District Administration vs Gasyali & Others [1968] E.A 300**, as was quoted in **Richard Murigu Wamai vs Attorney General & Another [2018] eKLR** and that of **William Ntomauta M'ethanga** sued as **M'mauta Nkari vs Baikiamba Kirimania [2017] eKLR**

23. **In conclusion the Defendants/Applicants submitted that the interlocutory judgment was irregular and premature and the same should be set aside.**

#### **PLAINTIFF/RESPONDENT'S SUBMISSIONS**

24. The Plaintiffs/Respondents submitted that the service of summons is provided for in Order 5 Rules 6 and 7 of the Civil Procedure Rules are explicit that service of summons shall be made by delivering or tendering the duplicate thereof; and Rule 8(1) in particular envisages that:

***"Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."***

25. In light of this provision, the plaintiff's advocate engaged the services of a process server, Mr. James M. Mukuni, who is duly authorized by the High Court of Kenya to effect service upon the Defendant, on 6<sup>th</sup> day of August, 2019.

26. They submitted that the Defendants were served with summons to enter appearance according to the rules of procedure. The process server, Mr. Mr. James M. Mukuni, filed an Affidavit of service on 7<sup>th</sup> August, 2019 confirming that he had received copies of summons, investigated the whereabouts of the Defendant and effected service upon the Defendant's at their offices.

27. On 6<sup>th</sup> August, 2019 the said process server, in the company of Mr. Abdirazak Mohamed Ibrahim an Advocate of the High Court of Kenya, proceeded to the Defendant's offices at Garissa and served upon all the defendants all of them acknowledging receipt of the pleadings and the summons to enter appearance.

28. On 26<sup>th</sup> September, 2019, the defendants appointed the firm of Garane & Somane and they filed a Notice of Appointment on the same day. To date a year and about Two (2) Months down the line the defendants either through the said Firm and/or in person have not filed a defense.

29. The Purported Notice of Appointment was never served on the Plaintiffs, either in person or their Advocates on record, as such this amounted to malice on their side.

30. Thus, contrary to the averments of the Defendant, the Affidavit of Service discloses the date, time and place of service. It also discloses, the name of the offices served all of which had the locus of service.

31. The Plaintiffs/Respondents further submit that the defendant was duly served as per Order 5 rule 1(8) of the Civil Procedure Rules. The affidavit of service sworn by the process server is evidence before this Honourable Court that the defendants were served.

32. The defendants cannot then come to this court to deny service. This can only be seen as an attempt to frustrate the Plaintiffs.

33. On the second issue, it is submitted that the default judgement entered on the 13<sup>th</sup> February, 2020 is proper and regular in law as both parties were given an opportunity to present their case hence the same should not be interfered with and the defendants have not appealed against the said judgement either.

34. They submitted that the litigation must come to an end and the defendants have not demonstrated any justifiable reasons why the default judgement entered on the 13<sup>th</sup> February, 2020 should be set aside.

35. In **SCOOBY ENTERPRISES LTD –VS- KISHI COUNTY ASSEMBLY SERVICE BOARD [2016] eKLR JUSTICE OKWANY. A.O** who relied on **PATEL –VS- EAST AFRICA CARGO HANDLING SERVICES LTD 1974 EA 75** where **Duffus P., J.** stated that:

*“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....where it is a regular judgement... the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits...defence on merits does not mean ...that a defence must succeed, it means...”a triable issue”, that is an issue that raises a prima facie defence and which should go to trial for adjudication.”*

36. Thus, the Court does have the discretion to set aside or vary any default judgment so long as this is done upon such terms as are just on the basis of the evidence placed before the Court, and always bearing in mind the principle set out in the case of **MBOGO VS. SHAH [1968] EA 93.**

37. It is evident that the entry of default judgement entered on the 13<sup>th</sup> February, 2020 herein was regularly done and therefore the said Judgment is a regular Judgment for all intents and purposes.

38. The Plaintiffs/Respondents further submitted that, where it is a regular judgment as is the case herein, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.

39. In this respect, the Defendant has not attached any draft defence to his application and therefore he has not demonstrated that it has any defence with triable issues that should be heard and determined by this Honorable Court.

40. On 26<sup>th</sup> September, 2019, the defendants appointed the firm of **Garane & Somane** Who in turn filed a Notice of Appointment on the same day. To date One (1) year and about Two (2) Months down the line the defendants either through the said Firm and/or in person have not filed a defense.

41. They submitted that the mere filing a notice of appointment only does not constitute a defense recognized by Kenyan Law nor does it constitute a reason to set aside judgement in place.

42. In **KENYA ORIENT INSURANCE LIMITED V CARGO STARS LIMITED & 2 OTHERS [2017] EKLR** The 2<sup>nd</sup> defendant contended that he was not a director or shareholder of the 1<sup>st</sup> Defendant and therefore had no authority or capacity to accept service on its behalf and would not have accepted such service, however the Court found that proper service was effected and that the Default Judgment was regularly entered.

43. The Court referred to the decision of the Court of Appeal in **SHADRACK ARAP BAIYWO VS. BODI BACH [1987] EKLR**, which held that when there is an affidavit of service on record, there is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect.

44. They submitted that the Defendants has been indolent and are not entitled to any equitable reliefs.

45. That the Plaintiffs has incurred huge costs in bringing the suit to court and stands to suffer great prejudice if the judgment is set aside.

46. The Plaintiffs are entitled to enjoy the fruits of their judgment and we therefore urge this Honourable Court to dismiss this application on the basis that the Defendants herein has failed to comply with procedural rules for the just and expeditious disposal of this suit.

47. It is their submission that the Defendants are not interested in the prosecution of this matter and this Honourable Court should decline to

grant the orders sought and prayed that the Defendants application be dismissed with costs.

#### 48. ISSUES, ANALYSIS AND DETERMINATION

49. After going through the rivaling pleadings and submissions, I find the issues are; **whether the service effected was irregular, whether the judgement in default should be set aside and if judgement is to be set aside, what are the orders of the court.**

50. The court has perused the file and noted the events leading up to the interlocutory judgement: it is apparent that, the Plaintiffs did not serve summons upon the Defendants – the Plaintiffs have an affidavit of service on record sworn by Senior Court Bailiff James Mukuni stating that he received from the Plaintiffs a set of documents, mentioning an application and pleadings but made no mention of summons.

51. On further inquiry by this Honourable Court when this matter came up for interpartes hearing on the 11th of March 2020 the Plaintiff's counsel did not demonstrate as to whether service of summons was made upon the Defendants.

52. The Plaintiffs could not even produce a received copy of summons to show that they had served the summons upon the Defendants. Order 5 rule 1(b) of the Civil Procedure Rules provides:-

**“(6) Every summons, except where the court is to effect service shall be collected for service within thirty days of issue or notification whichever is later, failing which the suit shall abate.”**

53. In it was held; **‘the use of the word “shall” makes this a mandatory provision. Failure by the Applicant to collect the summons within thirty (30) days of issue meant that this suit abated by operation of law. Accordingly there exist no valid summons capable of re-issue....’**

54. The courts have not been given room for discretion in the event summons to enter appearance have not been served and the outcome to the suit is fatal.

55. In **Mobile Kitale Service Station vs Mobil Oil Kenya Ltd & Anor Kisumu HCCC No. 205 of 1999**, Warsame J observed that;

**“...In my understanding Orders 4 and 5 of the Civil Procedure Rules are designed to enable parties to follow certain procedures. The word used is “shall” which makes it mandatory to comply with the discretion. And there is no explanation as to why the summons were not taken out then the court has no discretion but a judicial duty to ensure the rules of procedure are followed and failure to observe would be fatal.....however a court can only revert to the discretion when there is valid reasons, excuses, mistakes, errors which are excusable but when there is no proper explanation then the court's powers are invited.”**

56. The Plaintiffs did not serve their application seeking an interlocutory judgement on the Defendants. The Plaintiff's application dated 12th February 2012 was not served on the Defendants and was undefended.

57. The Defendant is a government and should be served in accordance with the Government Proceedings Act and in this case the Plaintiffs should have complied with Order 10 rule 8 of the Civil Procedure Code with regard seeking an interlocutory judgement against the government.

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

59. The plaintiffs were well aware that the Defendants had counsel given that there was a notice of appointment on record and that the Defendant was defended by counsel in the same matter when it was consolidated in Petition 9 of 2019. Thus an irregularity was committed.

60. The Plaintiffs applied to amend their plaint after the judgment in default was entered. After the Plaintiff applied for judgment in default and the same was granted on the 12th February 2020, the Plaintiffs then applied to the Court to amend its plaint and leave was granted on the 24th of February 2020 after judgment in default was entered.

61. Therefore, the judgement entered was for the initial plaint before amendment. There is no judgment in default in place after the 24th of February 2020 and the Plaintiff has to make a fresh application.

62. Thus the judgment issued would not subsist as a different set of facts have been entered through the now amended plaint and therefore as it stands there is no default judgment in place.

63. Another issue that comes to play is the fact that sums of money have been paid in settlement by the Defendants to the Plaintiffs, therefore the same cannot be ignored. This completely alters the amount sought by the Plaintiffs in their plaint.

64. Thus, should the interlocutory judgment be set aside? In the case of **Shah vs Mbogo [1967] EA 166** held that:

**“This 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....”**

65. Time and again, courts, in the spirit of promoting the right to fair hearing which is non-derogable and illimitable under Article 25(c) of the Constitution, 2010, have acknowledged and held that even where the service of summons is valid and proper, the judgment will be set aside if the defence raises triable issues which the Defendants have in their preliminary objection.

66. In **Sebel District Administration vs Gasyali & Others [1968] E.A 300**, as was quoted in **Richard Murigu Wamai vs Attorney General & Another [2018] eKLR** the court in underscoring the importance of hearing cases on merit and according both parties fair hearing held as follows:-

**“In my view the court should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, 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 circumstances to shut out a defendant from being heard.”**

67. Further in a similar case of **William Ntomauta M’ethanga sued as M’mauta Nkari vs Baikiamba Kirimania [2017] eKLR** the **Court of Appeal** in setting aside a default judgment that was regular despite there being proper service held that, **“the main concern of the court is to do justice to the parties, and it ought not to impose conditions on itself to fetter the wide discretion given it. Unlike the learned Judge, we felt that it is in the interest of justice to allow the appellant to defend the suit and the matter to be determined on merit being a family dispute. In doing so, we invoke Article 159 of the Constitution in order to render substantive justice.”**

68. In conclusion it is this court’s finding that the interlocutory judgment was irregular and premature and the same is for setting aside. Then the next question is, what are the court’s orders? It is not disputed that the multiple contracts subject of the suit herein had arbitration clauses which were to be complied with before the court could take over the matter.

69. It is not also disputed that the plaintiffs have continued to receive payments of the instalments of subject claims. Thus it is necessary for the parties in the spirit of the arbitral clauses in the contracts herein to sit down in arbitration and verify the outstanding debts and sort out any disputed amount if any. Thus the court makes the following orders;

- i) Thus the interlocutory judgement herein is set aside.**
- ii) The matter is referred to arbitration in terms of the arbitral clauses in the contracts subjects herein.**
- iii) Matter to be mentioned after 90 days from dates herein to confirm fate of arbitration.**
- iv) Costs in the main cause.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2020.**

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**C. KARIUKI**

**JUDGE**