



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E264 OF 2020

BETWEEN

ELIZABETH MARY OKELOPLAINTIFF

AND

LONGLIQI INTERNATIONAL (KENYA) LIMITED.....1ST DEFENDANT

LONGLIQI INTERNATIONAL (NIG) LIMITED..... 2ND DEFENDANT

LONGLIQI GLOBAL HOLDINGS CO. LIMITED.....3RD DEFENDANT

JIA DIAN 4TH DEFENDANT

RULING NO. 2

1. Judgment in default of filing defence was entered against the Defendants on 1st December 2020. They have now moved the court to set aside the judgment under **Order 10 rule 11** of the *Civil Procedure Rules*.

2. The 1st and 2nd Defendants have filed a Notice of Motion dated 2nd December 2020 supported by the affidavit of their advocate, Kori Kent Musonera, sworn on 2nd December 2020. The 3rd and 4th Defendants filed the Notice of Motion dated 2nd December 2020 supported by the affidavit of its advocates, Samuel Ndungu Karanja sworn on the same date.

3. Both parties raise the similar grounds in support of their respective applications. They stated that when the suit was filed, the application seeking attachment before judgment was argued and a ruling dismissing the application delivered on 22nd September 2020. Thereafter the court fixed the matter for pre-trial directions on 1st December 2020. Both advocates understood that the parties were negotiating settlement that is why they failed to file their respective defences. Mr Kori deponed that while, he had prepared the defence, he was informed by his client that the parties were negotiating settlement of the matter. In the meantime, he prepared the defence and attempted to file the same on the e-filing system but was unable to do so. He only learnt of the judgment when the matter came up for pre-trial directions as scheduled.

4. The Plaintiff opposed the application. Counsel submitted that the judgment was regular and that the reasons advanced by the Defendants in support of the application were insufficient. He added that since he was counsel in record for the Plaintiff, he ought to have been informed of the negotiations. Given the time it had taken since the application for attachment before judgment was dismissed, counsel urged the court to dismiss the application.

5. The court, under **Order 10 rule 11** of the *Civil Procedure Rules*, 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 *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.

6. There is no dispute that the judgment that was entered was regular. Even where the ex-parte judgment is regular, the court may yet set aside the judgment if there is a good defence to the claim and there are good reasons to do so (see *James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another* MSA CA Civil Appeal No. 6 of 2016 [2016] eKLR). In this case, I accept that explanation by the counsel for the Defendants that they expected that the parties were settling the matter. There is no evidence that the failure to file defence was deliberate or intended to delay or defeat justice. In any case, I would also lean against punishing the parties for the actions of their advocates.

7. I have taken into account that prior to the ex-parte judgment being entered, the parties were involved in a contested application for attachment before judgment. In the ruling dated 22nd September 2020, I alluded to the nature of the defence and held as follows:

17.... It is not disputed that the parties entered into agreements. The Plaintiff claims that the Defendants breached the agreement and that they fraudulently obtained from her USD 240,740.12 which she now claims. Those are contentious issues that may have to be resolved at the trial of the action.

8. I cannot say that the defences are frivolous. I will therefore set aside the judgment. Any prejudice suffered by the Plaintiff will be assuaged by an award of costs.

9. The Notices of Motion dated 2nd December 2020 are allowed. Interlocutory judgment entered herein is set aside. The Defendants are directed to file and serve their respective defences within 14 days from the date hereof. The respective Defendants shall pay costs of Kshs. 15,000.00 each to the Plaintiff within 14 days.

DATED and DELIVERED at NAIROBI this 18TH day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Otieno instructed by Otieno and Amisi Advocates for the Plaintiff.

Mr Kori instructed by H. Kago and Company Advocates for the 1st and 2nd Defendants.

Mr Karanja instructed by K. Mberia and Partners Advocates for the 3rd and 4th Defendants.