REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 1 OF 2017

MAGGY AGULO CONSTRUCTION CO LTD .....PLAINTIFF

VERSUS

MINISTRY OF PUBLIC HEALTH .....1ST DEFENDANT

MINISTRY OF PUBLIC WORKS.....2ND DEFENDANT

COUNTY GOVERNMENT OF VIHIGA.....3RD DEFENDANT

VIHIGA COUNTY TENDER COMMITTTEE.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. There are two applications and a preliminary objection for determination.

2. The first application, dated the 10th August 2018, is by the 5th defendant, on behalf of himself and the 1st and 2nd defendants. It seeks the setting aside of the judgment entered herein on 5th September 2017 and all consequential orders. It also seeks leave for the 1st, 2nd and 5th defendants to file defences out of time. The grounds upon which the same is premised are that the plaintiff did not have leave to enter judgment against the 1st, 2nd and 3rd defendants, contrary to Order 10 Rule 8 of the Civil Procedure Rules, that the said defendants had a good defence, fairness and justice necessitated that the said defendants be accorded an opportunity to file their defences, their failure to file defences in time was not deliberate, they would suffer prejudice should the judgment on record be executed, the plaintiff would suffer no prejudice and any delay in the conclusion of the matter could be compensated in damages, the delay in applying for setting aside of the orders was occasioned by the unavailability of the court file, and that the plaintiff had taken out notices to show cause against the 1st and 2nd defendants and warrants of arrest were likely to be issued. The said grounds are elaborated in the affidavit sworn in support of the application, on 10th August 2018, by Gilbert Tarus, the State Counsel having conduct of the matter.

3. The plaintiff responded to the application, vide her affidavit sworn on 21st March 2019. She avers that the application was being mounted after a considerable delay of one and half years, accusing the 1st, 2nd and 5th defendants of indolence and laxity. She avers that she had properly been awarded the contract, which she executed skilfully and diligently. She states that the draft defence on record consisted of mere denials. She further avers that Order 29 Rule 2(b) of the Civil Procedure Rules did not apply to the persons sued after devolution became effective under the new Constitution. She avers that should the judgment be set aside, the 1st, 2nd and 5th defendants should be condemned to pay throwaway costs of Kshs. 1, 000, 000.00.

4. The second application is dated 17th February 2020, and is filed by the 3rd defendant, who has moved court by way of a Motion seeking stay of execution and lifting of warrants of arrest against the defendants. It is also prayed that the warrants of arrest against the 3rd defendant be declared null and void. The basis of the application is that the court was in violation of the express provisions of section 21 of the Government Proceedings Act, Cap 40, Laws of Kenya, and Order 29 of the Civil Procedure Rules . The 3rd defendant has simultaneously filed a notice of preliminary objection, dated 17th February 2020. The grounds upon which the application is founded are: that the 3rd defendant had a pending application dated 5th September 2017, which seeks setting aside of the judgment on record; the said application raises triable issues; the 3rd defendant was a government for all intents by virtue of section 21(5) of the Government Proceedings Act; the acting County Secretary of the 3rd defendant was for all intents a public officer and warrants of arrest issued against him amounted to orders against the government by virtue of Order 29 Rule 1 of the Civil Procedure Rules; the warrants of arrest issued against the acting County Secretary in execution of a decree against the 3rd defendant were so issued contrary to section 21(4) of the Government Proceedings Act and

Order 29 Rule 2(2)(b) of the Civil Procedure Rules; the acting County Secretary was not in a position to make payments on behalf of the 3rd defendant as that is the mandate of the County Executive Committee Member in charge of the 3rd defendant's finances as provided for under section 151 of the Public Finance Management Act, No. 18 of 2012 among others. The said grounds are elaborated in the affidavit that Philip Gavuna, the Acting County Secretary of the 3rd defendant, swore on 17th February 2020.

5. I have pored through the file of papers before me, in search of a response, by the plaintiff, to the application dated 17th February 2020, and I have not come across any. I shall therefore take it that the said application is unopposed.

6. The preliminary objection dated 17th February 2020 raises six grounds: that the warrants of arrest issued against the acting County Secretary of the 3rd defendant were incompetent; that the warrants were contrary to Order 29 Rule 2 of the Civil Procedure Rules on issuance of such orders against government officials except in accordance with the provisions of the Government Proceedings Act; that the execution proceedings instituted against the acting County Secretary were contrary to the provisions of section 21 of the Government Proceedings Act; that the acting County Secretary is a public officer and the orders made against him were orders against the government by virtue of Order 29 Rule of the Civil Procedure Rules; that the decree-holder improperly approached the court by way of application for warrants of arrest instead of seeking the judicial review relief of *mandamus* in total violation of Order 53 of the Cavil Procedure Rules; and section 109 of the Public Finance Management Act prohibits the operation of the county revenue accounts except in accordance with the Constitution and with approval from the Controller of Budget.

7. Directions were given on 30th July 2020, on disposal of the applications. Both applications were to proceed by way of written submissions. So far none of the parties have filed their said submissions.

8. I will start by disposing of the application dated 10th August 2018. It is brought under the provisions of Order 10 Rule 8 and Order 51 of the Civil Procedure Rules. The applicant seeks the setting aside of the judgment entered against the 1st , 2nd and 5th defendants on 5th September 2017, and leave to file defences out of time, on the basis that the plaintiff did not obtain leave to enter judgment against them as required under Order 10 Rule 8 of the Civil Procedure Rules .

9. With regard to setting aside of judgments entered in default generally, the court, in *James Kanyita Nderitu Vs. Maries Philotas Ghika & Another* [2016] eKLR said:

> "We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. 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 appearances 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 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 (see Mbogo & Another vs. Shah (supra); Patel vs. EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another vs. Kubende [1986] KLR 492 and CMC Holdings vs. Nzioki [2004]1 KLR 173).
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> In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo Vs. Attorney General [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh Vs. Election Tribunal, Kotch, AIR 1955 SC 664, at 711:
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> > "There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not precluded from participating in them."

10. In Elizabeth Kavere & another Vs. Lilian Atho & another [2020] eKLR, the court observed that:

> "7. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The discretion of the court to set aside ex parte default judgment is conceded and both parties cited the Court of Appeal for Kenya Pithon Waweru Maina vs. Thuka Mugiria [1983] eKLR, where Kneller JA observed as follows:
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> > "The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran Vs. Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.

> The court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC."
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> This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah vs. Mbogo [1969] EA 116,123 BC Harris J.

The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani Vs. McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo Vs. Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration Vs. Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas Sodha Vs. Gordandas Hemraj (1952) 7 ULR 7 namely: "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." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith Vs. Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson Vs. Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..." So the magistrate should have recalled these points. The respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local land control board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. Shabir Din v Ram Parkash Anand (1955) 22 EACA 48, 51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/a Khudadad Construction Company Nairobi HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in The El Amria [1981] 2 Lloyd's Rep 539."

11. From the above, it is clear that this court has power to set aside a default judgment, obtained irregularly. The defendants' principal complaint is that Order 10 Rule 8 of the Civil Procedure Rules was not complied with. The said provision states as follows:

> "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 date."

12. In Maua Methodist Hospital Sacco vs. Commissioner Kenya Revenue Authority [2011] eKLR, the court said, with respect to application of Order 10 Rule 8:

> "As it can be seen from that definition, KRA is deemed to be the government within the meaning of Government Proceeding Act. That being so, order IXA rule 7 provides that no judgment in default can be entered against the government without leave of the court. That rule provides as follows:-
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> > "7. 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."
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> It should be noted that the Civil Procedure Rules have since been amended but I quote the above rule because at the time when the learned Deputy Registrar of this court entertained the application for interlocutory judgment, the previous rules were in operation. Suffice to say that the plaintiff under that Rule was required to file an application for leave to enter judgment against the defendant. The judgment therefore which was entered by the learned Deputy Registrar on 18th November 2010 was irregular."

13. In Gulf Fabricators vs. County Government of Siaya [2020] eKLR, the court considered similar circumstances and held:

> "31. I note that the application dated 11/7/2017 filed on 12/7/2017 sought for leave of court to be granted to the plaintiff for judgment to be entered against the defendant in default of entering appearance and filing a defence. I further note that the applicant never sought any prayer to the effect that interlocutory judgment be entered against the defendant, which judgment would then have given room for formal proof hearing followed by a final judgment.
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> 32. In other words, albeit leave of the court was granted, such leave was not and did not operate as interlocutory judgment. The plaintiff was expected to use the leave granted to request for judgment in default of appearance and defence, which was not done in the present case.
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> 33. That being the case, it is my humble view that the formal proof hearing leading to the judgment of 7/3/2019 was in itself premature and irregular. An irregular judgment is amenable for setting aside in limine. In setting aside an irregular or premature judgment, the court does not enjoy any discretion stipulated in the Mbogo vs. Shah [1968] EA 93 case. I would therefore on this ground alone dismiss this appeal."

14. In the instant cause, the suit was filed on the 22nd February 2017, against three entities of the national government and two entities of the

county government. The 1st, 2nd and 5th defendants filed their memorandum of appearance on the 29th March 2017. On the 1st September 2017 the plaintiff filed a request of judgment, and the same was entered on the 5th September 2017. At no point did the plaintiff file an application to seek leave of court to have judgment entered against the said defendants as prescribed by law. As I have pointed out above, all five defendants are government entities, by virtue of the provisions of the Government Proceedings Act. It follows that the failure to adhere to Order 10 Rule 8 of the Civil Procedure Rules made the default judgment irregular. The said judgment cannot stand, and the same is amenable to setting aside.

15. On the second application, the principal issue is the propriety of the execution proceedings mounted against the 3rd defendant, through its officials, with respect to the irregular default judgment. It is argued that the process was irregular. Firstly, as execution against the government should be through judicial review proceedings, mounted under Order 53 of the Civil Procedure Rules, after a certificate against government is served upon the government in compliance with section 21 of the Government Proceedings Act. Section 21 provides as follows:

> "21. Satisfaction of orders against the Government
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> (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
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> Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
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> (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
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> (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
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> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.
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> (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.
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> (5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."

16. Under section 21 of the Government Proceedings Act, execution of money decrees against government, which includes county government, should be through the process set out in that provision. That requires that a certificate of order against government be obtained, and served on the Attorney General, who is expected to bring it to the attention of the relevant accounting officer of the government. The duty to pay only arises after such service, and execution proceedings, by way of *mandamus*, can only be undertaken thereafter.

17. What I have stated above has been pronounced upon by the courts in previous proceedings. In *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR, for example, the court stated:

> "The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon."

18. Then there is *Republic vs. County Secretary Migori County Government & another* [2019] eKLR**,** where the court said:

> "11. I need not re-emphasize the need for strict compliance with Section 21 of the Act being the law of the land. In this matter I can gather from the record that a Decree and a Certificate of Costs in the suit was drawn and issued. I did not set my eyes on any Certificate of Order. There is a specific procedure on how the Certificate of Order required under the Act is obtained. The procedure

is contained in Order 29 of the Civil Procedure Rules. Under Rule 3 thereof the application is made to the Deputy Registrar in the High Court or to the court in the subordinate court. The format of the Certificate of Order is provided in Appendix A Form No. 22 of the Civil Procedure Rules. Form No. 23 provides the format for a Certificate of Costs in the event it is separately issued.

12. Once a party obtains the Certificate of Order and the Certificate of Costs, in the event the Certificate of Costs is obtained separately, together with the Decree, then such a party must satisfy the Court of service of those documents upon the party named in the Certificates. In this case there is neither evidence of issuance of the Certificates nor service thereof on the Respondents or their Advocates."

19. An execution process against the government or its officials which sidesteps section 21 of the Government Proceedings Act and Order 53 of the Civil Procedure Rules is deficient, irregular and illegal, and cannot stand. Consequently, the mode of execution, by way of warrant of arrest of an official of the 3rd defendant, that was ordered in this case was irregular and contrary to the Government Proceedings Act. There is, therefore, merit in the application dated 17th February 2020, and the same ought to be allowed as prayed.

20. The preliminary objection dated 17th February 2020, is largely drawn from the application dated 17th February 2002, and I believe the finding that I have made above effectively disposes of the said preliminary objection. The Motion dated 17th February 2020 makes reference to an application dated 5th September 2017. I have scrupulously gone through the record before me, but I have not come across any such application. The same is not among those that I was to determine in this ruling, going by the directions that I gave on 30th July 2020. I believe, though, the same, if it exists, has become academic in view of what I have discussed above.

21. As the default judgment, against all the defendants herein, was irregular, the same is hereby set aside, and so are all the consequential orders, including the warrants of arrest issued and executed against Philip Gavuna, the Acting County Secretary of the 3rd defendant. He shall be discharged from the personal bond that he executed pursuant to the orders of the court made on 18th February 2020. The defendants are hereby granted fourteen (14) days to file their respective defences, and, if any of them have so far filed defences, the same shall be deemed as properly filed. Let the matter thereafter be fixed for pre-trial conference, and thereafter for hearing. I shall award costs of the applications on the defendants, as the affidavit of service on record, sworn on 28th February 2017, is insufficient, as at it relates to only two of the defendants, and it is not clear as to how the rest of the defendants were served. Even for the two allegedly served, the affidavit of service does not return the documents that were allegedly served, upon which, the persons, who allegedly received the service, had allegedly acknowledged acceptance and receipt, by stamping and signing the same.

22. The final thing. I have seen a long letter on the record, dated 24th February 2020, and addressed to the Judge, by Margaret Agulo, of Maggyagulo Contractors Co Ltd, who I presume to be the plaintiff herein. The letter tells the Judge about what the writer had discussed, about the dispute, with certain officials of the 3rd defendant. The writer goes on to invite the mercy of the court in determination of the dispute. What I must say is that the writer of the letter is represented by an advocate in the matter, or at least her company, and no occasion should arise, at all, for such a person to write personally to the Judge with regard to a matter the Judge is handling. That should be the function of her advocate or an advocate acting for her company. Secondly, any issues that arise must be dealt with in open court, and her advocate, if there was a matter that required the attention of the court, should have had the file placed before the Judge for mention for directions, with notice to all the other parties. It is unethical for a party to write to the Judge, for the only interaction that such a party should have with the Judge should be in open court. Litigation is carried out openly in court, not privately through correspondence to the Judge. Such stuff amounts to trying to unfairly influence the Judge, and parties are advised to avoid such shenanigans at all costs. Needless to say that courts decide matters based on facts and the law, and not emotions and sentiment. Thirdly, the Deputy Registrar should not have had the letter filed away, instead it should have been brought to the attention of the Judge, for appropriate directions or action.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF DECEMBER, 2020

W MUSYOKA

JUDGE