



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 17 OF 2018

DUBAI BANK KENYA LIMITED (IN LIQUIDATION).....PLAINTIFF

-VERSUS-

MATTAN CONTRACTORS LIMITED.....1ST DEFENDANT

NAJIB RASHID YARROW.....2ND DEFENDANT

KENYA URBAN ROADS AUTHORITY (KURA).....3RD DEFENDANT

RULING

1. The defendant/Applicant herein filed the application dated 27th January 2020 pursuant to Order 10 Rule 11 and Order 51 Rules 1,3, 4 and 10 of the Civil Procedure Rules seeking orders that:

1. Spent.

2. This Honourable Court be pleased to set aside Interlocutory Judgment entered against the Defendant/Applicant.

3. That the hearing for formal proof set down on 28th January 2020 be stayed pending the hearing and determination of this application.

4. This honourable court be pleased to grant the Defendant/ Applicant an order for leave to file defence to the Counterclaim out of time and any other order that may be issued pursuant thereto.

5. The costs of this application be provided for.

2. The application is supported by the affidavit of the Defendant's Liquidation Agent **Mr. John Masega** and is premised on the grounds that:

a) That the Plaintiff/ Applicant deliberately/negligently failed to effect service of summons on the Defendant/Applicant in the above matter contrary to Constitutional Provisions and the Civil Procedure Act and the Rules therewith;

b) That the Defendant/Applicant has a valid defence with raises triable issues regarding the claims raised by the Plaintiff/Respondent.

c) That the Plaintiff/Applicant has secured a hearing for formal proof on 28th January 2020 in order to solidify the judgment against the Defendant/ Applicant despite having failed to properly effect service on the Defendant/Applicant.

d) That the plaintiffs claim against the Defendant/Applicant fundamentally touches on matters raised in the main Civil Suit No. 17 of 2018 and any orders thereto will affect the hearing and determination of the main suit, and it therefore in the interest of justice that the Defendant/Applicant is granted leave to file a defence in this matter.

e) That the issues raised in the Counterclaim are contingent to the main suit and would in the event they are proven, raise issues of set-off and not a fresh suit.

f) That the Defendant/Applicant is therefore eligible to an order for leave to file a defence.

g) That substantial loss will result to the Defendant/Applicant unless the orders sought are granted.

3. The Plaintiff/Respondent did not file any response to the application and when the matter came up for hearing on 26th November 2020, Miss Nganga advocate for the applicants urged the court to grant the prayers sought in the application.

4. I have perused the affidavit of service filed herein and I am satisfied that the respondent was duly served with the instant application and has not filed any response despite such service.

5. I have also perused the application together with the supporting affidavit and I am satisfied that it is merited.

6. Consequently, I allow the said application in the following terms: -

a) That the interlocutory judgment entered against the defendant herein be and is hereby set aside.

b) The defendant is granted leave to file and serve the defence to counterclaim within 14 days from the date of this ruling.

c) The costs of this application to abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Nganga for Applicants/Defendants in the Counterclaim.

Court Assistant: Sylvia