



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL SUIT NO. 17 OF 2017**

**KATSRAN LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT.....DEFENDANT/APPLICANT**

**RULING**

1. The Defendant/Applicant filed a Notice of Motion application dated 2/2/2018 seeking for orders *inter alia*: that this court be pleased to set aside the judgment entered against it on 16/1/2018 and all consequential orders thereto and the defendant be granted leave to defend the Plaintiff's Notice of Motion application dated 1/11/2017; that the costs be provided.
2. The application is supported by the annexed affidavit of DENNIS MUNGATA Learned Counsel for the Applicant sworn on even date and further on the grounds on the face of the application.
3. The Applicant's case is that its Advocates had been served with the Plaintiff's application dated 1/11/2017 scheduled for hearing on the 16/1/2018 but however the said Advocates mis-diarized the hearing date as 16/2/2018 instead of 16/1/2018. It is the Applicant's case that due to the said error there was non attendance by the Defendant on the 16/1/2018. It was further the Applicant's case that the Defendant has a good defence on merit and ought to be given an opportunity to defend the suit. Finally, it was the Applicant's case that it is in the interest of justice and fairness that the application for striking out defence be heard on merit.
4. The application was opposed by the Plaintiff/Respondent whose Managing Directors swore a lengthy replying affidavit dated 23/05/2018 raising several grounds of opposition *inter alia*: that the Defendant was duly served with the Plaintiff's application for summary judgment and which was allowed by this court on the 16/1/2018 and which paved way for the filing of a Bill of Costs by the Plaintiff; that the Defendant is guilty of laches and does not deserve the orders being sought as the unreasonable delay has not been explained; that the Defendant's defence is not meritorious in any way; that the application is meant to delay the plaintiff from realizing the fruits of a valid judgement and thus the application should be dismissed with costs.
5. The application was canvassed by way of written submissions.

**Plaintiff's submissions**

It was submitted for the Plaintiff that no evidence of misdiarizing of the hearing date for the application dated 1/11/2017 have been availed by the Defendant as a sign of good faith and hence the Defendant's counsel is misleading the court. It was also submitted that the Defendant has failed to respond to the Plaintiffs application dated 1/11/2017 and further failed to respond to the plaintiff's comprehensive replying affidavit and hence the application by defendant should be dismissed. Learned counsel for the plaintiff relied on the case of **Patel =Vs= Cargo Handling Services Ltd [1974] EA 75** where the court of Appeal for Eastern Africa held as follows:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means ....”**a triable issue**” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Learned counsel for the Plaintiff further submitted that the Defendants alleged defence does not raise any triable issues in view of the comprehensive replying affidavit filed by the Plaintiff detailing the reasons why summary judgement should be entered against the defendant and in which the defendant has failed to respond thereto. Finally it was submit4ed for the plaintiff that despite the judgement being granted on the 16/1/2018 the defendant has failed to comply and is thus in contempt of the court's order and should not deserve any favour from the court.

### **Defendant's submissions:**

It was submitted for the Defendant that the failure by the Defendant's advocates to attend court on the 16/1/2018 was by human error which is regretted as the date had been misdiarized and that this court do exercise discretion by setting aside the judgement. Reliance was placed in the case of **Shah =vs= Mbogo [1967] EA 166** where the court held as follows:

***"..... while the court would exercise its discretion to avoid undue hardship or injustice resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice ....."***

Learned counsel further submitted that the defendant has not set out to deliberately obstruct or delay the case since it had already filed a Memorandum of Appearance and Defence on time and that the failure to appear in court on the 16/1/2018 was as a result of an inadvertent error which is excusable in the circumstance. The case of **Patel =vs= Cargo Handling Services ltd [1974] EA 75** was relied upon where the court held as follows:-

***" There are no limits or restrictions on the Judges discretion except that if he does vary the judgment, he does so on such terms as may be just ..... 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 ....."***

It was further submitted that there was a regular defence on the merits which was not brought to the attention of the court so as to establish whether the same raised triable issues. The case of **James Wanyoike & 2 others =Vs= CMC Motors Group ltd & 4 others [2015] eKLR** where Kariuki J held thus:-

***"In my view the court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance of 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. A Defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and he be permitted to defend."***

Finally it was submitted for the Defendant/Applicant that the Defendant be granted an opportunity to defend the suit since the sums involved are public funds controlled by the Defendant which is a County Government and that it would be just and fair to have the same paid out only after the defence of the Defendant has been heard on merit.

### **Determination**

6. I have considered the Defendant's application as well as the rival affidavits. I have also considered the submissions of learned counsels as well as the authorities cited. It is not in dispute that upon the filing of the plaint herein, the Defendant duly filed its statement of defence. It is also not in dispute that whereas the parties were to ensure compliance in terms of the provisions of Order 11 of the Civil Procedure Rules and thereafter take final directions on the hearing of the matter, the Plaintiff herein moved the court by way of a Notice of Motion dated 1/11/2017 seeking an order for the striking of the Defendant's statement of defence and entry of judgement in favour of the Plaintiff as prayed for in the Plaint with an alternative prayer that the sum of Kshs.20,000,000/= be deposited in a joint interest earning account in the names of Advocates for the parties pending the hearing and determination of the suit. It is also not in dispute that the Defendant failed to file a response to the said application and also failed to appear in court during the hearing of the same on the 16/1/2018 whereupon this court allowed the said application as prayed since it was unopposed. The orders made on the 16/1/2018 has now precipitated the present application. I find the following issues necessary for determination namely:-

***(i) Whether there is a defence on the merits?***

***(ii) Whether the Defendant has given an explanation for any delay?***

***(iii) Whether there would be prejudice to the Plaintiff?***

7. As regards the first issue, it is noted that the Defendant already has filed its statement of defence dated 29/8/2017. A perusal of the said defence reveals that there are triable issues warranting a determination. Some of the averments raised therein include such matters as the fact that no contract was awarded to the Plaintiff; that if there was any such contract then the same has been fully settled with nothing outstanding and finally that the Defendant has not withheld or failed to remit taxes on the Plaintiffs account at Kenya Revenue Authority or that it orchestrated the adverse listing of the Plaintiff with the Credit Reference Bureau thereby prejudicing it from accessing credit facilities from financial institutions. These issues definitely call for a trial. Indeed the Plaintiffs application dated 1/11/2017 sought for an alternative prayer that the sums claimed be deposited into a joint interest earning account in the names of both advocates pending determination of the suit. This clearly shows that the Plaintiff did appreciate that the issues raised in both the plaint and defence should go to trial for adjudication. The Plaintiff in the application dated 1/11/2017 sought for the striking of the Defendant's defence and summary judgment entered in its favour. Even though the defendant failed to file a response to the said application, I find the Defendant's quest to be allowed to defend the suit should not be shut out. In fact the Defendant seeks to present its version of events regarding the Plaintiff's application dated 1/11/2017 which was allowed as unopposed. The Defendant seeks to fall back on its defence dated 29/08/2017. The Defendant could be granted some timeline within which to file its response to the said application if it is reinstated. The Plaintiffs discomfiture could be cushioned by an award of costs which the defendant is ready and willing to pay. Consequently I find that there is a defence on the merits which should be entertained in the event the plaintiff's application dated 1/11/2017 is reopened for hearing or in the main suit.

8. As regards the second issue, it is noted that the Defendant has indicated that its failure to appear in court on the 16/01/2018 was as a result of an inadvertent error on its part since its learned counsel had misdiarized the hearing date. Although no document was availed to support such assertion, I am inclined to grant the Defendant an opportunity of presenting its side of their case so that the matter could be determined on merit. It is common knowledge that human beings are not infallible and are prone to make mistakes or blunders quite often and ought to be excused once an explanation is tendered. Indeed learned Counsel for the Defendant regrets the error. As the Defendant has agreed to compensate the Plaintiff with costs, the explanation offered is found excusable and is accepted. The Defendant shall be given a timeline within which to file its response to the Plaintiffs Application dated 1/11/2017 once same is reinstated.

9. As regards the last issue, it goes without saying that the plaintiff is likely to stand prejudiced if the Defendants application is allowed because the plaintiff has already obtained a judgement. However I find it is fair and just to grant the defendant an opportunity to defend the suit while the plaintiff would be cushioned by an award of costs. The Defendant would be granted a limited period within which to file its response with corresponding leave to the Plaintiff to file further response if need be and thereafter the court will determine the issue of whether or not the Defendant's defence is amenable for striking out.

10. In the result, I allow the Defendants application dated 2/2/2018 on the following terms:-

***(a) The judgement entered on the 16/1/2018 together with all consequential orders thereto are hereby set aside and/or vacated.***

***(b) The Plaintiff's application dated 1/11/2017 is reinstated and ordered to be heard interpartes on priority basis.***

***(c) The defendant is granted leave to file and serve replying affidavit within fourteen (14) days from the date hereof.***

***(d) The Plaintiff is granted corresponding leave to file supplementary affidavit if need be within 14 days upon service.***

***(e) The Defendant to pay the Plaintiff thrown away costs of Khss.20,000/=.***

Orders accordingly.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of January, 2019.**

**D. K. KEMEI**

**JUDGE**