



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL CASE NO. 11 OF 2018**

**BETWEEN**

**AMALO COMPANY LIMITED.....PLAINTIFF/RESPONDENT**

**AND**

**B.N.KOTECHA & SONS LTD.....1ST APPLICANT/DEFENDANT**

**HEMAL KOTECHA.....2ND APPLICANT/DEFENDANT**

**RULING**

1. By a notice of motion dated 4th July, 2018 brought under Order 9 Rule 9 and Order 10 Rule 11 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law, the applicants prays for orders **THAT**: -

**1. Spent**

**2. The interlocutory judgment entered against the defendants be set aside**

**3. Defendants be granted leave to defend this suit**

**4. The Honourable Court be pleased to allow the firm of Prof. Tom Ojienda & Associates to come on record for the defendants**

**5. Any other or further relief that the court may deem fit to grant**

**6. The costs of this application**

2. The application is based on the grounds among others that the defendants upon being served with the plaint and summons to enter appearance on 4th June, 2018 instructed the firm of Prof. Tom Ojienda & Associates to enter appearance within 15 days which was on 19th June, 2018. That the memorandum of appearance dated 21st June, 2018 was submitted for filing on 22nd June, 2018 by which time an interlocutory judgment had already been entered. That the delay is not inordinate and that the defendants have a constitutional right to defend this suit. The application is also supported by an affidavit sworn on 4th July, 2018 by **HARSHIL KISHORE KOTECHA** who describes himself as a director and shareholder of the 1st defendant with authority from the defendant to swear the supporting affidavit. The supporting affidavit simply reiterates the grounds on the face of the application. Annexed to the affidavit is 1st defendant's resolution authorizing the deponent to sign the supporting affidavit (**HKK 1**); plaint and summons to enter appearance with a stamp to show they were received on 4th June, 2018 (**HKK 2**); letter of instructions dated 18th June, 2018 (**HKK 3**); memorandum of appearance dated 21st June, 2018(**HKK 4**) and letter dated 11th May, 2018 and contract dated 2nd May, 2018 between the defendant and KPMG for review of transactions to determine what was owing as between defendant and its trading partners including the plaintiff/respondent.

3. The application is opposed by way of grounds of opposition dated 24th July, 2018. According to the respondent, the judgment cannot be set aside *ex debito justitiae* as there was proper service of summons to enter appearance. The Defendant urged the Court to find that the delay to enter appearance is inordinate and further that this application is a meant to delay the course of justice for the reason that the applicants have not demonstrated a reasonable defence raising triable issues.

4. In response to the grounds of opposition, **HARSHIL KISHORE KOTECHA** who describes himself as a director and shareholder of the 1st defendant filed a supplementary affidavit on 5th November, 2018 to which he annexed draft defence dated 1st November, 2018 marked **HKK 1**.

5. In response to the aforementioned supplementary affidavit, **ANIR KUMAR D. SHAH** who describes himself as a director of the plaintiff questions the authenticity of emails by one Amar annexed to the supplementary affidavit who is says is not a director of the plaintiff. He also questions the origin of the said emails whose addresses are missing and which are not supported by the certificate under section 65(8) of the Evidence Act.

## **SUBMISSIONS BY PARTIES**

### **Applicant's submissions**

6. It has been submitted for the applicants that the court has unfettered, unlimited and unrestricted jurisdiction to set aside the impugned judgment on the grounds that the delay in filing the defence has been explained; that there is a defence on the merits; that the plaintiff will not suffer any prejudice and that prejudice if any, can be compensated by an award of costs. The applicants hold the view that failure to enter appearance within the prescribed time is a procedural technicality that should not drive the defendants from the seat of justice. In support thereof, applicant placed reliance on the law and numerous authorities.

### **Respondent's submissions**

7. The respondent argued that there was proper service of the plaint and summons. The court was urged not to bend rules to accommodate the applicants for the failure to enter appearance within 15 days. The respondent also submits that the applicants are guilty of laches for the reason that having resolved to instruct the advocates on record on 5th June, 2018 which was a day after service of the plaint and summons; they have failed to explain their inaction up to 19th June, 2018 which is an aggregate of 15 days. The respondent additionally submits that the draft defence fails the test of a being triable for the reasons that it is a bare denial which does not specifically deny the actual and ostensible authority of one director to bind the 1st defendant and appears to seek time to procure an audit report. In support thereof, respondent placed reliance on the law and the various authorities.

## **ISSUES FOR DETERMINATION**

8. From the submission by the parties, I have summarized the issues for determination as follows:

### **i. Is the *ex parte* judgment a regular one?**

9. The basis of approach in setting aside an *ex parte* judgment is that if service of summons to enter appearance has been served, then the court will have before it a regular judgment. The applicants concede that the plaint and summons to enter were served and the judgment on record is therefore a regular one.

### **Has the delay been explained?**

10. The applicant's conceded that the plaint and summons to enter appearance was served on them on 4th June, 2018. The firm of Prof. Tom Ojienda & Associates was not instructed until 19th June, 2018 which was the last day for entering appearance. I have read through the applicant's affidavits and nowhere has the delay in instructing counsel has been explained.

11. The foregoing notwithstanding, the applicants urge the court to find that they have a constitutional right to defend this suit. They specifically rely on Article 159(2)(d) of the Constitution.

12. There has been a misconception in recent times that compliance with rules of procedure is antithetical to **Article 159** of the **Constitution** and the overriding objective principle of sections **1A, 1B, 3** and **3B** of the **Civil Procedure Act**. That is my considered view is far from the truth for the reason that procedure is a hand maiden of just determination of cases.

13. The general trend, following the enactment of **Sections 1A, 1B, 3** and **3B** of the **Civil Procedure Act** and **Article 159(2) (d)** of the **Constitution**, is that courts today place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice. This application was filed 14 days after the last day that the applicants ought to have entered appearance. The delay though unexplained is not inordinate. That procedural lapse on the part of the applicants, deplorable as it is, is excusable under the provisions of aforementioned provisions of the Constitution and the Civil Procedure Act.

### **iii. Does the draft defence raise triable issues?**

14. A regular judgment such as the one in this matter would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd versus Augustine Kubede (1982-1988) KAR** the Court of Appeal while discussing discretion to set aside an interlocutory judgment stated:

**“The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence.”** (Emphasis mine).

15. The discretion is unfettered and is to be used with reason. (See **Philip Kiptoo Chemwolo case**). In **Mbogo v Shah [1968] EA 93**, the court held that:

**“.....discretion for setting aside 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 party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”. (See Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) e KLR CA 217/2009).**

16. I have considered the application *vis a vis* the affidavits and annexures on record. I have also considered the submissions by the parties' advocates and the authorities which were cited in support thereof. This court has a duty to consider whether the draft defence raises triable issues. In so doing, I will endeavour to address three main issues raised in the draft defence as hereunder.

17. The 1st issue for consideration is to be found at paragraph 4 of the draft defence where the defendants deny that they were supplied with any goods and products as pleaded at paragraph 4 of the plaint. I have considered the contents of a letter dated 11th May, 2018 by applicant's advocate in response to respondent's advocate's letter to the 2nd applicant. Paragraph 3 of that letter dated 11th May, 2018 reads as follows:

**Our client has instructed Messrs. KPMG Advisory Services Limited to undertake an audit to review the transactions of the company with other trading partners including suppliers for adequate support, execution of the transactions and amounts owed to its business partners. Your transactions with our client thus fall within the scope of the review.” (Emphasis mine).**

18. The denial is repeated at paragraph 6 of the draft defence which also makes reference to an audit of the transactions of the 1st applicant with its trading partners that the applicants have instructed KPMG Advisory Services Limited to undertake.

19. With respect, I would have expected the applicants to disclose the nature of transactions they had with the respondent that necessitate an audit but that is lacking. In view of such non-disclosure, the court makes an inference that the transactions thereto are those that relate to supply of goods and products as pleaded at paragraph 4 of the plaint. Having said that, I with respect find that the reference of transactions for audit by KPMG is not a triable issue which should go to trial for adjudication.

20. The second issue is to be found at paragraph 5 of the draft defence where defendants plead that Harshil Kishore Kotecha, a director and shareholder of the 1st defendant had by emails advised one Anil Kumar D.Shah, a director of the respondent not to transact with the 2nd applicant without the 1st respondent's Board's resolution. There is a two page document annexed to the supplementary affidavit by Harshil Kishore Kotecha which is referred to as an email. The document is neither addressed to Anil Kumar D.Shah, a director of the respondent as pleaded in paragraph 5 of the draft defence nor does it contain the address to which it was allegedly sent. Be it as it may, the document does not in any way advise one Anil Kumar D.Shah, a director of the respondent not to transact with the 2nd applicant without the 1st respondent's Board's resolution. Consequently, this too is not a triable issue which should go to trial for trial.

21. The final issue is also to be found at paragraph 5 of the draft defence which denies in *toto* the pleadings at paragraph 5 of 6 of the plaint to the effect that the 1st defendant had by a Deed of Guarantee and Indemnity and Deed of Settlement both executed by the 2nd applicant on 25th March, 2017 agreed and acknowledged that it was indebted to the respondent in the sum of Kshs. 221,684,838.50 which sum continues to attract interest at the rate of 21% per annum.

22. Interestingly, the applicants have not made any specific pleading relating to the Deed of Guarantee and Indemnity and Deed of Settlement mentioned herein above. The 2nd applicant that executed the documents has not filed an affidavit renouncing them and they as a result stand unchallenged. In Magunga General Store vs Pepco Distributors Ltd [1987] 2 KAR 89, where the defendant used such generalized denial, Platt, J.A., said-

**“First of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”**

23. These observations are applicable to this case. In the Deed of Guarantee and Indemnity and Deed of Settlement, the applicants quite frankly admitted liability. Upon being sued, they deny liability generally without advancing any explanation therefor. This court is not satisfied that there is a defence on its merits. (See Patel v East Africa Cargo Handling Services Ltd (1974) EA. 75). From the foregoing, it seems clear to me that the defence is a mere, general denial which does not raise any triable issues. It is not a reasonable defence.

24. Consequently, I find that the applicants have not made out a case for exercise of this court's discretion in their favour. On the contrary, I find that the applicants are seeking to deliberately evade or otherwise obstruct or delay the course of justice. (See Mbogo v Shah (Supra) and Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) e KLR CA 217/2009).

## **DISPOSITION**

25. As a result, the notice of motion dated 4th July, 2018 is considered and found to have no merit and it is disallowed with costs to the plaintiff/respondent.

**T.W.CHERERE**

**JUDGE**

**DELIVERED AND SIGNED IN KISUMU THIS 14<sup>th</sup> DAY OF March, 2019**

**F.A.OCHIENG**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant** - Felix

**For the Defendants/Applicants** -

**For the Plaintiff/Respondent** -