REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.518 OF 2015

PEMBE FLOUR MILLS LTD............PLAINTIFF/RESPONDENT

VERSUS

WILSON NDUNGU KAMOMOE........................1ST DEFENDANT

MOHAMMED NASSIR KHALIFA.....................2ND DEFENDANT

JOSEPHAT OKEO KEGENGO...........................3RD DEFENDANT

BENJAMIN MAILU......................4TH DEFENDANT/APPLICANT

DAVID MAINGI KOGI.................5TH DEFENDANT/APPLICANT

R U L I N G

(1) Before the Court is the Notice of Motion dated **7th May 2018** by which **BENJAMIN MAILU** (the 4th Defendant/ Applicant) seek the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT pending the hearing and determination of this suit, the Honourable Court be pleased to set aside the judgment in default of defence and Decree thereto entered against the 4th and 5th Defendant/Applicant herein on the 20th day of June 2016 day of July 2016 respectively.**
>
> **4. SPENT**
>
> **5. THAT this Honourble Court be pleased to enlarge time and the 4th and 5th Defendants joint statement of Defence be deemed duly filed.**
>
> **6. THAT costs be in the cause.**

(2) The application was premised upon **Order 10 Rule 11** of the **Civil Procedure Rules, 2010, Section 95 and 1A** and **B, 3A and 63 (e)** of the Civil Procedure **Act Cap 21** Laws of Kenya and all other enabling provisions of the law. The same was supported by the affidavit sworn by the 4th Applicant on **7th May 2018**.

(3) The Plaintiff/Respondent **PEMBE FLOUR MILLS LTD** filed a Replying Affidavit dated **5th July 2018** in opposition to the application. The Court gave directions that the application be canvassed by way of written submissions. The Applicants filed their written submissions on **29th October 2018** whilst the Plaintiff/Respondent filed its written submissions on **16th November 2018.**

BACKGROUND

(4) The Plaintiff/Respondent filed this suit on **23rd October 2015**, seeking judgment against the 1st to 5th Defendants in the amount of **Kshs.218,665,038.00** plus costs of the suit and interest. The Applicants were duly served with a summons to Enter Appearance on **17th March 2016**. The 4th Applicant then filed his Memorandum of Appearance on **8th March 2016**. The 5th Defendant did not file a Memorandum of Appearance. However their joint statement of Defence dated **16th February 2017** was not filed until **3rd March 2017.** By way of letter dated **24th May 2016** the Plaintiff/Respondent wrote to the Hon Deputy Registrar requesting that judgment be entered against the Defendants in default of entering appearance and/or filing a defence and on **20th June 2016** judgment in default was entered as against the 4th and 5th Defendants and subsequently on **21st July 2016**, the Plaintiff/Respondent extracted a decree in relation to that judgment. At that point the 4th and 5th Defendant/Applicant filed this present application.

(5) The Applicants submit that an agreement was reached between their Advocates and the Advocates for the Respondents that they would only file their defence once they had been served with the Plaintiffs full bundle of witness statements and documents. The initial bundle served upon the Applicants lawyers did not contain all the witness statements. After waiting in vain to be served with the entire list of witness statements, the Applicants proceeded to file their joint statement of Defence on **3rd March 2017**.

(6) The Applicants further submit that after waiting in vain for a full year for the suit to be set down for hearing, the Applicants proceeded to file an application for the suit to be dismissed for want of prosecution. It was at this point that the Applicants learnt of the existence of the judgment entered against them in default of Defence. They contend that the extracted decree was never served upon them. They then filed the present application seeking to set aside the said judgment and decree.

(7) On their part the Plaintiff/Respondent submits that the judgment in default entered against the 4th and 5th Applicants on **20th June 2016** was proper. They submit that the Applicants were duly served with the summons to enter appearance on **17th March 2016**, thus the Applicants were made aware of the existence of the suit against them. The Respondent further submits that no explanation has been given for the failure by the 5th Applicant to file his Memorandum of Appearance and no plausible explanation has been advanced for the delay in filing the joint statement of Defence. The Respondent urges the court to dismiss the present application in its entirety.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the present application, the reply thereto, the written submissions of both parties as well as the relevant law. Three issues arise for determination as follows:-

(i) Was the judgment in default regularly entered?

(ii) Is there a Defence on merit?

(iii) Should the present application be allowed?

(i) **Was the Default judgment regular**?

(9) There is no dispute that the Defendant/Applicants were properly served with the summons to enter appearance in this matter. The Affidavit of Service sworn by one **Chrispine Olengo** on **17th February 2017**, is clear proof of this fact. It is also not in dispute that no defence was filed until **3rd March 2017** well beyond the stipulated period granted by statute to file a defence. The Plaintiff/Respondent in the meantime applied for and obtained judgment in default of defence. What the Court must now decide is whether said judgment in default was regular or irregular and therefore ought to be set aside.

(10) In **SOUTHERN CREDIT BANKING CORPORATION LTD –VS- JONAH STEPHEN NGANGA [2006] eKLR** it was held thus:-

> **"Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is irregular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If the judgment entered is found to be irregular it ought to be set aside ex debitio justitae."**

(11) In an attempt to explain the delay in filing their defence the Applicants claim that an agreement was reached between the parties that, they do not file defence until provided by the Plaintiff/Respondent with their entire list of witness statements and bundle of documents. This argument is however not persuasive at all. **Order 7 Rule (1)** of the Civil Procedure Rules is clear that defence must be filed within 14 days after a party has entered appearance in a suit. There is no provision that this Rule may be waived upon agreement of the parties. Having been served with a summons to enter appearance and having filed a Memorandum of Appearance in the suit on **8th March 2016**, the Applicants were obliged to file their defence 15 days after that date. There exists no nexus at all between service of list of witness statements and documents and the filing of a defence. The filing of defence has not been made conditional upon receipt or service of witness statements and list of documents. The alleged agreement between the advocates is of no consequence and did not absolve the Defendants of their obligation to file defence within the stipulated period. I find that the Applicants were guilty of laches in failing to file their defence as required and if this were the only considerations then I may have been minded to disallow this application.

(12) However it is apparent from my perusal of the Plaint filed on **23rd October 2015**, that allegations of fraud have been made against the Defendants in that Plaint. Therefore this is not strictly speaking a liquidated claim. In **PAUL KIRANTO OLE YIALLE –VS JONATHAN MURUME MUNTET & 2 others [2008] eKLR Maraga J** (as he then was) defined a liquidated claim in the following terms:-

> **"A liquidated claim is a claim for an amount previously agreed upon by the parties or that which can be precisely**

determined by operation of law or by the terms of the parties agreement."

(13) **Order 10 Rule 4** of the **Civil Procedure Rules, 2010** provides as follows:-

> **"4(1) <u>Where the Plaint makes a liquidated claim only</u> and the Defendant fails to appear on or before the day fixed in the summons or all the Defendants fail so to appear, the Court shall, on request in Form No.13 of Appendix A, enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment and costs."** [emphasis supplied]

Where a suit seeks judgment on a liquidated claim alone then judgment in default may be entered. However where allegations of fraud have been made (as in the present case) then in absence of a defence the matter ought to proceed to formal proof.

(14) In the case of **RATILAL GORDHANBHAI PATEL –VS- LALJI MAKANJI (1957) E.A 314** the Court of Appeal held that:-

> **"Allegations of fraud must be strictly proved although the standard of proof may not be as to require proof beyond any reasonable doubt, something more than a balance of probabilities is required."**

I note that the Respondents have not replied at all to this aspect of the Applicants submissions. A perusal of the Plaint reveals that Para 14 of the same includes the particulars of the allegations of fraud allegedly perpetrated by the Defendants. These allegations of fraud can only be determined upon calling of witnesses and receipt of evidence in support of those allegations. In the circumstances it was improper for the Hon Deputy Registrar to have entered judgment in default. The matter ought to have been set down for formal proof. For this reason I find that the judgment in default was irregular and ought to be set aside.

(ii) **<u>Is there a Defence on Merit</u>**?

(15) There can be no gainsaying that the right to be heard is one of the fundamental rights secured to all citizens by virtue of **Article 50(1)** of the **Constitution of Kenya 2010.** There is a joint Defence on record. Though filed out of time, I have perused the same and I am satisfied that it does raise triable issues. In **PATEL –VS- E.A. CARGO HANDLING LTD (1974) E.A. 75** the Court held that:-

> **"Defence on merit does not mean a Defence that must succeed. It means a triable issue that is an issue which raises a prima facie defence which should go to trial for adjudication."**

Similarly in **TREE SHADE MOTORS –VS- DT DOBIE & ANOTHER [1995-1998] E.A 324** it was held:-

> **"Where a draft Defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable Defence to the Plaintiff's claim. It does, the Defendant should be given leave to enter and defend."**

(16) From the narration of events I find that the Applicants have all along intimated their intention and desire to defend this suit. The courts ought to be slow to turn away any litigant who approaches the seat of justice. The Applicants deserve their day in court. The delay in filing said defence cannot be said to have been inordinate. The Respondents do not stand to suffer any prejudice that cannot be compensated by an award of costs. Accordingly I am inclined to allow the Applicants the opportunity to defend this suit.

(17) Finally I am satisfied that the present application has merit and I do allow the same in terms of prayers (3) and (5) thereof.

Costs will be met by the Defendant/Applicants.

Dated in Nairobi this 28th day of June, 2019.

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Justice Maureen A. Odero