REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.190 OF 2013

ROOFSPEC AND ALLIED WORKS CO. LTD.....APPLICANT

VERSUS

GEORGE KAMAU THUGGE.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **17th July 2018** by which **GEORGE KAMAU THUGGE** the Defendant/ Applicant seeks the following Orders:-

> **"(1) SPENT**
>
> **(2) SPENT**
>
> **(3) THAT the ex parte judgment entered herein on 24th April 2015 against the Defendant and all consequential orders thereto be set aside.**
>
> **(4) THAT the Honourable Court be pleased to deem the Defendant's Statement of Defence dated 28th June 2016 and filed in Court on even date as being properly on record.**
>
> **(5) THAT the Honourable Court be pleased to issue such further orders as it may deem in the interests of justice.**
>
> **(6) THAT the costs of this Application be in the cause."**

The application which was premised upon **Section 1A & 1B and 3 & 3A** of the **Civil Procedure Act, Order 10, rule 11 and Order 51 Rule 1** of the **Civil Procedure Rules;** and **Article 159(2)** of the **Constitution of Kenya 2010** and all other enabling provisions of the law, was supported by the affidavit of even date sworn by **VIVIENNE EYASE**, an Advocate of the High Court of Kenya practicing in the firm of **Kimondo Gachoka & Company Advocates**.

(2) The Respondent **ROOFSPEC AND ALLIED WORKS CO. LTD** filed their Grounds of Opposition dated **24th September 2018**. Pursuant to directions given by the Court the application was disposed of by way of written submissions. The Defendant/Applicant filed their written submissions on **24th October 2018** whilst the Plaintiff/Respondent filed their written submissions on **1st November 2018**.

BACKGROUND

(3) The Plaintiff on **16th May 2013** filed the instant suit simultaneously with an Application of even date seeking orders of injunction. The Defendant/Applicant filed their Memorandum of Appearance on **19th July 2013**, concurrently with a Chamber Summons Application dated **18th July 2018**, seeking a stay of proceedings and a referral of the matter to Arbitration. That application was heard on its merits and by a ruling delivered on **18th December 2014** the **Hon Lady Justice Jackie Kamau** dismissed the same. On **24th April 2015** interlocutory judgment was entered as against the Defendant/Applicant in default of defence. Thereafter on **23rd May 2016** the Plaintiff/Respondent filed an Amended Plaint and the matter proceeded for Case Management with a view to setting a date for formal proof hearing. It was at this point that the Defendant/Applicant filed the present application seeking to set aside the interlocutory judgment of **24th April 2015.**

(4) It was submitted for the Defendant/Applicant that the interlocutory judgment was irregular as the Applicants had only entered appearance for the purpose of having the matter referred to arbitration and as such it was not necessary to file a defence. It was further submitted that following the filing of an Amended Plaint on **23rd May 2016**, the Defendant/Applicant filed their defence on **28th June 2016**, which defence raised triable issues. That no prejudice will be suffered if the interlocutory judgment is set aside and the matter proceeds to hearing on its merits, and that the present application has been brought without inordinate delay. Finally it was submitted that the Defendant/Applicant has a right to be heard and ought not be denied the opportunity to present his case except as a last resort.

(5) The Plaintiff/Respondent on their part submits that the interlocutory judgment entered was regular, lawful and justified given the circumstances. That the failure by the Defendant/ Applicant to file their defence resulted purely from laches which is not excusable in law.

(6) The Respondent submitted that the Defendant/ Applicant entered appearance and filed the Chamber Summons dated **18th July 2013**. That the Defendant/ Applicant participated actively in the hearing of said Chamber Summons but apparently saw no need to file a defence to the suit. That the Defendant/Applicant despite being fully aware of the existence of the suit as well as the ruling delivered on **18th December 2014** in which the court determined that it had jurisdiction to hear and determine the matter, still failed to file any defence until **28th June 2016**, more than eighteen (18) months down the line. The Plaintiff/Respondent argued that their Amended Plaint filed on **23rd May 2016** did not amount to a new suit. Accordingly the defence filed on **28th June 2016** after entry of interlocutory judgment was null void and of no consequence. It was submitted that the Defendant/ Applicant having entered appearance in the suit cannot claim that they had not been served with a summons to enter appearance as such a position would be illogical.

ANALYSIS AND DETERMINATION

(7) Having carefully considered the rival submissions filed in this matter together with the relevant statute law and case law I find that two main issues arise for determination:-

(i) Was the interlocutory judgment entered on **24th April 2015** regular?

(ii) Do valid ground exist to set aside said interlocutory judgment?

Interlocutory Judgment

(8) It is admitted by all parties that after this suit was filed on **19th May 2013**, the Defendant/Applicant entered appearance in the matter on **19th July 2013**. The Applicant contends that they were never served a summons to Enter Appearance. This allegation is not however factually correct. The purpose of a summons is to alert the Defendant of the existence of the suit and to invite the Defendant to enter appearance and to file a defence. A look at the record reveals that in fact a summons to Enter Appearance dated **20th May 2013** was taken out and I have no doubt that it was on the basis of service of this Summons that the Defendant entered appearance in the matter. The Applicant concedes that it did receive the pleadings in this matter and this is what prompted them to enter appearance in the matter. In light of this concession the Applicant cannot be heard to argue that they did not receive summons in the matter.

(9) I am not persuaded by the Applicants argument that it only entered appearance for purposes of seeking a referral of the matter to arbitration. A party does not enter appearance only for a specific purpose. The purpose of entering appearance is to deal with all matters arising from the suit in question. It is clear that the Memorandum of Appearance was filed in response to a summons to enter appearance which means that the Applicant was at all times fully aware of the existence of this suit.

(10) In **JAMES KANYITTA NDERITU & Another –VS- MARIOS PHILOTAS GHIKAS & Another [2016]eKLR**, the Court of Appeal in propounding what amounts to a regular default judgment held as follows:-

> **"In 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 appearance or to file defence, resulting in default judgment."**

These are precisely the circumstances of this case. The Defendant/Applicant was served with a summons, did enter appearance but for reasons best known to themselves failed and/or neglected to file a defence. The argument that the Applicant only filed appearance in order to prosecute the Chamber Summons seeking to refer the matter to arbitration does not hold water. The law does not envisage different types of appearances. One does not enter appearance only for a specific purpose.

(11) The Defendant/Applicant did not file any defence prior to **24th April 2015** when interlocutory judgment was entered. They only purported to file their defence on **28th June 2016**, almost fourteen (14) months **after** interlocutory judgment had already been entered against them. Accordingly I find that the interlocutory judgment of **24th April 2014** was regular and was properly entered.

Merits of this application to set aside the interlocutory judgment

(12) **Order 10 Rule 11** of the Civil Procedure Rules, 2011 provide that:-

> **"Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

The Respondent contends that the application as drawn is fatally defective given that it seeks the setting aside of an ex-parte judgment which

does not exist. The correct position is that the impugned judgment is an interlocutory judgment entered in default of defence. In my opinion this is not an error which can be deemed fatal. By virtue of **Article 159 (d)** of the **Constitution of Kenya 2010**, courts are exhorted to administer substantive justice without undue regard to technicalities. The above is a mere technicality and does not in my view render the present application fatally defective.

(13) The interlocutory judgment in this case was entered on **28th April 2015**. It was not until **28th June 2016** that the Defendant filed a defence. The Defendant was fully aware of the existence of this suit. They filed and prosecuted the Chamber Summons dated **19th July 2018**. The Defendant had more than ample time from the time this suit was instituted to file their defence if they so wished. I can only agree with the Respondent that the Defendant is guilty of laches in failing to file their defence in good time. The fact that the Applicant was seeking to have the matter referred to arbitration did not preclude them from filing a defence as the two are not mutually exclusive. In **ORION EAST AFRICA –VS- MUGANA FARMERS CO-OPERATIVE UNION LIMITED & Another 2015 eKLR** it was held:-

> **"….Default judgment should not be set aside where there was unexplained, unreasonable delay in applying to set it aside."**

In this case there has been a delay of close to one and a half years in bringing this application. No reason has been advanced for that delay despite the Applicant being fully aware of the default judgment.

(14) Having so found the next question is whether the default judgment should be set aside. Notwithstanding finding of laches on the part of the Defendant, the Court has an obligation to exercise its discretion judiciously in order to dispense justice to both parties. Each case must be evaluated on its own unique facts and circumstances. The Court is called upon to consider whether the Applicant will be prejudiced if denied an opportunity to be heard on merit. The Applicants defence must be interrogated to assess whether it raises any triable issues. In **PATEL – VS- E.A CARGO HANDLING SERVICES LTD 1974 E.A 75** it was held:-

> **"That where there is a regular judgment as is 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 the merits 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.**

Likewise in **TREE SHADE MOTORS LTD –VS- DT DOBIE & ANOTHER 1995 – 1998 E.A 324** the Court held that:-

> **"Even if service of summons is valid; the judgment will be set aside if defence raises triable issues…where the Defendant showed a reasonable defence on the merits the Court could set the ex-parte judgment aside."**

(15) Therefore the fact that the judgment entered was regular, and the finding that they was delay in bringing the application to set aside that default judgment does not preclude the court from exercising its discretion in favour of the Applicant as long as the defence is found to raise triable issues. I have perused the statement of defence filed in this matter on **20th June 2016**. I am satisfied that it raises triable issues which merit consideration by the Court in order to reach a just and a fair determination.

(16) I am also mindful of the fact that on **23rd May 2016** after entry of the interlocutory default judgment the Plaintiff purported to file an Amended Plaint without the leave of the court. Counsel appearing for the Plaintiff sought for time to take instructions on whether to withdraw the Amended Plaint. This was never done**.** All in all the circumstances of this case favour the setting aside of the default judgment. I am fortified in this finding by the case of "**SEBEI DISTRICT ADMINISTRATION –VS- GASYALI & ANOTHER [1968]**, **E.A 300** in which the High Court of Uganda sitting at Mbale observed:-

> **"In my view the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or 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 <u>I think it should always be remembered that to deny the subject a hearing should be the last resort of a court</u>. 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 be permitted to defend…"** [emphasis supplied]

Based therefore on the foregoing I do hereby set aside the judgment in default entered on **24th April 2015** and give orders as follows:-

(a) That the Plaintiff serve the Defendant with their Amended Plaint dated **23rd May 2016** within 7 days hereof.

(b) That the Defendant to file and serve their defence to that Amended Plaint within 7 days of service.

(c) The Respondent is awarded throw away costs of **Kshs.30,000/=** (Thirty Thousand Shillings only).

(d) If orders (a), (b) and (c) above are not complied with the order setting aside the interlocutory judgment shall be vacated forthwith and the matter shall proceed for formal proof on the base of the Plaint filed on **16th May 2013**.

(e) The Applicant shall meet the costs of this application.

(f) Mention on **26th April 2019** in order to confirm compliance.

Dated and Delivered in Nairobi this 5th day of April 2019

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Justice Maureen A. Odero