



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO 294 OF 2015

ENVIRONMENTAL SOLUTIONS LTD.....PLAINTIFF

-VERSUS-

MAASAI MARA UNIVERSITY.....DEFENDANT

RULING

By a Notice of Motion application dated 29th June 2018, brought under the provisions of **Article 2(4), 25(C), 48, 50 and 159(2) (d) of the Constitution; Section 1A and 1B of the Civil Procedure Act cap 21 of the Laws of Kenya; Order 10 Rule 11 of the Civil Procedure Rules 2010;** the Applicant sought orders that;

- a) Pending the hearing and determination of this application the Court herein to stay execution of the default judgment dated 27th April 2018, the decree dated 27th April 2018 and the warrant dated 14th June 2018;*
- b) Pending the hearing and determination of this application the Court herein to issue orders of temporary injunction restraining the Plaintiff and Cleverline Auctioneers from selling by auction or disposing of in anyway whatsoever any of the Defendant's property in purported execution of the default judgment and decree both dated 27th April 2018;*
- c) This Court to set aside the default judgment and decree both dated 27th April 2018 entered against the Defendant to pave way for the hearing and determination of the Defendant's preliminary point of law seeking for stay of the suit pending arbitration.*

DEFENDANT'S SUBMISSIONS IN SUPPORT OF THE APPLICATION

1. The Defendant submitted that on 25th May 2018 the Defendant received a notice of entry of judgment from the Plaintiff informing it that Judgment had been entered against it in default of defence for **Kshs 76,280,000/-** plus costs and interest. The Defendant through its Advocates tried to trace the file in the court Registry and it was only on 26th June 2018 that the Defendant was able to trace the same. It is upon perusal of the file that the Defendant learnt that Default Judgment had been entered against it despite the fact that; the application for Default judgment had never been served upon it; secondly, there was a pending preliminary point of law on jurisdiction that was yet to be heard and determined and most importantly, the Defendant had already filed a defence way back on 23rd July 2015.

2. Through this default judgment, the Plaintiff was awarded a total of **Ksh 103,803,391.30**. The Defendant contends that the Default judgment dated 27th April 2018 was obtained through material misrepresentation of facts as there was indeed a defence on record dated 23rd July 2015 together with a list of witnesses and list of documents. The Defendant contends that the Default Judgment purports to enforce a non-existent contract as the Contract that was entered into by itself and the Plaintiff was for **Ksh 337,000.00** and not the alleged **Ksh 76,380,000/-** more fundamentally, the Defendant contends that the Default judgment was entered contrary to public policy and public procurement guidelines which prohibit variation of contract sum which was **Ksh 337,000.00**. The Default judgment plus interest is **Ksh 103,803,391.30**. That is **30,802.19 %** of the contract price.

3. This prompted the filing of this application on 29th June 2018 and the Justice Maureen Odero issued the following orders *ex-parte*:

“That orders of temporary injunction be and is hereby issued restraining the Plaintiff and Cleverline Auctions from selling by auction or disposing of in anyway whatsoever any of the Defendant's property in purported execution of the Default Judgment and decree both dated 27th April 2018 pending the hearing of this application...”

4. When the parties appeared before court, the Plaintiff conceded to the application as there was indeed the defence dated 23rd July 2015 on record. However, the Plaintiff asked that it be awarded the costs of this application. Therefore; the only issue pending for determination is which party should be awarded costs.

5. It is a principle of law that costs follow the events. Having conceded to the Default judgment being set aside then it is the Plaintiff to pay the Defendant costs. In ***Kenya Power & Lighting Company Ltd –vs- David Obare Omwoyo t/a Omwoyo Auctioneers [2019]eKLR***, Maina J. held as follows in his judgment:

“whereas it is correct that rule 7 of the Auctioneers Rules, 1997 places the burden of payment of auctioneers charges upon the judgment debtor and does not make provisions for exceptions, I am of the view that it would be unjust to expect a defendant to do so in certain circumstances. This case is a classic example of such cases. In this case; the judgment giving rise to the auctioneer’s charges was set aside on account of irregular service. That judgment was therefore annulled the moment the defendant, now the appellant, met the conditions that were imposed by the court for setting aside the judgment. It would therefore be unjust to, for now, to order the appellant to meet the costs of those proceedings given that no blame was placed upon it for the irregular service and it is not yet possible to determine whether the case against the appellant will succeed.”

6. In this case; the default judgment was occasioned by material misrepresentation of facts by the Plaintiff to the Deputy Registrar. The Defendant had filed its Defense and it was plainly wrong to attempt to steal a march by misrepresenting to the Deputy Registrar that the same had not been filed. It is due to this fact that defense was on record that the Plaintiff in fact conceded to the default judgment being set aside. Owing to the fact that the default judgment dated 27th April 2018 has been set aside in entirety then there is no way that the Defendant can now be condemned to pay the Auctioneer’s fees. The Defendant has succeeded in having the default judgment set aside and should therefore be awarded costs and costs follow the event.

There’s no judgment and therefore the prayer for auctioneer’s costs is premature.

PLAINTIFF’S SUBMISSIONS AGAINST THE APPLICATION

1. The Plaintiff sought Interlocutory judgment against the defendant due to failure to file Defense which was entered after ascertaining that no Defense was filed.

2. By the application filed on 29th June 2018, the Defendant sought that the Interlocutory judgment be set aside as there was a Defence filed on 23rd July 2015 albeit filed in High Court Civil Division of the High Court whereas the matter was/is filed in Commercial Division of the High Court. The Defence was not in the Court file but was placed in the Court file later.

3. At the time; judgment had already been entered and the execution process commenced; Auctioneer who acted on instructions attached Defendant’s goods and hence Professional fees are due and owing. The Court should determine who is liable to settle costs and Auctioneers fees.

4. Secondly, the Plaintiff relied on the following grounds;

a) once the default judgment was entered, the decree was extracted and on 25th May 2018 notice of entry of judgment was served to the Defendant;

b) Warrants of attachment were issued on 14th June 2018 and Proclamation Notice and was issued on 25th June 2018;

c) The Plaintiff’s Replying affidavit to the Defendant’s application to strike out the suit filed on 6th April 2018, it was deposed in paragraphs 4 & 7 that the Defendant did not file Defense and hence the Interlocutory judgment entered;

d) The Defendant did not serve the Plaintiff with the copy of Defense nor write to Counsel for the Plaintiff; that the Defense was inadvertently been filed in the wrong Court.

For these reasons the Defendant ought to settle the Auctioneers fees.

DETERMINATION

The Court considered submissions by parties on the twin issues of Auctioneers Fees and Costs pending for determination after concessions of most of the issues raised in the instant application filed on 29th June 2018.

The Defendant/Applicant sought stay of execution of default judgment of 27th April 2018, an injunction against the plaintiff & Cleverline Auctioneers to restrain them from disposal of Defendant’s assets. Secondly, that the default judgment be set aside and the matter proceeds for hearing first on the subsisting Preliminary Objection.

A perusal of the Court file discloses the following; the plaintiff filed Plaintiff on 17th June 2015. The Defendant entered appearance on 9th July 2015. The Defendant filed Defence under Protest on 23rd July 2015 albeit in the wrong Division; Civil Division as per the Court stamp

instead of Commercial Division.

Apparently, as submitted by Plaintiff through Counsel, the Defence though filed was not placed in the Court file and they were not served with a copy of the same. This fact is confirmed by correspondence from Plaintiff's Counsel to Deputy Registrar housed in the Court seeking entry of judgment which was complied with. By letters dated 7th & 27th September 2017 by Plaintiff's Counsel on request for entry of judgment in default it is noted that by virtue of **Order 10 Rule 10 CPR 2010** the judgment was entered. In the subsequent letter, the Deputy Registrar noted that appearance was entered but no defence was filed by Defendant and there was a pending application for striking out the suit/Plaint filed by the Defendant. The parties were directed to seek directions from the Judge and from the record they did not do so. Further, Notice of judgment was served to the Defendant.

From the above chronology, the Plaintiff was entitled to pursue default judgment as the Defendant who filed Defence it was not in the Court file at the time request for judgment was made and granted.

However, what concerns this Court is that on the one hand after the Court dismissed the Defendant's application to strike off the suit vide Ruling of 11th April 2018, the Plaintiff through advocates on record Messrs Kihara & Wayne Advocates sought execution of decree of the Interlocutory judgment. The Decree was issued on 27th April 2018 and warrants of attachment and Proclamation were also issued on 14th & 25th June 2018 respectively.

Yet from the oral submissions by Prof. Ojienda on 22nd May 2019, he submitted and produced a copy of Reply to Defence filed on 10th August 2015 by Plaintiff through Counsel on record then; Messrs Nyamu & Nyamu Advocates and served to the Defendant's Counsel On 12th August 2015.

Subsequently; as evidenced in the Court file pretrial case management was undertaken by the Plaintiff's advocate on 18th February 2016 when Plaintiff's List of issues for determination & Pre-Trial Questionnaire were filed by Messrs Nyamu & Nyamu Advocates for the Plaintiff. The paradox is how would parties participate in hearing and determination of the Defendant's application of 6th January 2017 for striking out of the suit and in the Pre –Trial Proceedings without interrogating the issue of filing of Defence? How would parties in the same suit/Court file simultaneously pursue execution proceedings on the basis of an Interlocutory judgment and also Pre-Trial Processes? If execution of the judgment was complete what would remain for hearing and determination?

All these questions point to several issues and circumstances beyond control; The Plaintiff's advocates were Nyamu & Nyamu Advocates from inception of the suit upto when the Notice of Change of Advocates was filed on 21st July 2017. Interestingly, the plaintiff did not acquaint itself with the progress of the case i.e that the Defence was filed and served to former Advocates who in turn filed Reply to Defence. The present advocates were not aware of this fact and hence pursued interlocutory judgment and execution.

From these facts, the plaintiff ought to have familiarized itself with progress of the case and issue proper instructions to new Counsel on the matter. Similarly, new Counsel may have exercised due diligence on the case so far so as to avert parallel activities in the same matter.

Although, the Defendant filed inadvertently the Defence in High Court Civil registry instead of High Court Commercial Division; the former Plaintiff's advocate seem to have been aware of the Defence filed on 23rd July 2015 and therefore filed and served Reply to Defence on 10th August 2015 and served Defendant's advocate Prof Ojienda and thereafter commenced Pre-Trial processes as confirmed from the Court. In the circumstances the buck stops with the Plaintiff.

DISPOSITION

- 1. The application filed on 29th June 2018 which is already compromised by parties consents is granted.**
- 2. The Auctioneers Fees and Costs of the application shall be borne by the Plaintiff who through different Counsel occasioned parallel proceedings culminating to the irregular execution of default judgment.**
- 3. The matter to be set down for hearing of the pending Preliminary Objection on a date to be obtained from the Registry.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 20TH SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

COUNSEL FOR THE PLAINTIFF

MR. OCHIENG FOR DEFENDANT

MS JASMINE – COURT ASSISTANT