REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E064 OF 2019

R.J. VARSANI ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

CHELSEA HOLDINGS LIMITED.....1ST DEFENDANT

COSMOCARE LIMITED.....2ND DEFENDANT

INNOVATIVE PLANNING & DESIGN CONSULTANTS.....3RD DEFENDANT

TRIDENT ESTATES LIMITED.....4TH DEFENDANT

TOWER COST CONSULTANTS LIMITED.....5TH DEFENDANT

RULING

1. The defendant/applicant herein filed the application dated 10th June 2019 seeking orders to set aside the exparte judgment and all consequential orders entered on 29th May 2019 and for unconditional leave to file a defence in the suit. The application is brought under Article 159 of the Constitution and Orders 10 Rule 11, and Order 22 Rules 22 and 25 of the Civil Procedure Rules.

2. The application is supported by applicant's advocate's affidavit sworn on 10th June 2019 and is premised in the grounds that upon receiving instructions, from the defendant, the advocates filed the Memorandum of Appearance but did not file a defence within the prescribed timelines as the advocate having the conduct of the case was taken ill. The applicant's deponent explains that the said advocate subsequently left employment before filing the defence and that it was only after the defendant's advocates were served with the Notice of Entry of Judgment on 4th June 2019 that they perused their file and noted that the statements of defence had been drafted but was not filed in court.

3. The applicant attributes the failure to file the defence within the stipulated period to the advertent mistake of the advocate who had the conduct of the case and states that the instant application has been brought without delay.

4. The plaintiff/respondent opposed the application through its Managing Director's (**Ravji Jadva Varsani**) replying affidavit sworn on 17th June 2019 wherein he avers that the instant application is yet another game being played by the defendants in order to ensure that the plaintiff is not paid its money that has been due for a very long time.

5. The plaintiff's deponent faults the applicant for failing to name the advocate who allegedly fell ill thereby leading to the delay and/or failure to file the statement of defence on time and further observes that the applicant has not furnished any proof of the alleged illness or the claim that the said advocate left employment.

6. The respondent contends that the applicant has on various occasions sought to defeat justice by delaying its payments and that the intended defence is flimsy and does not raise any triable issues.

7. It is the respondent's case that granting the orders sought in the application will occasion it grave injustice as it will further delay the payment of the sums of money due to it under a contract that it duly executed and whose terms it had performed. The respondent further argues that the respondent is not entitled to the discretionary orders sought.

8. Parties filed written submissions to the application which I have carefully considered. The main issue for determination is whether the

applicant has made out a case for the granting of the orders to set aside the interlocutory judgment entered on 29th May 2019.

9. The law governing the setting aside of exparte interlocutory judgment in default of appearance and defence is Order 10 Rule 11 of the Civil Procedure Rules which stipulates as follows:

> ***"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."***

10. In ***Patel v E.A. Cargo Handling Services Ltd*** *(1974) EA 75* the Court held that:-

> ***"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 on issue which raises a prima facie defence which should go to trial for adjudication.'***

11. Similarly in ***Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) EA 324***, it was held that:-

> ***"Even if service of summons in valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."***

12. Applying the principles enunciated in the above cited cases to the instant case, I find that it is in not disputed that summons to Enter Appearance were served upon the defendants who instructed their advocates on record to act for them in the matter. Indeed, it was shown that two Memorandums of Appearance were filed on 18th and 22nd April 2019. The applicant's advocate's however claim that the statement of defence, a draft copy thereof which they attached to the affidavit in support of the application as annexure "WD-2", was not filed within the prescribed time or at all due to the illness and subsequent resignation of the advocate who had the personal conduct of the case and that they only became aware of the entry of judgment when a notice of such entry was served upon them on 4th June 2019.

13. The respondent on the other hand argues that this application is once again one of the many games that have been employed by the defendants whom it accuses of deliberately delaying the payments that are due to it.

14. Looking at the facts of this case however, it did not escape the attention of this court that the defendants instructed their advocates, in good time, to enter appearance on their behalf and to file a defence. Indeed, Memorandums of Appearance, as I have already noted in this ruling, were filed on 18th and 22nd April 2019. The applicant's advocates have also conceded that the delay in filing the defence was due to an inadvertent mistake on the part of the counsel who had the conduct of the case.

15. In the circumstances therefore, this court is of the view that the applicant cannot be held responsible for the mistake of his advocates. I find that the court has the discretion to grant orders to set aside ex parte judgment on condition that such discretion is exercised judiciously. In ***CMC Holdings Limited v Nzioki*** [2004] 1 KLR 173 it was held that:

> ***"That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."***

16. Further, under the overriding objective in Sections 1A and 1B of the Civil Procedure Act, this Court is enjoined to ensure that there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties. Under the said objective, it has been held that the challenge to the Courts is to use the new *"broom"* of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible. See ***Stephen Boro Gitiha v Family Finance Building Society & 3 Others*** Civil Application No. Nai 263 of 2009 and ***Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 Others*** [2013] eKLR.

17. Taking a cue from the above cited decisions and the duty imposed on the court to exercise its discretion judiciously, this court is also of the view that the respondent's position that the instant application is a deliberate attempt to delay the payments due to them cannot be said to be far-fetched. I say so because if indeed the respondent's advocate who had the conduct of the case fell ill and left the law firm, nothing could have been easier than for the applicants' advocates to furnish the court with proof of the advocate's illness and resignation as a demonstration of good faith so as to allay the respondent's fears that this application is yet again one of the many delaying tactics that have all along been employed by the defendants/applicants in order to frustrate their claim.

18. A perusal of the defendants draft defence however shows that it raises several triable issues including the claim that the defendants were not party to any contract with the plaintiff.

19. Having regard to the rival positions taken by the parties herein and taking into account the respondent's claim that the applicant is hell bent on delaying the realization of its payments under the contract, I am of the view that this is a matter where the court should set aside the interlocutory judgment but on condition that part of the claimed amount be deposited in court so that both parties can be at the same level and

have the impetus to conclude the matter within the shortest time possible.

20. For the above reasons and observations, I allow the instant application in the following terms:-

> ***a) The exparte judgment entered on 29th May 2019 and all consequential orders are hereby set aside but on condition that the defendant jointly and severally deposit in court the sum of Kshs 10 million within 30 days from the date of this ruling failure to which the order setting aside the exparte judgment shall be vacated and the judgment reinstated.***
>
> ***b) The defendants shall file and serve their statement of defence within 14 days from the date of this ruling.***
>
> ***c) The costs of this application to be paid to the respondent.***

Dated, signed and delivered in open court at Nairobi this 30th day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Aguko for the plaintiff/respondent

Mr. Wachira for the defendant/applicant

Court Assistant – Sylvia