REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 53 OF 2016

BLUEBIRD AVIATION LIMITED.....APPELLANT

VERSUS

MSI AIRCRAFT MAINTENANCE

INTERNATIONAL GMBH AND CO.KG .....RESPONDENT

(Being an appeal from the ruling and / or orders of the Chief Magistrate's Court at Milimani, Hon. Racheal Ngetich dated and delivered on 22nd January 2016 in CMCC No. 1486 of 2014)

JUDGMENT

The respondent filed a suit against the appellant in the lower court claiming a sum of USD 78,322.47 plus costs and interest being the sum due and owing in respect of services and parts supplied at the request of the appellant. Despite demand made that sum remained unpaid by the time the suit was filed. Following service of Summons to enter appearance the appellant filed a notice of preliminary Objection on the basis that the suit was defective, bad in law, incompetent, lacking in substance and offended the mandatory provisions of statute and therefore should be struck out on the basis that it was filed by a party without legal capacity and locus standi.

The other reason advanced was that the suit was incompetent as it was filed in total disregard of order 4 and more specifically rule 2 thereof of the Civil Procedure Rules. Subsequently, the respondent applied for interlocutory Judgment which was entered and a notice thereof served upon the appellant. The appellant then filed an application to set aside the default judgment and annexed a draft statement of defence to that application.

In a ruling dated 22nd January, 2016 the lower court dismissed the application which prompted the present appeal. in the memorandum of appeal filed on 11th February, 2016 the appellant complained that the lower court erred in law and fact in holding the appellants defence was an afterthought aimed at denying the respondent the fruits of successful litigation, and by determining the success and merit of the defence at the interlocutory stage of hearing the application where no evidence could be adduced. The lower court was also felted for failing to follow the principle of broad equity that the main concern of the court is to do justice to the parties and not to impose discipline and that there is no error of default that cannot be put right by payment of costs. Further the lower court was faulted for failing to consider that the defence raised triable issues.

Other issues raised in the memorandum of appeal included the failure to apply the approach that the court discretion in setting aside an ex-parte judgment is intended to avoid injustice or hardship resulting from excusable mistake or error. The lower court had observed that the preliminary objection was filed after the request for judgment and no sufficient explanation was given for failure to file a defence.

The appellant also complained that it was condemned unheard contrary to rules of natural justice and finally that the notice of preliminary objection raised points of law on the capacity of the respondent to institute the suit which goes to the core of the entire suit.

Both parties shave filed submissions and cited some authorities which I have noted. I am required to examine, reconsider and evaluate the lower court record with a view to arriving at independent conclusions which I have done.

The appellant may have committed a strategic miscalculation by filing the notice of preliminary objection. That notice from the record was never prosecuted. That notwithstanding the application leading to the ruling of the court which promoted this appeal has been at the centre of the argument in the submissions and it is important therefore to address a few issues raised therein.

There is no dispute that the appellant was served with summons to enter appearance and file a defence. Indeed the memorandum of appearance was filed on 17th April, 2014. The notice of preliminary objection was filed on 27th May, 2014 but by then the respondent has filed a request for judgment. That does not mean that the notice of preliminary objection was incompetent.

In the argument to set aside the *exparte* judgment counsel for the respondent submitted that the failure to file a defence was a deliberate choice and there was no inadvertence or excusable mistake or error on the part of the defendant who is the appellant herein. Father it was the position of the respondent that the defence was a sham only meant to delay and obstruct justice and thereby deny respondent the fruit of that judgment.

Counsel then made observation targeted at paragraph 5, 8 and 9 of the said defence and concluded that the application should be allowed. The court was drawn into some conclusions I believe at the instance of the respondent submissions and addressed the merits of the defence and concluded that there was no reason to disturb the judgment already entered.

From the reading of the said ruling, it is clear that if the respondent's claim was a liquated sum that required no explanation, the submission by the respondents counsel and the court's interpretation of the pleadings, clearly showed evidence was required to prove the respondent's claim. It should be noted that by the time the application to set aside the default judgment was being argued, there was already a draft defence on the record to guide the court on the merits or otherwise.

I have perused that draft defence. It is clear without saying much that several triable issues stand out which ought to have been interrogated by way of a trial. Whereas it is true that the appellant defaulted in failing to file a defence in time, its quest to challenge the respondent's suit was manifested in the entering of appearance and raising a notice of preliminary objection followed by the draft defence.

This court would rarely interfere with the discretion of the lower court unless it is shown the said discretion was exercised to the prejudice of the other party. A party who expresses the desire to be heard should not be driven from the seat of justice unless the omission complained of causes prejudice to the other. The appellant has demonstrated that it should have its day in court.

Following the application for stay of execution a substantial party of the sum claimed was ordered to be deposited in a joint interest account in the names of both advocates. Compliance thereof is a clear demonstration that the appellant is determined to have its day in court.

I have considered the issue of prejudice. If the respondent eventually succeeds in proving its case, interest will be ordered on the sum claimed. No prejudice therefore is likely to be visited upon the respondent. If anything if it is true the appellant owes the respondent then this is a case of postponing an obvious eventuality but then the rights of the parties should be upheld.

In my view an order for costs should have influenced the court to allow the appellants application when it was presented. I am persuaded that this appeal be allowed. It is so ordered. However, the appellant shall pay the costs of the appeal to the respondent. The lower court file shall be remitted for hearing before another magistrate of competent jurisdiction provided that the draft defence is regularised by payment of the filing fees and service upon the respondent and compliance with Order 11 of the Civil Procedure Rules.

Dated, signed and delivered at Nairobi this 21st Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE