



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION MILIMANI**

**CIVIL CASE NO. 383 OF 2017**

**PADDY DISTRIBUTORS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PADDY KENYA LIMITED.....2<sup>ND</sup> PLAINTIFF**

**NAKURU CEMENT SUPPLIERS.....3<sup>RD</sup> PLAINTIFF**

**PATRICK NGUNVE.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**BAMBURI CEMENT LIMITED.....DEFENDANT**

**RULING**

By an Application dated 25<sup>th</sup> April 2018 and filed on 14<sup>th</sup> May 2018, the Plaintiffs sought orders that: -

1. This court be pleased to issue an order setting aside the decree issued on 17<sup>th</sup> January 2018 against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs;
2. This court be pleased to give leave for the Plaintiffs to file Defence to the Counterclaim by the Defendant; and
3. Costs of this Application be provided for.

The Application is based on the following grounds and on the Supporting Affidavit of Patrick Ngunve Kamande: -

1. That though time had been granted to defend the counterclaim, the Plaintiffs' advocate had difficulty accessing the 4<sup>th</sup> Plaintiff, Managing Director of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff, who was to give fresh instructions so as to enable the advocate to respond to the counterclaim. The 4<sup>th</sup> Plaintiff was not available as his wife and child had been hospitalized at Aga Khan Hospital; and
2. That the Defendant will not suffer any prejudice by setting aside the decree pending the hearing of the main suit.

The Defendant responded to the Application by filing a Replying Affidavit dated 4<sup>th</sup> July 2018. The Defendant opposed the Application stating that the allegation of 4<sup>th</sup> Defendant's family being hospitalized is wholly unsupported by documentation evidencing the said hospitalization in Aga Khan Hospital. Furthermore, the Defendant stated that the 4<sup>th</sup> Plaintiff did not indicate how long the hospitalization lasted so that the court could assess whether indeed the hospitalization would justify the failure to file a Defence as from 30<sup>th</sup> October 2017 when the counterclaim was served upon the Plaintiffs until the 17<sup>th</sup> January 2018 when Default Judgment was entered.

Further, the Defendant stated that a response to the counterclaim was to be filed within 15 days of serving the counterclaim which time would have ended on 14<sup>th</sup> November 2018 and the alleged hospitalization occurred in the month of December.

The Defendant went ahead to state that there is a pattern of laxity in the Plaintiffs' part when it comes to complying with procedure and time lines. The Plaintiffs were granted leave to file the Application on 19<sup>th</sup> February 2018, yet the Application dated 25<sup>th</sup> April 2018 was filed almost three months later on 16<sup>th</sup> May 2018 and was served on the Defendant more than a month later on 26<sup>th</sup> June 2018.

Further, the Plaintiffs' Application is filed on the basis of the wrong provisions of the law i.e. **Order 40 and 42 of Civil Procedure Rules.**

The Defendant further opposed the Application on the ground that the Plaintiffs have also taken the liberty of filing the very same Defence they seek to be allowed to file in breach of **Order 36 rule 4** Civil procedure Rules and thus, the said Defence to Counterclaim filed on 14<sup>th</sup> May 2018 ought to be struck out *suo motto* without the need for an application to that effect by the Defendant. Even if the court were to allow the irregularly filed Defence to Counterclaim, it raises no triable issues and is a mere sham defence of four vaguely worded paragraphs.

It was thus the Defendant's prayer that the court does not allow the Application dated 25<sup>th</sup> April 2018 because it is defective both in form and in substance. In the alternative, should the court allow the Application, the Defendant urges the court to order the Plaintiffs to deposit the amount of Kshs. 5,024,725.46 claimed in the counterclaim.

In its Defence, the Defendant raises a counterclaim against the 2<sup>nd</sup> Plaintiff for the sum of Kshs. 4,385,131.24 and against the 3<sup>rd</sup> Plaintiff Kshs. 639,594.22 which sums are arrived at as follows:

- a. For the 2<sup>nd</sup> Plaintiff, the amount of Kshs. 29,385,131.24 was due for cement supplied by the Defendant and which the 2<sup>nd</sup> Plaintiff failed and/or refused to pay to the Defendant leaving the Defendant to call in the bank guarantee for the sum of Kshs. 25,000,000 leaving a shortfall of Kshs. 4,385,131.24 as unpaid.
- b. For the 3<sup>rd</sup> Plaintiff, the amount of Kshs. 25,639,594.22 was due for cement supplied by the Defendant and which the 3<sup>rd</sup> Plaintiff failed and/or refused to pay to the Defendant leaving the Defendant to call in the bank guarantee for the sum of Kshs. 25,000,000 leaving a shortfall of Kshs. 639,594.22 as unpaid.

The Defendant therefore avers that the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs are in breach of their distributorship agreement with the Defendant and for which breach the Defendant has suffered loss.

The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs having been duly served with Defence and Counterclaim, failed to enter appearance and/or file Defence within the stipulated time. The Defendant thus filed an Application dated 30<sup>th</sup> November 2017 requesting for Judgment. The Deputy Registrar issued the decree on 17<sup>th</sup> January 2018.

On 14<sup>th</sup> May 2018, the Plaintiffs filed a Notice of Motion dated 25<sup>th</sup> April 2018 for orders that this court sets aside the aforesaid decree and to be given leave to file Defence to the Counterclaim.

On the same day, the Plaintiffs filed a Defence to Counterclaim dated 25<sup>th</sup> April 2018 which stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs deny in total any claims of Kshs. 4,385,131.24 and Kshs. 639,594.22 respectively. In addition, the Plaintiffs also denied the existence of any bank guarantees as against the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and any breach of the distributorship agreement. It was thus the Plaintiffs' prayer that judgment be entered in favour of the Plaintiffs as against the Defendant as pleaded with costs.

The Defendant responded by filing their Replying Affidavit dated 4<sup>th</sup> July 2018.

### **PLAINTIFFS' SUBMISSIONS**

The Plaintiffs filed their Submissions dated 15<sup>th</sup> March 2019 on 8<sup>th</sup> May 2019.

It was the Plaintiffs' submission that the 4<sup>th</sup> Plaintiff's wife was hospitalized at Aga Khan Hospital and that the child was in child nursery for more than 3 months and it was for this reason that the advocate had not received fresh instructions or directions from the 4<sup>th</sup> Plaintiff hence the delay in filing Defence to the Counterclaim.

Further, it was the Plaintiffs' submission that this court has wide discretion when it comes to granting leave and setting aside any order, decree or ruling but only if sufficient cause is shown to warrant such leave. The reasons advanced by the Plaintiff are on medical grounds. Plaintiffs relied on the case of ***Rogers vsComptoir D Escompts De Paris*** which stated that one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the parties. It was thus the Plaintiffs submission that the reasons given are excusable mistakes, and leave should thus be granted.

### **DEFENDANT'S SUBMISSIONS**

It was the Defendant's submission that the issues for determination are: -

1. Whether there was unjustified undue delay in filing the Defence to Counterclaim;
2. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiff's Application dated 25<sup>th</sup> April 2018 is incompetent and fatally defective considering it is anchored on the wrong provisions of the law and unsupported by unmarked annexures;
3. Whether the Defendant's Defence to Counterclaim dated 14<sup>th</sup> May 2018 is properly on record;
4. Whether the irregularly filed Defence to Counterclaim raises any triable issues;
5. Whether the Plaintiffs are entitled to the equitable orders sought.

On the issue of whether there was unjustified undue delay in filing the Defence to Counterclaim. It was their submission that no documentary evidence attached to the Supporting Affidavit of Patrick Ngunve to support the claim of illness or indicate the length of the hospitalization of the 4<sup>th</sup> Plaintiff's family so that the court could appreciate the 4<sup>th</sup> Plaintiff's predicament.

The Defendant relied on the rule of evidence that **"he who alleges must prove. Section 107 (1) of the Evidence Act.**

The Defendant relied on *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR* which held:

***"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge..."***

Furthermore, the Defendant submits that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are legal persons as envisioned by the Companies Act and as such should have necessary measures to operate as an entity and not as an individual. It was not prudent for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs to halt their operations in light of the 4<sup>th</sup> Defendant's family hospitalization given that the 4<sup>th</sup> Defendant himself was well and healthy.

The statutory period for filing a Defence to Counterclaim is expressly stated under **Order 7 rule 11 CPR** as 15 days after service. The Plaintiffs have been exhibiting lethargy in dealing with this suit. Despite delay in filing their Reply to Defence and Defence to Counterclaim, the court granted them the chances to file the Application since February 2018 and they did not file the same until 16<sup>th</sup> May 2018. The court gave the Plaintiffs three chances to file the said application (19/02/2018, 14/05/2018 and 27/07/2018). It was thus the Defendant's submission that the Plaintiffs have delayed this matter and such delay is unreasonable, inordinate and inexcusable under all circumstances.

On the issue of whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiff's Application dated 25<sup>th</sup> April 2018 is incompetent and fatally defective considering it is anchored on the wrong provisions of the law and unsupported by unmarked annexures. It is the Defendant's submission that the Plaintiff's Application is anchored on **Order 40, Order 42 rule 6 and Order 51 of the Civil Procedure Rules**. The provisions are cited are on Temporary Injunctions and Interlocutory Orders and stay of execution pending appeal. They are not in tandem with the orders sought by the plaintiffs in their Notice of Motion dated 25<sup>th</sup> April 2018. By virtue of the foregoing, the Application is factually defective and cannot stand in totality.

On the issue of the unmarked annexure, the Defendant submits that the Plaintiff failed to mark the annexures to his Supporting Affidavit dated 25<sup>th</sup> April 2018 thus offending **Rule 9 of the Oaths and Statutory Declaration Rules** which provides:

***"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."***

On the issue of whether the Defendant's Defence to Counterclaim dated 14<sup>th</sup> May 2018 is properly on record. It was the Defendant's submission that the Plaintiffs filed their Defence to Counterclaim without leave of the court. The Plaintiffs only came to court latter to seek leave from court just to sanitize their wrong doing.

On the issue of whether the irregularly filed Defence to Counterclaim raises any triable issues. The Defendant avers that **Order 2 Rule 15 (1) (a) of the Civil Procedure Rules** provides for dismissal of an application where the pleadings fail to disclose a reasonable cause of action. It relied on the case of *Blue Sky EPZ Limied -vs- Natalia Polyakova & Another [2007] eKLR* where the court held:

***"The power to strike out pleadings is draconian, and the court will exercise it only clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue."***

The Defendant submitted that the general principle is that if the Defence shows bona fide triable issue, the Defendant should be allowed to defend. However, the substance of the Defence to the Counterclaim in this instant case does not raise bona fide triable issue. It was thus their submission that the Defence to Counterclaim lacks merit and raises no reasonable defence and should thus be struck out.

As to whether the Plaintiffs are entitled to the equitable orders sought. The Defendant relied on **Order 10 rule 4 (2) CPR** which provides:

***"Where the plaintiff makes a liquidated demand together with some other claims and the Defendant fails, or all the defendant fail, to appear as aforesaid, the court shall, on request in Form no. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub rule (1) but the award of costs shall await judgment upon such other claim."***

The Defendant relied on the case of *Shah v. Mbogo & Anor. (1966) EA 116* which set down the criteria for setting aside a judgment as follows:

***"In setting aside judgment, the court must establish: -***

- 1. That there is a reasonable explanation for any delay;***
- 2. That there is a defence on merit;***

### 3. That it is just to do so. “

It was the Defendant’s submission that the court’s discretion to set aside an ex parte judgment should not be used to assist a person who has deliberately sought to obstruct or delay the course of justice which is exactly what the Plaintiffs are doing.

#### **DETERMINATION**

The issues to be determined are: -

1. Whether the default judgment that had been entered was regular.
2. Whether the decree issued on 17<sup>th</sup> January 2018 against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs may be set aside.
3. Whether the court may grant leave to the Plaintiffs to file Defence to the Counterclaim.

#### ***(i) Whether the Default Judgment that had been entered was merited/regular***

Order 7 rule 11 of the Civil Procedure Rules provides:

***“Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.”***

It is thus clear that 15 days passed and defence for the counterclaim was not filed, The defendant applied judgment in default to be entered on 17<sup>th</sup> January 2018. The court was therefore justified to enter default judgment against the Plaintiff upon application by the Defendant since a Reply to Defence and Defence to Counterclaim had not been filed within the prescribed time period.

#### ***(ii) Whether the decree issued on 17<sup>th</sup> January 2018 against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs may be set aside***

Order 10 rule 11 of the Civil Procedure Rules provides:

***“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 criteria for allowing an application for setting aside a default judgment was set out in the case of **James Kanyiita Nderitu & Another - vs- Marios Philotas Ghikas & Another [2016] eKLR** where the court held that:

***“In a 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. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other...”***

The Defence and Counterclaim were filed on 24<sup>th</sup> October 2017 from the Court record, on 10/10/2017, the Plaintiff sought to amend the Plaintiff with leave from Court and was granted 7 days and the Defendant was granted 7 days to file amended Defence. On 3/11/2017 the Court set the matter for hearing on 19/2/2018. On 19/2/2018, the Plaintiff informed the Court that 4<sup>th</sup> Plaintiff had medical cases to attend to; his wife and child were hospitalized. The matter was adjourned to 14/5/2018 by which time the default judgment was entered against the Plaintiffs. The Court granted parties time to file the instant application or enter into a consent.

The explanation given by the Plaintiffs as to why there was delay in filing the Defence to Counterclaim is that, the 4<sup>th</sup> Plaintiff’s wife and child had been hospitalized. As such, the 4<sup>th</sup> Plaintiff was unable to give Counsel instructions as to how he would handle or respond to the counterclaim. However, no documentary evidence was furnished to this court to prove such hospitalization. Furthermore, the 4<sup>th</sup> Plaintiff was well and healthy and should thus have issued instructions to Counsel on record through other means of communication such as telephone or email. Moreover, despite the delay in filing their Defence, the court granted them leave to file the application to set aside the judgment in February 2018 but the Plaintiff filed the same on 14<sup>th</sup> May 2018. From the foregoing, it is clear that the Plaintiffs lack a reasonable explanation as to the delay in filing their Defence to Counterclaim.

On 14<sup>th</sup> May 2018, the Plaintiffs filed their Defence to Counterclaim without leave of court. The questions that then arise are: whether such Defence raises triable issues and as such has merit and whether the Defence to Counterclaim is properly on record?

In **Blue Sky Limited EPZ Limited vs Natalia Polyakova & another [2007] eKLR**, the Court stated that:-

*"In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue."*

The case of Five Forty Aviation Ltd. Vs Trade Winds Aviation [2015] eKLR attempted to define "triable issues". The court stated that:

*"A triable issue does not mean one which will succeed but is a case raising prima facie defence so as to go for adjudication."*

The same was reiterated in the case of Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 where the court held:

*"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN J put it "a triable issue" that is, an issue which raises a prima facie defence and which should go to trial for adjudication."*

In Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324, it was held that:-

*"Even if service of summons is 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."*

Further, in Isaac Awuondo V Surgipharm Limited & Another [2011] eKLR the Court of Appeal had to reiterate the following principles in Moi University V Vishva Builders Limited - Civil Appeal No. 296 of 2004 (unreported) where the Court held:-

*"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."*

Upon reading the Defence to Counterclaim dated 25<sup>th</sup> April 2018, it is clear that the Defence is a mere denial which does not amount to a defence. It thus fails to raise any triable issues.

Having established that the Plaintiffs have no reasonable explanation as to the delay in filing their Defence to Counterclaim and their Defence to Counterclaim failing to raise triable issues, it shall not be just to set aside the Decree issued on 17<sup>th</sup> January 2018.

**(iii) Whether the court may grant leave to the Plaintiffs to file Defence to the Counterclaim**

On 14<sup>th</sup> May 2018, the Plaintiffs filed their Defence to Counterclaim without leave of court. The plaintiffs alleged that they filed because their application was unopposed, no Replying Affidavit was filed. The Replying Affidavit was filed on 4<sup>th</sup> July 2018 way after 14 days to file the same. Their filing of the Defence to Counterclaim negates their request to be granted leave to file the same and as such, orders sought for leave are void.

#### **DISPOSITION**

- 1. The Decree issued on 17<sup>th</sup> January 2018 be upheld;**
- 2. The Application dated 14<sup>th</sup> May 2018 is dismissed with costs;**
- 3. The Defence to Counterclaim dated 25<sup>th</sup> April 2018 is struck out for failure to raise triable issues.**
- 4. Parties to take a hearing date for the main suit from the registry.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 20<sup>th</sup> DECEMBER 2019.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**NO APPEARANCE FOR THE PLAINTIFFS**

**NO APPEARANCE FOR THE DEFENDANTS**

**MS JASMINE – COURT ASSISTANT**