



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 166 OF 2017**

**EFIL ENTERPRISES LIMITED.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ALEX NG'ANG'AT/A ALEX**

**ELECTRICAL SERVICES.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**FLUIDLINE SERVICES LIMITED.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**AIR TRAVEL & RELATED**

**STUDIES CENTRE LTD.....DEFENDANT/APPLICANT**

**RULING**

1. This Ruling relates to a Notice of Motion Application dated 6<sup>th</sup> July 2017, brought under the provisions of Order 10 Rule 11 and Order 51 Rule 1 & 15 of the Civil Procedure Rules, of Kenya and all other enabling provisions of the Law.

2. The Application is seeking for orders that;-

*(i) That the Honourable Court be pleased to stay execution of the ex-parte interlocutory judgment made on the 29<sup>th</sup> June 2017 and all other consequential orders pending the hearing and determination of this suit;*

*(ii) That the ex-parte interlocutory judgment entered on 29<sup>th</sup> June 2017 against the Defendant and all other consequential orders be set aside and/or reviewed and the Defendant be granted unconditional leave to defend this suit;*

*(iii) That the costs of this Application be provided for.*

3. The Application is supported by the grounds thereon and an Affidavit sworn by Francis Ndathe Kimani, an Advocate of the High Court of Kenya, who is in conduct of this matter on behalf of the Defendant. He averred that on or about 20<sup>th</sup> June, 2017, he was instructed by the Defendant (herein "the Applicant") to defend this matter on its behalf. He then filed a notice of appointment on the same day and served it upon the Plaintiffs'/Respondents Advocate.

4. He immediately embarked on preparing the statement of Defence and Counter-claim to file it within the fifteen (15) days as stipulated by the law. That despite the same being a bulky document that required a lot of time, he managed to finalize it on the 4<sup>th</sup> July 2017. However, when the law firm clerk attended the Civil Registry to file the Statement of Defence and Counter-claim, he was informed that the Court file could not be traced and advised to return on 5<sup>th</sup> July 2017, to check if the file would have been traced. On 5<sup>th</sup> July 2017 when the clerk returned to the Civil Registry he learnt that an interlocutory judgment had been requested for on 28<sup>th</sup> June 2017 and entered against the Applicant on 29<sup>th</sup> June 2017.

5. Upon perusal of the Court file, it was evident that the interlocutory judgment was entered based on the affidavit of service, dated 23<sup>rd</sup> June 2017 sworn by Plaintiffs (herein "the Respondents") process server's, one Julius Thiong'o Muchoki's which was attached to the request of

judgment.

6. Subsequently, the interlocutory judgment was entered into in favour of the Plaintiffs as follows:

*(i) A sum of Kshs. 32,226,116.77;*

*(ii) Interest of 10% per annum on the amount in (a) above;*

*(iii) Costs of the suit.*

7. The Applicant argued that it has a good defence and a Counter-claim that raises triable issues and therefore should be accorded an opportunity to be heard and the case to be determined on merit. It was further argued that, by the time the ex-parte interlocutory judgment was entered; fifteen (15) days after the filing of the notice of Appointment on 20<sup>th</sup> June 2017 had not lapsed as the said interlocutory judgment was entered only nine (9) days after the filing of notice. As such it is in contravention of Order 10 Rule 4 of the Civil Procedure Rules and therefore the prayers.

8. The Applicant averred that the matter involves a huge sum of money, to wit, Kshs 32,226,116.77 and the Applicant will be highly prejudicial if the Application is not allowed. It was argued that the Respondents will not suffer any prejudice if the Application is allowed as the case will go to full trial and be determined on merit.

9. However, the Application was opposed vide a Replying Affidavit dated 28<sup>th</sup> July 2017 sworn by Madhusudan Manji Rabadia, a director 1<sup>st</sup> Plaintiff/Respondent. He averred that the suit was filed on 20<sup>th</sup> April 2017 and immediately the summons became available, the Plaintiff's Advocates on record, instructed Mr. Julius Thiong'o Muchoki the Court process server on 7<sup>th</sup> June 2017 to effect service of the summons, Plaintiff and Supporting pleadings upon the Applicant, which instructions were carried out the same day.

10. That the Applicant failed to enter appearance within the requisite 15 days from the date of service as stipulated by Order 5 Rule 1 of the Civil Procedure Rules and file a defence in response to the claim within the time set as required by Order 7 Rule 1 of the Rules whereupon the 1<sup>st</sup> Respondent instructed its Advocates to request for judgment in default, which was duly granted by the Court on 29<sup>th</sup> June 2017.

11. It was argued that the Applicant is truly indebted to the Respondents for the amount claimed in the Plaintiff for various works and services provided to the Applicant under Contract which fact is supported by the Applicant's own annexures relating to the Contract between the parties.

12. The Respondent termed the allegations of purported service of a notice of Appointment dated 20<sup>th</sup> June 2017, upon them as blatantly untrue in that the purported signature and official office stamp on the face of the said document does not belong to their office, the identity of the receiver is unknown, and was never received by them save for service of the current application dated 6<sup>th</sup> July 2017. Consequently, the Applicant is clearly attempting to hoodwink the Court to cover for its own failure to comply with the statutory requirements regarding filing of Court pleadings and/or laches and undue delay on its own part.

13. It was averred that the Applicant has already demonstrated malafides by issuing the Respondents with several bouncing cheques amounting to Kshs 3,578,050.00, thus the partial repayments is aimed at appeasing the Plaintiffs/Respondents into compromising the suit and the 1<sup>st</sup> Respondent is apprehensive that, the Applicant's application to set aside the valid judgment is purposefully meant to defeat the ends of justice and deny Respondents the rightful fruits of their judgment. The Respondents further averred that the Applicant has no valid defence and is simply avoiding satisfaction of its contractual obligations thus prejudicing the Respondents. It is therefore in the interest of justice to deny the Applicant's request for stay and setting aside of the Judgment.

14. In response the Applicant filed a supplementary affidavit dated 2<sup>nd</sup> August 2017 sworn by Chepng'eno Irine, an Advocate of the High Court of Kenya, practicing in the firm of F.N. Kimani & Associates who has conduct of this matter. She maintained that she perused the Court file on 2<sup>nd</sup> August 2017 and established that the Respondent's Advocate on record had made a request for the decree via a letter dated 10<sup>th</sup> July 2017 and filed in court on 12<sup>th</sup> July 2017. She also established that the decree had been issued on 24<sup>th</sup> July 2017, despite the fact that an interlocutory judgment was entered against the Applicant herein on 29<sup>th</sup> June 2017 and the matter had not gone for formal proof. Therefore the said decree was issued illegally and unprocedurally.

15. The Applicant also filed a further affidavit dated 14<sup>th</sup> August 2017 reiterating that the Notice of Appointment was served upon the Respondents Advocate on 20<sup>th</sup> June 2017 at their offices located at Lavington Hill House, along Olunguruone road and off James Gichuru Road and the said advocate has not denied service of the same under oath.

16. The parties disposed of the Application vide written submission where upon the Applicant invited the Court to consider the following issues for determination:-

*(i) Whether the judgment entered was a regular Judgment?;*

*(ii) Whether the Defendant should be granted leave to defend the case herein; and*

*(iii) Whether the Defendant has met the threshold for granting a stay of execution and setting aside of an ex parte judgment.*

17. On the 1<sup>st</sup> issue the Applicant reiterated that the Plaintiffs were served with the Notice of Appointment on the 20<sup>th</sup> June 2017, (as per the annexed notice of appointment marked exhibit “A” indicating it was received by “Mathew Magare & Associates Advocates Reception”). Therefore the entry of interlocutory judgment on the 28<sup>th</sup> June 2017, eight (8) days after notice of appearance is contrary to the law.

18. The Applicant relied on the case of; Joseph Njuguna Thairu vs City Council of Nairobi (2015) eKLR, where the Court set out the principles guiding setting aside ex parte judgment as follows:-

*(a) If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the Defendant/Applicant and such a judgment is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial itself;*

*(b) If the default judgment is a regular one, the Court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order 9A Rule 10 (now Order 10 Rule 11) of the Civil Procedure Rules.*

19. The case of; Eunice Wanjiru Chege vs Hannah Wanjiku Chege (2013) eKLR, was also cited where the Court stated as follows:-

*“...unless under very clear circumstances, a party should not be driven away from the seat of justice without a hearing. That ought to be the last option of the Court. I would also point out that under Article 159 of the Constitution, justice shall be administered without undue regard to procedural technicalities. In this case, what the Defendant/Respondent’s counsel has done is file a Notice of appointment rather than a memorandum of appearance. I would regard that as a procedural technicality that should not have fatal consequences to the Defendant/Respondent’s case....”*

20. The Applicant also reiterated that the draft defence and Counter claim raise triable issues, are premised on good ground and not just mere denials nor filed to deny the Respondents the fruits of their judgment.

21. Further that the judgment is for a substantial amount of money of about Kshs 26,960,546, which will highly prejudice the Applicant if the suit is not heard and determined on merit, so that both parties get justice as envisaged in Article 50(1) of the Constitution. The Applicant further relied on Article 48 of the Constitution of Kenya 2010 to argue that the Application should be allowed in the interest of justice.

22. Further reliance was placed on the case of; James Wanyoike & 2 Others vs C M C Motors Group Limited & 4 Others (2015) eKLR quoted the case of; In Tree Shade Motors Ltd vs DT Dobie & Another (1995-1998) 1EA 324 where the Court held that:

*“even if service of summons in valid, the Judgment will be set aside if Defence and Counterclaim raises triable issue. Where a draft Defence and Counterclaim 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 and Counterclaim to the Plaintiff’s claim. Where the Defendant showed a reasonable Defence and Counterclaim on the merits, the Court could set the ex parte judgment aside.”*

23. Finally the Applicant submitted that before a Court of law exercises its unfettered discretion under Order 10 Rule 11 of the Civil Procedure Rules 2010, it must be satisfied that a number of conditions are met, which were set out in the case of; James Wanyoike & 2 Others vs CMC Motors Group Limited & 4 Others (2015) eKLR where the Court quoted the case of; Patel vs EA Cargo Handling Services Limited (1974) EA 75 where the Court stated as follows:-

*“I also agree with this broad statement of principles to be followed. The main concern of the Court to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree 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 and Counterclaim on the merits. In this respect, Defence and Counterclaim does not mean in my view a Defence and Counterclaim that must succeed, it means as SHERIDAN, J. put it, “a triable issue” that is an issue which raises a prima facie Defence and Counter Claim and which should go to trial for adjudication.”*

24. However the Respondents filed response submissions and reiterated that after service of the Summons and pleadings, the Applicant failed to enter appearance and/or file a defense within the requisite 15 days from the date of service as stipulated by Order 5 Rule 1 and Order 6 Rule 1 of the Civil Procedure Rules. Subsequent to this failure a request was made for Judgment which was entered as said herein.

25. The Respondents maintained that they never served with notice of appointment and the judgment entered herein is regular. They relied on the case of; Patel vs EA Cargo Handling Services Limited (1974) EA 75, the Court of Appeal held that the discretion to set aside will normally be exercised only where the Defendant has a reasonable defence or counter-claim which raises triable issues on the merits.

26. It was submitted that the Court has the discretionary power to grant the orders sought based on the principles regarding the threshold for setting aside of an ex-parte judgment which are well settled in the case of; Ramco Limited vs Mistry Jadva Parbat & Company Ltd & Ors (2002) 1 EA 233, s stated above.

27. Further that in the case of; Patel vs EA Cargo Handling Services Limited (1974) EA 75, the Court held that;

*“...the main concern of the court is to do justice to the parties, and the court should not impose conditions on itself to fetter the wide discretion given it by the rules....where there is a regular judgment the court will not usually set aside the judgment unless it is satisfied that there is a defence and counterclaim on the merits.”*

28. Therefore the Court has powers under Order 22, Rule 22 of the Civil Procedure Rules to issue stay of execution orders only upon sufficient cause being shown and to only stay the execution of such decree for a reasonable time. However, before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit or upon such terms as are just as provided for under Order 10 Rule 11 of the Civil Procedure Rules.

29. That in this case, the Defendant has failed to meet the threshold for stay or setting aside of the ex-parte judgment. However, should the Honourable Court be so inclined as to issue a stay of execution and /or set aside the default judgment, the Court should impose stringent terms upon the Applicant to furnish the entire decretal amount of Kshs 32,226,116, into Court as security which will be paramount in safeguarding the Respondents interest in light of the substantial decretal amount.

30. I have considered the Application, the Affidavits in support and opposition. I have also considered the submissions filed by the respective parties. The issue to determine is whether the Applicant has met the legal requirement for grant of the orders sought. I note from the Court file that the Plaintiff was in Court on the 20<sup>th</sup> April 2017. The summons were issued on 31<sup>st</sup> May 2017. The Defendant had fifteen (15) days from the date of service within which to enter appearance from the date of the summons. According to the Affidavit of Service filed by Julius Muchoki, service of the summons was effected on 7<sup>th</sup> June 2017. The Defendant therefore should have entered appearance by 22<sup>nd</sup> June 2017.

31. The Court file shows that on 20<sup>th</sup> June 2017, a notice of appointment was filed in Court by the firm of F.N. Kimani & Associates on behalf of the Defendant. On 28<sup>th</sup> June 2017, a request for judgment was filed in Court. There is no record on the Court file to show that a defence was filed by then. On the 29<sup>th</sup> June 2017, the Court entered the interlocutory judgment. It is also a fact that by this time there was defence in the Court file.

32. The Applicant alleges that on 4<sup>th</sup> July 2017, they went to the registry to file the defence and a counterclaim and they were told that the Court file was not available, and they should go back on 5<sup>th</sup> July 2017. However, there is no evidence to support these allegations of the missing file. Even then, the Defendant confirms that the following day when their lawyer's clerk returned to the registry, the file was available but it had interlocutory judgment. Although the Applicant alleges that the judgment is abit confusing in that an interlocutory judgment was entered for a liquidated amount and for entire prayers prayed in the Plaintiff, I was not able to understand the confusion as this was a liquidated claim and judgment was entered for the same, being a sum of Kshs 32,226,116.77 plus interest at 10% per annum and costs of the suit.

33. The Applicant further alleges that by the time judgment was entered, the fifteen (15) days had not lapsed since the filing of their notice of appointment, and that it contravenes Order 10 Rule 4 of the Civil Procedure Rules. It is true that the notice of appointment was filed on 20<sup>th</sup> June 2017, and interlocutory judgment entered on 29<sup>th</sup> June 2017. What is however not clear, is whether this notice of appointment was served on the Respondents. I have looked at it, the Court stamp looks genuine, but there is a dispute as to whether the record of receipt by the Respondents lawyers is genuine. This issue will require investigations. In view of the fact that the Court is not able to tell at this stage whether the content is genuine or not, it will leave the matter to rest at that, as it is possible it was served or not.

34. Be that as it were, I have considered the other issue raised as to whether the statement of defence and/or the counterclaim has merit. Obviously, the Applicants argue that it raises triable issues, but the Defendant argues to the contrary. The Court will not delve into the merits thereof in view of the fact that if it were to do that at this stage, without hearing the parties on the same, it may prejudice the matter and the parties. However, a perusal thereof indicates that there are issues concerning the performance of the contract between the parties and whether the claims raised by each one of them can be supported.

35. Article 48 of the Constitution of Kenya, provides that, the State shall ensure access to justice for all persons. Article 59 entitles every person to have any dispute resolved by Application of the law. While article 159 requires the Courts to uphold substantial justice. It is against this background that the Court finds that it will be in the interest of justice to accord the Applicants an opportunity to be heard on merit. However, the Court is also duty bound to safeguard the rights of the Respondents.

36. The Respondents have invited the Court to order the deposit of all the decretal sum herein. However, that may amount to confirming the interlocutory judgment prior to hearing the parties on merit of their case. In conclusion, I order that, the notice of motion Application dated 6<sup>th</sup> July 2017 be and is hereby allowed in terms of prayer (4) whereby the interlocutory judgment entered on 29<sup>th</sup> June 2017 is set aside and all consequential orders on condition that the Applicant files and serves a defence and a counterclaim referred to herein within two (2) days of this order and upon payment of the requisite sum.

37. The Applicant shall also pay the Respondents, the costs of this Application and throw away costs of Kshs 20,000, for any inconvenience that may be caused by setting aside of the judgment. If the order as to the filing and serving of the Defence and counterclaim is not complied with, the same shall stand vacated without further reference to the Court.

38. Those then are the orders of the Court.

**Dated, delivered and signed in open court this 8<sup>th</sup> day of February 2018.**

**G.L.NZIOKA**

**JUDGE**

**In the presence of:-**

Mr. Tolle for the 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs/Respondents

Ms. Kiarithia holding brief for Mr. F.N. Kimani for the Defendant/Applicant

Lang'at.....Court Assistant