

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 427 OF 2014

MEKADISHEM MINISTRIESPLAINTIFF

VERSUS

FATUMA TOMNO.....1ST DEFENDANT

JOHN MWORIA

T/A MWORIA & ASSOCIATES..... 2ND DEFENDANT

RULING

1. The application dated 26th January, 2017 principally seeks orders that the *exparte* judgment given herein against the Defendants be set aside and the Defendants be given leave to defend this suit.

2. The application is supported by two affidavits sworn by the Applicants. The delay in filing of the statements of defence is blamed on the attempts to resolve the dispute and the referral of the matter to the Criminal Investigations Department. It is further stated that the draft defences raise triable issues.

3. The application is opposed. It is stated in the replying affidavit that the failure to enter appearance and file a defence is not excusable as the suit was filed long after the negotiations had ceased. It is further stated that the delay of three years is inordinate. That the respective defences by both the Defendants are not valid and have no chances of success. It is further stated that the Defendants have failed to refund the purchase price of Ksh.6,000,000/= or effect the specific performance of the sale agreement.

4. The application was canvassed by way of written submissions which I have considered.

5. The principles applicable in determining whether to set aside an *exparte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is 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. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93*.

6. In the case at hand, no good reasons have been given for the failure to file the defences within time.

No amount of negotiations or investigations would be a bar to the filing of a defence. If the Defendants were desirous of raising the issue of arbitration, they could have entered appearance and made an appropriate application. The *ex parte* judgment was regularly entered.

7. The 1st Applicant has exhibited a draft defence and a counterclaim. The 2nd Applicant has annexed a draft defence also. Looking at the draft defences, the same raise triable issues. For example who is in breach of contract and whether there was professional misconduct on the part of the 2nd Applicant.

8. This court's view is that despite the mistakes made by the Applicants, they should not suffer the fate of not having their case heard on merits. The Respondent can be compensated by way of costs. The deposit of the purchase price of Ksh.6,000,000/= is not denied and ought to be secured.

9. With the foregoing, I allow the application on condition that the sum of Ksh.6,000,000/= is deposited in a joint interest earning bank account in the names of the advocates for the parties herein or in court within 30 days from date hereof. Throw away costs and the costs of this application to the Respondent.

Date, signed and delivered at Nairobi this 27th day of March, 2018

B. THURANIRA JADEN

JUDGE