REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 92 OF 2017

GULF BADR GROUP (K).....PLAINTIFF

VERSUS

MORE THAN CONQUERORS CO. LTD.....DEFENDANT

R U L I N G

1. In their application dated 20/3/2018, the defendant seeks to set aside a default judgment entered on 5/01/2018 not because of lack of service or proper service but on the basis that having been instructed, the advocate, by mistake and inadvertence, failed to file a defence in time having entered appearance.

2. Beside the confessed mistake and inadvertence the applicant has exhibited in the Affidavit in support of a defence filed out of time and asserts it raises triable issues and should be given a chance to be canvassed. The defence filed out of time alleges wrongs against the defendant by the plaintiff and threatens a counterclaim of USD270,000/= at an opportune time.

3. The Application was opposed by the Replying Affidavit of Hannah M. Mtekele, Advocate which asserts that the judgment on record is regular and was entered after she personally reminded the defendants advocate to file a defence to avoid entry of a default judgment, such reminder were ignored.

4. The defence exhibited is decreed by counsel for the plaintiff as lacking merits and that if the court gets inclided to set aside, it should order the full decretal sum to be deposited into a joint interest bearing account because the defendant does not have any known office premises because even the summons could only be served at a dropping zone.

5. With the leave of the court, the plaintiff/respondent filed a supplementary Affidavit (it ought to have been a further affidavit under the rules) whose sole purpose was to exhibit correspondence between the parties to counter the assertion that the defence raises triable issues. That Affidavit exhibited a trail of email which show that several changes were made on mutual request and direction by the defendant to the bills of lading, the defendant requested for discounts on some of the invoices and made promises to pay. There is however none to show that any complaint was lodged by the defendant for delayed dispatch or inflated invoices. Based on that Affidavits, the defendant prayed that the Application be dismissed and the judgment entered be left undisturbed.

6. Parties attended court and offered oral submissions in which the Defendant's advocate maintained the confessed mistake and inadvertence on his part and pleaded that such should not be visited upon his client. He was however categorical that the only condition his client was prepared to abide by is thrown away costs and not the deposit proposed by the plaintiff. I wish to point out that it come out because the court had asked the parties to consider setting aside by consent and upon terms.

7. For the plaintiff respondent submissions were offered to the effect that the failure was not inadvertent but deliberate after she (the advocate) personally reminded counsel but no steps were taken. The counsel however appreciated the wide and unfeltered discretion upon the court and submitted that if the court be inclined to set aside then the sum in the default judgment be secured by deposit as the defendant does not have even a physical location of business and only reachable at a dropping zone.

8. Having considered the rival position taken by the parties, I appreciate the matter before me to demand that the court exercises its discretion on whether or not to set aside.

9. The principles applicable are now well settled by not only the High Court but even the court of appeal in a long line of decided cases. The principles are that:-

i. The court has a very wide and unfettered discretion to set aside with clear intent and purpose to do justice even where the judgment is regularly entered (*Maina vs Mugina [1982-88] 2 KAR 171.*

ii. Where the judgment is irregularly entered, the court has no discretion not to set aside [*Kanji vs Velji[1954] 21 EACA 20*.

iii. The discretion is geared and aimed at doing justice between the parties and intended to remedy lapses and avoid injustice or hardship resulting out of genuine and excusable mistake or inadvertence but never intended to assist a party who has by design, evasion or deliberate default set out to delay or derail the course of justice [*Shah vs Mhogo [1968] EA 93.*

iv. The discretion, like other judicial discretions is due for judicious exercise in a selective and discriminatory manner, not arbitrarily, whimsically or idiosyncratically *[Pithon Waweru vs Thugu Mugiria[1982-99] 1 KAR 171*.

v. Some of the considerations that go into the matter include the conduct the parties and the circumstances prior to and after the entry of judgment [Jeuse Kimani vs Mcconnel [1966] EA 547.

vi. Mistake is a mistake and should not be a basis to eject a litigant from seat of justice [*Chemwolo vs Kubebez*).

10. While applying the settled principles to the facts and circumstances of this matter, it is not in doubt that service was regular and adequately effected. Consequently it is a matter that falls for the courts discretion to serve the interests of justice.

11. At paragraph 3 of the Replying Affidavit, the Respondent has averred on oath and the same has not been rebutted or denied that between November 2017 and 6th February 2018 she personally reminded the advocate for the defendant, out of professional courtesy, to file a defence in good time to avoid default judgment but the same was neglected.

12. That is a matter that goes to determine whether the delay was occasioned by excusable mistake or error or it was a deliberate default to delay, derail or obstruct the course of justice.

13. The allegation that counsel reminded another out of courtesy to file a defence but the reminder was ignored when looked at from the view point that the same counsel totally failed say anything about such alleged reminder lead me to the reference that he was indeed reminded and he chose to do nothing. In those circumstances I am not persuaded that the mistake was an excusable one. Rather I am minded to say that it was deliberate or just wanton neglect of duly which cannot be seen otherwise but to work toward delay and defeat of justice. How should it be treated? Should it fall upon the client to bear? Is the decision in ***Pithon Waweru vs Mugiria(supra)*** cast in stone that a mistake of counsel shall never be visited on the litigant?

14. Since Pithon Waweru's case, several development have occurred which permit the court to say that in some circumstances counsels mistake may well justly fall upon his client. One of the developments is that it is now mandatory that an advocate must take out a professional indemnity insurance policy to guard him and protect his client in the event of a professional negligence.

15. That requirement is well grounded under the advocates Act so much so that no counsel can be licensed for any practice year without evidence of such an insurance policy being in place.

16. I understand the rationale is to address the mutual interest of both the advocate and client. The advocate is not called upon to dig into own pockets incase of a mistake while the client is also secured even in the event the advocate be incapable of meeting his demand for reparation for losses and injury occasioned by the mistake or negligence of counsel.

17. The second development was from the court rooms in the decision in ***TANA & ATHI RIVER DEVELOPMENT AUTHORITY VS JEREMIA KIMIGHO MWAKI [2015] eKLR*** where the court cited with approval the decision in ***KETTERMAN & OTHERS VS HASEL PROPERTIES LTD [1988] 1 ALL ELR 38*** and remarked that there would be cases in which justice will be better served by allowing the consequences of the negligence of lawyers fall on their own heads.

18. That reasoning has been subsequently followed in **Three ways Shipping Services Ltd vs Mitchell Cotts Freighters (K) Ltd [2005] eKLR** and ***Savings and Loans Ltd vs Susan Wanjiru Muritu Nbi HCCC No. 397 of 2002***. The authorities underscore the need for efficient execution of legal businesses. Here I find that the mistake of counsel is not excusable at all, and cannot be the basis to set aside.

19. The second issue is whether the defence filed already, albeit late raises triable issues. In considering the merits of the defence, the court needs not deliver itself in finality noting that so far no evidence has been offered. However, an arguable point can be gleaned from the defence filed however irregularly brought to the attention of the court. For a defence to raise arguable points, it need not be a defence that must succeed. It is enough that the court says it would or may not be true as alleged. That defence delivered in some 19 substantive paragraph, not very short by all standards, rises points the court consider arguable. They may be arguable even though I have also read the entire corpus of the email communication exchanged between the parties and I did not identify any of the issues raised in the defence having been raised by the correspondence. One may only say that the correspondence may not be all between the parties. That being my position that there is disclosed arguable defence, I am bound to set aside. I do set aside but in terms of Order 10 Rule 11 the court is mandated to set terms that would serve the cause of justice.

20. Being well aware that having set the judgment aside the claim by the plaintiff falls for proof by evidence, I am also cognizant of the concerns raised by the plaintiff that the defendant has no known office where it conducts its business because even service of summons could

only be effected upon dropping zone. That may also infer that the defendant has no known assets.

21. Even that concern has not been challenged by the defendant. With that in mind and the need to balance the interest of justice between the parties, together with the fact that defence has been filed, I consider this to be one of the cases where the defendant be called upon to secure the sum claimed.

22. Consequently, I do set aside the default judgment on the basis that the statement of defence filed raises triable issues but on terms and conditions that:-

i. The defence dated 15/3/2018 and filed in court on 19/3/2018 is deemed duly filed and should be served forthwith if not yet served.

ii. The defendant shall within 30 days from today deposit into an interest being account in the joint names of the advocates for the parties the sum sued. In default of such deposit the Order for setting aside shall stand discharged and vacated and the default judgment shall stand reinstated.

iii. The costs of the Application are awarded to the plaintiff in all events and shall be determined at the conclusion of the case. This is because this application has been necessitated by a default on the defendant's part.

iv. Let parties take a date for case conference within 60 days from today.

v. Any parties who has not filed any document shall do so within 14 days from today.

Dated and delivered at Mombasa this 15th day of June 2018.

P.J.O. OTIENO

JUDGE