REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.51 OF 2017

BANK OF AFRICA KENYA LIMITED.....PLAINTIFF

VERSUS

PUT SARAJEVO GENERAL ENGINEERING CO.LTD....1ST DEFENDANT

ESED BECIREVIC.....2ND DEFENDANT

ADNAN TERZIC.....3RD DEFENDANT

R U L I N G

Before this court is the Notice of Motion dated 24th April, 2017, brought under **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 11 and Order 22 Rule 22(1)** of the Civil Procedure Rules and all other enabling provisions of the law. In their motion the 1st Respondent seeks the following orders:-

1. Spent

2. Spent

"3. THAT the Honourable Court be pleased to set aside the judgment entered default of defence in the matter and all the consequential orders.

4. THAT the Applicant be granted unconditional leave to file its defence and to defend the suit on its merits.

5. THAT the costs of this application be provided for.

The application was supported by the affidavit of **PAUL NYAMODI** sworn on even date.

The application was based on the grounds that the 1st Respondent had obtained ex-parte judgment in default of defence against the Applicant for a sum of **USD1,280,881.73** (approximately Kshs.133,211,700) together with interest, that the firm of Advocates instructed by the Applicant did enter appearance in the matter but failed to file a Defence within the stipulated period, hence the entering of the judgment in default of defence.

The Applicant contended that the failure to file its Defence in time was not intentional but was as a result of an inadvertent omission on the part of their Advocate on record and that inadvertent error by their counsel ought not be visited upon the Applicant. The applicant pleads that it has a meritorious defence which raises triable issues and if the said judgment is not set aside the Applicant would be condemned unheard which is contrary to the Rules of Natural Justice.

The Applicant further contended that it stood to suffer prejudice and irreparable loss if the said judgment in default of defence was not set aside as its properties are likely to be attached which would stall the business of the Applicant, that it was in the interests of justice that the court hears both parties and determines the suit on its merits and any prejudice suffered by the Respondent/Plaintiff could be adequately compensated by an award of costs if said judgment was set aside. Finally, the Applicant urged the court to exercise its power under the overriding objective principle and allow for the just, expeditious, proportionate and affordable resolution of this matter, by exercising its discretion to set aside the judgment in default of defence.

The Plaintiff/Respondent opposed the application and relied on the Replying Affidavit sworn on **9th May, 2017** by **BEN MWAURA**, the Senior Manager, Recoveries of the Respondent Bank. The Respondent contended that the application was lacking in merit as the Applicant had conceded to having been granted and received the Term Loan Facility dated **15th September, 2014** for **USD 1,360,000.00** for the purpose of settling an outstanding debt with Frontier Haulage Limited, upon terms and conditions that were duly accepted by the Applicant. Having by various letters admitted its indebtedness to the Respondent in the stated sum and by servicing the said loan the applicant was estopped from turning around and denying that indebtedness.

The respondent argued that the Court did in its ruling of **17th March, 2017**, acknowledge the various admissions of the debt and in particular highlighted the letter of admission dated **26th January, 2016**. That no justifiable reason has been given why the defence was not filed on time, the mistake of counsel is not an excuse to deny the bank the fruits of litigation and the annexed draft defence is merely a sham as it does not raise any bona fide triable issues. Finally the Respondents insisted that the judgment in default of defence was regularly entered and urged the court to dismiss this application with costs.

Directions were given that the application be disposed of by way of written submissions. The Applicant filed their written submission on **17th April, 2018** together with their List and Bundle of documents. The Plaintiff/Respondent filed their written submissions on **14th May, 2018**. The court heard highlighting of those written submissions on **9th July, 2018**.

MR. BARAZA counsel for the Applicant submitted that the failure by the Applicant to file their defence within the stipulated time of fourteen (14) days was not attributable to the applicant but rather was due to an inadvertent mistake on the part of their Advocate on record. Counsel had been duly instructed by the Applicant to file both a Notice of Appearance and a Defence. However the Plaint dated **7th February, 2017** was filed together with an application dated **31st January, 2017** as well as with a Court Order issued on **3rd February, 2017**. The Advocate on record did enter appearance on **7th February 2017** and filed on behalf of the 1st defendant an application dated **13th February, 2017** seeking to set aside the Court order of **3rd February 2017**; as well as a response to the application dated **31st January, 2017.** In the process of filing these various documents the Advocate on record for the applicant inadvertently omitted to file the defence.

Counsel submitted that the error of the Advocate on record ought not be visited upon the client by denying the Applicant an opportunity to canvass their defence on merit.

Counsel went on to submit that the requirement that a defence be filed within 14 days of service with a Plaint and summons to enter appearance is a mere procedural requirement and that failure to adhere amounts to a procedural technicality that does not go to the root or the substance of the matter.

As such this omission is curable under **Article 159 (2)(d) of the Constitution of Kenya 2010.** That regardless of any short comings of the defence the court is obliged by the Rules of Natural Justice and in particular by **Article 50 of the Constitution of Kenya, 2010** to hear and determine each case on its merit and that no litigant should be driven from the seat of justice without being heard. In support of this proposition counsel relied on the case of **MARTHA WANGARI KARUA –VS- THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS NYERI Civil Appeal No.1 of 2017.**

Finally, it was submitted by counsel for the Applicant that the annexed proposed defence raised triable and important issues which requires adjudication before the court. Failure to set aside the judgment in default will occasion prejudice to the applicant as the applicant will stand condemned unheard. It was urged that the application be allowed and the costs be provided for.

MR. WAWIRE counsel for the respondent opposed the application and relied entirely on the Replying Affidavit sworn on **9th May, 2017**. Counsel reiterated that it was not in dispute that judgment in default of defence was entered against the applicant on **11th April 2017**. The advocate on record for the 1st defendant/Applicant did enter appearance but did not file any defence, therefore counsel submitted that the judgment in default was entered regularly. In order for that judgment to be set aside it must be demonstrated firstly that the reasons for the failure to file a defence were excusable and secondly that the defence has merit.

It was submitted for the Respondent that the failure by the applicant's advocate to file a defence was not excusable. The mere citing of inadvertence or mistake is not sufficient excuse for failure. There are several occasions where the courts have held that clients cannot continue to hide behind the failure of their advocates to perform certain required actions on their part. Counsel cited the following cases in support of that contention:-

(i) GERALD MWITHIA –VS- MERU COLLEGE OF TECHNOLOGY & ANOTHER [2018]eKLR

(ii) JOSEPHAT NDERITU KARIUKI –VS- PINE BREEZE HOSPITAL LTD [2006] eKLR

(iii) WATER PARTNERS INTERNATIONAL –VS- BENJAMIN KOYOO T/A GROUP OF WOMEN IN AGRICULTURE - KOCHIENG (Gwako) MINISTRIES [2014]eKLR

In all the above cited cases, the courts held that the litigant must bear the brunt for mistakes made by their advocates. The client would be liberty to pursue his advocate for such mistakes.

Even if the mistake of the advocate on record was held to be excusable, then it was submitted for the Respondent that the proposed defence had no merit in any case; given that the applicant had already admitted its indebtedness to the Respondent's Bank. Counsel cited the fact that there were on record, several letters in which the applicant admitted the debt. One **MR. JAMES MULI** the Finance Officer of the applicant's company swore an affidavit on **11th December, 2017** in which he furnished details of the amount owed. The applicant is therefore estopped from denying its indebtedness. In the face such admissions the Respondent posits that a hearing would serve no useful

purpose.

Finally counsel for the Respondent submitted that the failure to file a defence cannot be deemed a mere technicality which is curable under **Article 159 of the Constitution of Kenya 2010**. The court was urged to dismiss the present application in its entirety and award costs to the Respondent.

I have considered the submissions filed by both counsel in this matter as well as the authorities annexed thereto. I find that the following issued arise for determination:-

(i) Was the judgment in default of defence entered regularly?

(ii) Ought the mistake/error on the part of counsel for the defendant be visited upon the client?

(iii) Does this failure to file defence within the stipulated time amount to a procedural technicality curable by **Article 159(2)(d)** of the **Constitution of Kenya 2010**?

(iv) Does the Draft defence raise triable issues?

(v) Ought this application to be allowed.

I will proceed to deal with and analyze each of the above issues individually.

ANALYSIS AND DETERMINATION

Order 7 rule 1 of the Civil Procedure Rules provides that a defendant shall file his defence to a suit within fourteen days from the date of filing a Notice of Appearance. Counsel acting for the Applicant in this matter concedes that he did file a Memorandum of Appearance on **7th February, 2017**.

However counsel by his own admission failed to file a defence in the matter. Consequently on **11th April, 2017** the Hon Deputy Registrar entered judgment in default of defence against the defendant in the sum of **Kshs. USD 1,280,881.73**. It is the entry of that judgment in default of defence that has given rise to the present application.

Counsel for the Respondent countered that no prejudice would be suffered by the applicant as it had already admitted the debt. On the other hand the respondent stood to suffer prejudice should the default judgment be set aside as the principal loan continues to accrue interest at the rate of 14% per annum. The principal amount owed is **USD1,280,881/73** and the decree was issued way back on **12th April, 2017**. The 2nd and 3rd defendants are foreigners who are not even in the country therefore the respondents are unable to pursue them, and their only refuge remains the applicant. To allow the application would deny the respondent the fruits of their judgment.

In the affidavit sworn in support of this application dated **24-4-2017, MR PAUL NYAMODI** counsel for the Defendant pleads that the failure to file the defence in time was not deliberate but was due to an inadvertent mistake made by the Advocate. Counsel explains that together with the Memorandum of Appearance which was filed on **7th February 2017**, his firm also filed an application dated **13th February 2017** and on **16th February 2017** the firm filed a Replying Affidavit in response to the 1st Respondent's application dated **31-1-2017**. In the process of filing this plethora of documents, counsel inadvertently failed to file a defence within the stipulated period. It is submitted that the failure to file on time was not intentional but rather was inadvertent, and that being an inadvertent omission the same ought not to be visited upon the client.

Counsel for the Plaintiff/Respondent submitted that, it is not enough for the applicant to heap the blame entirely on his advocate, and that the excuse of blaming counsel is no longer tenable in law. The applicant must demonstrate that he took tangible steps and exercised due diligence in following up on his case.

Counsel cited the words of **Ringera J** in **OMWOYO –VS- AFRICAN HIGHLANDS & PRODUCE CO. LTD [2002]1 KLR,** where it was held:-

> **"Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment".**

This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In espousing this position counsel for the Respondent relied on the case of **BELINDA MURAS & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR** in which **Hon Madan JIA** (as) he then was defined what constitutes a mistake as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. <u>The court may not condone it but ought certainly to do whatever is necessary to</u>**

rectify if the interest of justice so dictate." [own emphasis]

Similarly in **PHILLIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBEDE [1982-88] KLR 103 at 1040 Apaloo J/A** as he then was stated thus:-

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit".** [own emphasis]

Finally on this point in **SHAH –VS- MBOGO & ANOTHER [1967]6.A U7,** the Court of Appeal for Eastern Africa held that:-

> **"Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused".** [own emphasis]

I find that it has been demonstrated and has been conceded that no defence was filed within the stipulated 14 day period. In the premises the entry of the judgment in default on **11/4/2017**, was regular, lawful and procedural and I do so find. The question is whether that failure to file the defence in time was excusable. The court must weigh the rights of the plaintiff who has judgment in his favour against the rights of the defendant to have his case heard and determined on the merits.

Counsel has explained what led to the inadvertent mistake and the failure to file the defence in time. As soon as the suit was filed several applications were filed in quick succession. These required responses by counsel. In other words this was not a case where counsel simply sat back and did nothing. There was activity in the file by counsel on behalf of the defendant. The intention to vigorously oppose the suit was clear. I find that this is **not** a case here there has indolence on the part of the respondent or his advocate. The present application has not been brought merely to delay and/or to obstruct justice. In the case of **MARTHA WANGARI KARUA –VS- IEBC Nyeri Civil Appeal No.1 of 2017** the Court of Appeal held as follows:-

> **"The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.."**

The amount involved in this suit is a very substantial sum **USD 1,280,881.31** approximately **Kshs.133,211,700/=** based on exchange rates in the year 2017 when the suit was filed. This is not an amount to be sneezed at. Justice demands that the applicant be accorded an opportunity to present his defence before being condemned to pay such a huge sum of money. The defendant deserves to be allowed an opportunity to present his case and have the same determined on its merits.

The final question is whether the draft defence raises triable issues. Counsel for the Plaintiff submits in the negative. It is argued that having already admitted the debt vide their letter of **26th January 2010** and by its various promises to pay the defendant cannot turn around and now deny its indebtedness to the Plaintiff. With respect, this question of the indebtedness of the defendant to the plaintiff is one which is central to the dispute between the parties and as such is best determined at a full hearing where the Plaintiff may prove its claim upon a balance of probability. I have perused the draft defence and I am satisfied that it raises issues which are best determined at a hearing of the suit.

For the above reasons, I am satisfied that the Notice of Motion dated **24th April, 2017** has merit. The same is hereby allowed and the judgment in default entered on **11th July 2017** is hereby set aside. The Defendant to file and serve their defence within 7 days of today's date. Thereafter dates for case Management Conference to be taken in the Registry. Costs of this application to be met by the Applicant.

Dated in Nairobi this 21st day of September, 2018.

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JUSTICE MAUREEN A. ODERO

Ruling delivered at the Nairobi High Court this 21st day of September, 2018.

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JUDGE