



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 310 OF 2017**

**HIGH CHEM EAST AFRICA LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**DAVID NJAU WAMBUGU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**POLYCHEM EAST AFRICA LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**EAGLE CHEMICALS EL-SHARK**

**COMPANY FOR TRADE & INDUSTRY.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**EAGLE SPECIALITY CHEMICALS LTD....4<sup>TH</sup> DEFENDANT/APPLICANT**

**DAES HOLDING LIMITED.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application before court by the defendants is by way of a notice of motion. It is dated **3<sup>rd</sup> October 2017**. It is brought under Articles 50, 159 (2) (d) of the constitution and sections 1A and 1B and 3A of the CPA cap 21 and under order 10 Rule 11 of the Civil Procedure Rules 2010 (the Rules). The defendants are seeking a prayer for the court to set aside the default judgment entered herein on **19<sup>th</sup> September 2017** and any consequential orders or decree emanating therefrom and that the defendants be granted leave to defend the suit.

2. The application is supported by an affidavit sworn on **4<sup>th</sup> March 2017** by **David Njau Wambugu**.

3. By that affidavit the 1<sup>st</sup> defendant deponed that after the defendants were served with the summons and plaint a memorandum of appearance was filed on behalf of the defendants by their advocate on **3<sup>rd</sup> August 2017**. The 1<sup>st</sup> defendant further deponed that the plaintiff in filing its claim, filed voluminous documents which were technical in nature and which took the defendants and their advocate time to go through them. Further that the documents the defendants and their advocate needed to consult in order to prepare their defence were archived and had to be looked for. As a result of that difficulty, the defendants' advocate wrote and requested the plaintiff's advocate to permit them file their defence out of time. The plaintiff's advocate by the letter dated **5<sup>th</sup> September 2017**, gave the defendants 7 days from **30<sup>th</sup> September/August 2017** to file their defence.

4. It is admitted by the defendants that even with that extension, they filed their defence out of time. It was filed on **13<sup>th</sup> September 2017**. The defence annexed to the 1<sup>st</sup> defendant's affidavit clearly shows the court's stamp of **13<sup>th</sup> September 2017**.

5. The plaintiff filed in court on **13<sup>th</sup> September, 2017**, a request for judgment in default of a defence. The Deputy Registrar of this court on **19<sup>th</sup> September 2017**, entered interlocutory judgment against the defendants. The entry of judgment by the Deputy Registrar is in the following terms:

*"19/9/17*

*Defendant 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> having been duly served and having failed to enter appearance/file defence and on the application of the advocate for the plaintiff enter judgment as prayed.*

Date 19/9/17

Deputy Registrar

High Court of Kenya

Milimani Nairobi.”

6. The plaintiff did not file a replying affidavit to the application but just as the defendants did, it filed written submissions and provided legal authorities which I have had an opportunity to consider.

#### **ANALYSIS AND DETERMINATION**

7. As stated before, the defendants did not deny that their defence was filed out of the prescribed period. Because the plaintiff had consented to extend the period of filing the defence for the defendants by 7 days, according to my calculations the defendants should have filed their defence by **6<sup>th</sup> September, 2017**.

8. Order 10 Rule 4 to Rule 9 of the Rules provides that a defendant who fails to file an appearance or defence within the prescribed period can have a default judgment entered on the request by the plaintiff. As it will be seen from the reproduced default judgment above, the Deputy Registrar of this court in entering judgment did not indicate whether it was in default of appearance or defence. This is even though the defendant had filed their appearance within the prescribed period. It is however, this court’s view, that the entry of default judgment against the defendants was regular because the defendants failed to file a defence within the prescribed period, be it as it may, that the time the request for judgments was made the defendants had filed their defence.

9. Order 10 Rule 11 of the 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.”***

10. It would be seen that the court is afforded discretion and latitude to set aside interlocutory judgment regularly entered. This is what was stated in the case **Global Tea Investment Ltd vs Kanorero River Farm Limited & Another [2014] eKLR** where the court referred to the case **Kenya Commercial Bank Ltd Vs Reuben Waweru D. Kigathi and Another, High Court Civil Case No. 325 of 1999**, where the court held that:-

***“The court has unlimited discretion to set aside or vary judgment entered by default of appearance but as usual with the discretionary powers, the same discretion must be exercised judicially and upon reasons”.***

11. The court in **Wachira Karani v Bildad Wachira [2016]eKLR** considered the discretion of the court in setting aside interlocutory judgment and stated as follows:

***“In the case of Esther Wamaitha Njihia & two others vs. Safaricom Ltd [3] the court citing relevant cases on the issue held inter alia:-***

***“the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. [4] the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice (see Shah vs Mbogo [5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (see Sebei District Administration vs Gasyali. [6] It also goes without saying that the reason for failure to attend should be considered.”***

12. Having considered the parties submissions, I am inclined to exercise my discretion in favour of the defendants. I have looked at the plaintiff’s pleadings. It runs into 41 pages and 115 paragraphs. It is indeed very detailed and technical as stated by the defendants. It is for that reason that I accept the defendants’ explanation that the defendants and their advocates had to spend considerable time to prepare a defence to the claim. The defendants’ defence runs into 18 pages and 70 paragraphs. I have considered that defence and in my view it raises triable issues. It has long been accepted by the courts that in exercising its discretion in setting aside ex parte judgment the court should consider the nature of the case and the defence filed. This was stated in the case **Fursys (K) Limited v Systems Intergated Limited T/A Symphony [2005]eKLR** where the court stated:

***“In Python Waweru Maina v Thuku Mugiria (1982-88) 1 KAR 171, the Court of Appeal citing with approval the case of JAMNADAS v SODHIA v GORDANDAS HEMRAJ (1952) 7 UR 7 held inter alia that:***

***“5. The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally it should be remembered that to deny the subject a hearing should be the last resort of a Court.”***

13. I am satisfied that the defendants have not attempted to delay justice in this matter nor were they indolent. For that reason I grant the following orders:

*a. The interlocutory judgment entered on 19<sup>th</sup> September, 2017 is hereby set aside.*

*b. The defendants are hereby granted leave to defend this suit. In that regard the defendants are requested to supply to this court a copy of the memorandum of appearance and the defence filed since those copies are not to be found in the court file.*

*c. The defendants shall pay the plaintiff's costs of the notice of motion dated 3<sup>rd</sup> October 2017.*

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of October, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

**MARY KASANGO**

**JUDGE**