



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 311 OF 2016

HON. KENNEDY ODHIAMBO NYAGUDI.....PLAINTIFF

- V E R S U S -

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

1. Kennedy Odhiambo Nyagudi, the plaintiff herein, filed an action against Kenya Power & Lighting Co. Ltd, the defendant herein, vide the plaint dated 25th November 2016, in which he sought for *inter alia* general damages for loss and damages arising from power upsurge in the supply of electricity or lack of supply of the same. The plaintiff also sought for costs and interest. The plaint was filed contemporaneously with the motion dated 25.11.2016. It is apparent from the record that the plaint and the summons to enter appearance were served together with the aforesaid motion. On 3rd February 2017, the plaintiff successfully obtained judgment in default of appearance and defence against the defendant. The defendant felt aggrieved and was therefore prompted to file the motion dated 28.2.2017 in which it sought to have the default judgment set aside. The motion is supported by the affidavit of Emily Kirui, the defendant's legal officer and the further affidavit sworn by Osamba Otieno.

2. When served with the motion, the plaintiff filed the replying affidavit he swore to oppose the application. Learned counsels made oral submissions to dispose of the motion.

3. I have considered the grounds stated on the face of the motion dated 23rd February 2017 and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival oral submissions. It is the submission of the defendant's advocate that he concentrated his focus on the proceedings seeking for the confirmation of compliance of this court's order issued on 28th November 2016 which orders were subsequently extended on various occasions.

4. Mr. Otieno, learned advocate for the defendant, made oral submissions before this court in which he admitted that the defendant's advocate made a mistake by failing to file the appearance and the defence until the statutory period lapsed. He beseeched this court not to let the client suffer for the mistakes of counsel. The learned advocate also pointed out that the draft defence filed by the defendant raises serious triable issues.

5. The plaintiff vehemently opposed the motion. It is the submission of Mr. Aduda, learned advocate for plaintiff that the averments relied upon by the defendant are averments made by persons not authorised by the defendant. Mr. Aduda argued that the deponent should have filed minutes of the defendant's board showing the authorisation. Mr. Aduda also took issue with the reliance of a letter exchanged on a without prejudice basis. The learned advocate urged this court to expunge the affidavits from record. The plaintiff also pointed out that the draft defence does not raise triable issues. This court was further urged

to find that no good reasons were advanced in support of the motion.

6. After considering the material placed before this court plus the rival oral submissions of learned counsels, it is apparent that the following issues remain undisputed:

7. First, that the plaint and the summons to enter appearance were served upon the defendant.

8. Secondly, that the plaintiff lawfully obtained a regular judgment in default of appearance and a defence.

9. Thirdly, that this file has been very active since it was filed in November 2016. In other words, the parties have been in and out of court to ascertain whether or not the orders of injunction issued by this court on 28.11.2016 were complied with.

10. The court is given unfettered discretion when determining an application seeking to set aside a default judgment. Depending on the circumstances of each case, the law does not bar the court from setting aside a regularly obtained default judgment. In this matter the defendant's advocate has admitted that it was his mistake which made the client fail to enter appearance and a defence. This argument has not seriously been contested by the plaintiff. However the plaintiff has argued that the deponent of the affidavit filed in support of the motion has not annexed to the aforesaid affidavit minutes of the board of the defendant company giving her authority to do so. The deponent of the affidavit filed in support of the motion is sworn by one Emily Kirui, a legal officer with the defendant. The deponent has specifically deponed that she is authorised to make the averments by her employer. The company has not come forward to deny giving its legal officer authority to swear the affidavit. In my view it is sufficient to make the averment that one has authority to depone. It is not a must for a party to bring forth the minutes of the board of the defendant company to prove authority. The objection therefore is overruled.

11. The other objection which was ably argued by Mr. Aduda is the reliance of a letter written on a without prejudice cover. With respect, I agree with Mr. Aduda that the letter must be expunged from record. The letter on without prejudice cover, in law is not meant to be used in evidence. The letter attached to the supporting affidavit must and is hereby ordered expunged from record. The rest of the paragraphs of the supporting affidavit of Emily Kirui shall however remain intact.

12. Having disposed of the preliminary issues, let me address my mind to the merits of the motion. The defendant has stated that it has a defence with triable issues. The plaintiff is of the view that the draft defence does not raise any triable issues, I have on my part examined the draft defence attached to the further affidavit of the Osamba Otieno. The draft defence comprise of 30 paragraphs. In the draft defence, the defendant avers that it supplied the plaintiff with sufficient power. It is also stated that the power supply were at times disconnected due to failure by the plaintiff to settle the power bills. It is also stated that the defendant may plead the defence of an act of God in that some of the transformers were struck by lightning therefore the plaintiff is not entitled to general damages. In my humble view, the draft defence raises serious triable issues.

13. After a careful consideration of the arguments put forward, I am of the opinion that though the plaintiff obtained a regular judgment, there is need to give the defendant a chance to defend the suit by opening the doors of justice by setting aside the default judgment. This court's decision is buttressed by two main grounds. First, the default judgement was obtained due to the mistake of the defendant's counsel. This court is reluctant to allow a litigant to suffer due to a genuine mistake made by its advocate. In this case, the advocate admitted his mistake.

14. Secondly, the defendant has been able to show that it has a good defence with triable issues. This suit raises very fundamental issues which touch on the relationship between the supplier of electricity and the consumer of such power. The plaintiff has raised fundamental questions, which can only be answered if the suit is determined via a trial. In the process of the trial, questions relating to the frequent power blackouts and power disconnections facing many Kenyans may be unravelled. This case, if substantively determined will demystify the opaque relationship between the defendant as a supplier of electric power

and the plaintiff as a consumer.

15. For the above reasons, I allow the motion dated 28th February 2017 in terms of prayer 3. In the circumstances of this case I think the plaintiff is entitled to costs of the motion. Consequently I grant the plaintiff costs of the motion assessed at ksh.15,000/=. The defendant is given 15 days to enter appearance and file a defence.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant