REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.279 OF 2016

CIMBRIA EAST AFRICA LIMITED……..…….PLAINTIFF

VERSUS –

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

1. The application dated 29th November 2016 was brought by the defendant, KENYA POWER & LIGHTING COMPANY LIMITED. It is an application for setting aside the default judgement which was entered against the defendant on 28th October 2016.

2. The said judgement was entered after the defendant had failed to enter appearance within the prescribed time.

3. It is common ground that the Plaint and Summons to Enter Appearance were served upon the defendant on 7th October 2016.

4. Pursuant to the express words appearing on the face of the Summons, the defendant had 15 days from the date of service, to enter appearance. By my calculations, the defendant ought to have entered appearance by 22nd October 2016.

5. On 28th October 2016, the plaintiff filed a Request for Judgement and the court acted promptly, by granting judgement in default of Appearance.

6. On 2nd November 2016 the court issued a Decree, which made it clear that the judgement against the defendant was for Kshs. 109,751,217.19 together with interest and costs.

7. Thereafter, on 22nd Novemer 2016, the court issued a Certificate of Costs, for the sum of Kshs. 5,058,235.86.

8. Three (3) days later, on 25th November 2016, Court Brokers visited the defendant's premises, where they proclaimed the defendant's attachable goods, in the process of the execution of the Decree.

9. It is the process of execution which caused the defendant to move to court, seeking the setting aside of the judgement.

10. The defendant owned up to the fact that it had been duly served, and it explained that the Plaint and Summons were then forwarded to their Insurer APA INSURANCE LIMITED.

11. It was at the offices of the Insurer that the Plaint and Summons to Enter Appearance were *"erroneously archived"*.

12. The defendant urged the court not to punish it for the delay on the part of the Insurer.

13. The defendant asked the court to give it an opportunity to defend itself, on the merit of its case.

14. When canvassing the application the defendant first submitted that the court erred when it entered the *exparte* judgement on a claim which did not constitute a liquidated demand.

15. The provisions of Order 10 Rule 4 (1) of the Civil Procedure Rules provides as follows;

> "Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgement against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgement, and costs".

16. It follows that if the claim is for a *"liquidated demand only"* then the court shall enter judgement in default of appearance. The question which must therefore be answered is whether or not the plaintiff's claim herein was for a liquidated demand.

17. In FABRIZIO GRICOLETTI & ANOTHER Vs KENYA POWER & LIGHTING COMPANY LIMITED [2011] e KLR Omondi J. held that;

> "The prayer in the plaint was for damages in the sum of Kshs. 43,660,000/- which was a total figure of different losses which the Respondent outlined in different paragraphs of the plaint.This was thus a liquidated claim as contemplated by Order 10 Rule 4…."

18. In this case the plaintiff claimed that the defendant had caused excessive and unregulated power to be supplied to its premises, leading to serious loss and damage to electrical installations.

19. The plaintiff asserted that the loss and damage was attributable to negligence in the defendant's part.

20. Luckily for the plaintiff, it had taken out a policy of insurance. Therefore, its insurers, M/s Heritage Insurance Company Limited compensated the plaintiff for the loss and damage which it had incurred.

21. The plaintiff then cited the particulars of the Special Damages it had suffered, as follows;

i) Material Damage Kshs. 74,355,924.19

ii) Consequential loss Kshs. 34,474,733.00

iii) Loss Adjuster's fees Kshs. 1,045,676.00

Sub-Total Kshs. 109,876,333.19

iv) Less Salvage value Kshs. 125,116.00

TOTAL Kshs. 109,751,217.19

22. It is that sum which the plaintiff was claiming from the defendant. The only other claims were for interest and costs of the suit.

23. Notwithstanding that specified claim, the defendant submitted that the claim was not a liquidated claim.

24. Black's Law Dictionary defines Liquidated Claim thus;

> "1.A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties agreement.
>
> 2.A claim that was determined in a judicial proceedings".

25. Meanwhile, Halsbury's Laws of England, 4th Edition Vol. 12, at paragraph 1109 says;

> **"….In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated".**

25. In this case, the plaintiff has not asked the court to assess or quantify its claim.

26. The claim was already quantified by the loss adjuster who was engaged by the plaintiff's insurer.

27. Nonetheless, it is to be noted that;

> "A claim does not become a liquidated demand simply because it has been quantified.To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract.Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic.If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'…

The words 'debt' or 'liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure".

- Per Ringera J. *(as he then was)* in TRUST BANK LIMITED Vs ANGLO AFRICAN PROPERTY HOLDINGS LIMITED & 2 OTHERS Hccc No. 2118 of 2000.

28. On the one hand, the plaintiff is not inviting the court to assess or quantify its claim, but on the other hand the *"definite figures"* cited by the plaintiff as being special damages, cannot be said to be figures which were either already ascertained or to be capable of being ascertained as a mere matter of arithmetic.

29. The fact that the plaintiff's insurer did engage a loss adjuster, who was then paid Kshs. 1,045,676/- is an indication that it was necessary for investigations to be conducted and assessments made.

30. The defendant was not a party to that earlier process of ascertainment of the value of the loss and damage sustained by the plaintiff. Therefore, if the defendant was so minded, it could insist on interrogating the material and information which formed the basis for the assessment of the sums being claimed by the plaintiff.

31. In my considered opinion, the plaintiff's claim was not for a liquidated demand. Therefore, the learned Deputy Registrar ought not to have entered judgement for the sums claimed.

32. In the event, the judgement is irregular and it therefore has to be set aside.

33. But if the claim were for a liquidated demand, would I still have set aside the default judgement?

34. In the case of PATEL Vs E.A CARGO HANDLING SERVICES LIMITED [1974] E.A 75, the Court of Appeal expressed itself thus;

> "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.I agree that where it is a regular judgement, as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on merits".

35. The message is that the court has an unfettered discretion when determining whether or not the default judgement ought to be set aside.

36. However, it is a cardinal rule that the discretion of the court must be exercised judicially, with the ultimate goal of doing justice to the parties.

37. Therefore, if the defendant were found to be deliberately evading or obstructing or delaying the judicial process which the plaintiff had mounted against him, the court would not exercise its discretion to assist him.

38. The plaintiff submitted that the defendant's application was a futile attempt to obstruct the course of justice, by frustrating the plaintiff's efforts to execute the judgement.

39. In my considered view, it cannot be said that just because the defendant had made an application to set aside the default judgement, it was attempting to obstruct the course of justice. Each party is entitled to come to court, to seek such relief as it deems appropriate.

40. I find no evidence that the defendant was keen on delaying, obstructing or evading the course of justice. If anything, the defendant had acted promptly, by handing over to its Insurance Brokers, the Plaint and Summons to Enter Appearance. The said Insurance Brokers also acted promptly by handing over the Plaint to the Insurer.

41. It is at the offices of the Insurer where the court documents were, inadvertently, filed away.

42. There is no suggestion at all that the defendant had a hand in the unfortunate happenings at the offices of its insurer. And I find no reason that would have motivated the defendant to obstruct the course of justice, considering that the defendant was appropriately insured.

43. In the circumstances, even if the default judgement had been regular, I could have set it aside.

44. On the issue of costs, I find that the defendant, although successful, must meet the costs of the application. I so find because it was the failure of the defendant to enter appearance which led to the application for judgement. If the defendant had acted timeously, and filed a Memorandum of Appearance, the court would not have entered judgement.

45. In the circumstances, the defendant will pay the costs of the application dated 29th November 2016, together with all thrown away costs.

46. For the avoidance of any doubt, the said thrown away costs include the court fees paid when the plaintiff applied for judgement, and the court fees for the Decree and for the execution process.

47. As regards the plaintiff's submission on the need for the defendant to deposit the decretal amount in court, I find no merit in it, because the default judgement was irregular.

48. But I am not suggesting that whenever the court sets aside a regular default judgement, the defendant ought to be ordered to deposit the decretal amount in court. In relation to the question whether or not the defendant should deposit the decretal amount in court, as a condition for setting aside a default judgement, the court must consider the justice of each case and determine it appropriately.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **23rd day** of **May** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Nthiwa for Waweru for the Plaintiff

Miss Wanjiru for Mege for the Defendant

Collins Odhiambo – Court clerk.