



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 5 OF 2017**

WELD-CON LIMITED.....PLAINTIFF

VERSUS

CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL

ENGINEERING CORPORATION .....1<sup>ST</sup> DEFENDANT

KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup> DEFENDANT

**RULING**

1. I intend to be short in this cause.
2. The application before me is by the 2<sup>nd</sup> Defendant. It was filed on 16 March 2017. The 2<sup>nd</sup> Defendant asks the court to set aside a default judgment entered against the 2<sup>nd</sup> Defendant on 6 March 2017.
3. I would first point out that the principles which guide the exercise of discretion to set aside a default judgment are now well settled. The case of **Evans v Bartlam [1937] A C 473**, referred to copiously by counsel to the proceedings set the pace. Lord Atkin [at p. 480] stated as follows in regard to the principles.

*“One is that, where judgment was obtained regularly, there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he had a prima facie defense...The principle obviously is that unless and until the court has pronounced a judgment upon merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure”.*

In the same case, Lord Wright [at 489] remarked:

*“In a case like the present, there is a judgment, which though by default is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication...The court might also have regard to the applicant’s explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion is empowered by the rule to impose”.*

4. Local courts have been consistent in following the principles enunciated in **Evans v Bartlam (supra)**: see for example **Patel v E.A Cargo Handling Services Ltd [1974] EA 75**, **Chemwolo & Anor v Kubende [1986-89]1 EA 74**, **Mbogo v Shah [1968] 1 EA 93** and **Macho Credit Limited v Giro Commercial Bank Limited [2014] eKLR**.

5. In sum, the court's discretion to set aside a regular default judgment entered pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules is unlimited and unfettered and is not to be vitiated by any extraneous factors but may be influenced by the defense tendered or reasons advanced by the applicant for the delay or default. The main concern, as has been pointed out severally, is to do justice between the parties and in this regard the defense tendered ought to be the point of consideration: see **Express Kenya Ltd –v- Manju Patel [2000] 1 E A 54**. A reasonable defense will suffice even though the circumstances which led to the default/delay ought to also endear the applicant to the court.

6. In the instant case, the Plaintiff's claim was lodged on 10 January 2017. It was a claim for work done and material supplied. The Plaintiff sued both Defendants. The Plaintiff's claim was largely against the 1<sup>st</sup> Defendant. The Plaintiff had executed works and supplied material under a sub-contract with the 1<sup>st</sup> Defendant. The main contract for the works had been between the two defendants. The Plaintiff claimed that the 1<sup>st</sup> Defendant did not settle its invoices. In turn, the 1<sup>st</sup> Defendant in its statement of defense alleged that the 2<sup>nd</sup> Defendant had failed to pay under the subcontract. The 1<sup>st</sup> Defendant then set up a claim against its co-defendant. The 1<sup>st</sup> Defendant claimed that the 2<sup>nd</sup> Defendant had failed to pay the amount of Kshs. 522,245,285/65. The 1<sup>st</sup> Defendant sought judgment against the 2<sup>nd</sup> Defendant. The Plaintiff had sought Kshs. 135,991,645/31 jointly and severally from the two Defendants.

7. The 2<sup>nd</sup> Defendant filed no pleadings leading to the default judgment being entered on 6 March 2017 for the amount claimed.

8. In its application dated 14 March 2017 and which application, I must point out was timeously filed, the 2<sup>nd</sup> Defendant contends that it has a viable defense to the Plaintiff's claim. The 2<sup>nd</sup> Defendant also contends that it will suffer prejudice if the default judgment is not set aside. The 2<sup>nd</sup> Defendant further asserts that it has a good defense.

9. During oral arguments, Ms. Areri for the 2<sup>nd</sup> Defendant contended that the 1<sup>st</sup> Defendant was not owed any sums by the 2<sup>nd</sup> Defendant and further that the amount's claimed were part of illegal variation of works not sanctioned by the 2<sup>nd</sup> Defendant. Ms. Areri urged the court to allow the application.

10. Mr. Inamdar, for the Plaintiff, was more categorical and firm. He stated that the 2<sup>nd</sup> Defendant had no genuine bona fide defense. Counsel insisted that the Plaintiff had obtained a proprietary right in the judgment and it could only be set aside in special circumstances. Mr. Inamdar also pointed out that the 2<sup>nd</sup> Defendant had not explained the delay or default in filing the defense.

11. The affidavit in support of the application simply states that "a mistake on the part of counsel ought not to be visited upon the client". The same affidavit which was sworn by the 2<sup>nd</sup> Defendant's counsel also states that as a result of the 2<sup>nd</sup> Defendant's reorganization, counsel failed to get the documents on time and thus the filing of the defense statement was delayed.

12. I must forthwith point out that the 2<sup>nd</sup> Defendant has in my view not advanced any plausible explanation for the delay and default in filing the defense. The 2<sup>nd</sup> Defendant does not state the nature of documents its counsel was unable to access so as to prepare and file the defense statement. The 2<sup>nd</sup> Defendant has also not pinpointed the alleged mistake of counsel.

13. Absence of an explanation alone must however not divest the court of its discretion to set aside a default judgment and ensure that the ends of justice are met. The court's discretion to set aside judgment is not to be conditioned on the explanations advanced for the delay or default.

14. *In casu*, the 2<sup>nd</sup> Defendant admits the existence of a contract with the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant in its draft statement of defense also admits having settled part of the contractual amount. The 2<sup>nd</sup> Defendant states that the agreed value of the works were assessed and fully paid.

15. The circumstances of the case and of the default judgment are such as to give an indication that the Plaintiff's claim may not be resisted by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant is largely focused on the claim against it by the 1<sup>st</sup> Defendant. The claim by the Plaintiff is substantially also against the 1<sup>st</sup> Defendant. There is no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant.

16. It may not be said that the 2<sup>nd</sup> Defendant's defense is bare or a sham. It is reasonable in my view when the 2<sup>nd</sup> Defendant contends that the 1<sup>st</sup> Defendant has been fully paid. It is also reasonable when the 2<sup>nd</sup> Defendant contends that the additional works were never sanctioned by the 2<sup>nd</sup> Defendant. It is a defense that may stand the test against the 1<sup>st</sup> Defendant. It may not be an automatically winnable defense but its success as against the 1<sup>st</sup> Defendant may certainly also see success as against the Plaintiff.

17. In the response to the application the Plaintiff's director has exhibited various documents including correspondence to show that the defense may not hold. It is not for me to hold a mini-trial now. I need only be satisfied that on the face of the proposed defense, it is not a sham but a reasonable one. I have returned the verdict that it is not a sham.

18. I conclude that this is a suitable case for the default judgment to be set aside. Any prejudice suffered by the Plaintiff may adequately be compensated in costs.

19. In disposal, allow the application by the 2<sup>nd</sup> Defendant dated 14 March 2017. The default judgment entered against the 2<sup>nd</sup> Defendant on 6 March 2017 is hereby set aside. The 2<sup>nd</sup> Defendant must now file and serve its defense statement within the next ten (10) days in full compliance with Order 7 Rule 5 of the Civil Procedure Rules.

20. The Plaintiff will have costs of the application as well as the thrown away costs, to be taxed if not agreed.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of October, 2017.**

***J.L.ONGUTO***

**JUDGE**