REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 222 OF 2017

V-LINE SERVICES LIMITED……PLAINTIFF/RESPONDENT

VERSUS

VAGHJIYANI ENTERPRISES LIMITED….DEFENDANT/APPLICANT

RULING

1. The motion before me is dated 2 October 2017. It was launched under urgency by the Defendant. The Defendant seeks an order to stay the execution of a decree issued pursuant to a default judgment entered in favour of the Plaintiff on 5 July 2017. The Defendant also seeks to set aside the default judgment. Additionally, the Defendant prays for an unconditional leave to defend the Plaintiff's claim and also to launch its own counter claim.

2. The motion is opposed.

3. I will perhaps start off by pointing out that the principles to guide the court's discretion where default judgment is sought to be set aside are relatively clear. If the judgment was irregularly obtained then the court will set it aside *ex debito justitiae* (as matter of right) without exercising discretion as it is nullity: see **Wachira *v* Ndanjeru [1986-9] 1 EA 577, Mayon *v* Ottoman Bank [1968] EA 156** and **Craig *v* Kanssen [1943] 1 KB 256.**

4. Where however the default judgment is regular then the court has an unlimited and unfettered discretion under Order 10 Rule 11 of the Civil Procedure Rules to set aside the judgment. The principal consideration is however always whether the Defendant has a defence with merits. The court will also have regard to the Defendant's explanation as to why there was default in filing the appearance and or the defence, as the case may be. The approach though is always not to deny any party the right of hearing, especially if costs may suffice as sufficient sanction. see: **Evans *v* Bartlam [1937] AC 473, Chemwolo & another *v* Kubende [1986-9] 1 EA 74** and **Davidson & another *v* Scan Forwarders (K) Ltd and another [2007] 2 EA 126.**

5. The court's unfettered discretion is intended to be exercised to ensure no injustice or hardship which may result from accident, inadvertence or exercisable mistake or error is occasioned. However, it is not to assist parties who deliberately or otherwise seek to avoid the course of justice through evasion or obstruction or unnecessary delay.

6. In the instant case the Plaintiff's claim was lodged on 22 May 2017. The summons to enter appearance was properly and regularly issued. Proper service of the summons then followed. The Defendant subsequently instructed counsel who filed a Notice of Appointment on 14 June 2017. An appearance was

filed but not a defence. Subsequently, on 4 July 2017 the Plaintiff's counsel requested for judgment in default. The claim was for a liquidated sum. Judgment was accordingly entered (minuted and signed) on 5 July 2017 as there was no defence on record and time had expired. The judgment in the circumstances was regular.

7. The Defendant has however heaped blame on its counsel, who has since been debriefed. The Defendant asserts that it instructed its former counsel Mosi and Co. Advocates to file a defence but somehow it was not filed for inexplicable reasons. The Defendant also urges that it has a tenable and plausible defence as well as a counterclaim.

8. It is evident that the Defendant was intent in resisting the Plaintiff's claim but the Plaintiff's lethargic counsel failed to act. The mistake appeared genuinely to be on the part of the counsel, counsel swore an affidavit on 1 August 2017 and owned up to the inadvertence. Counsel explained that he believed the parties were intent in following an arbitration process to settle the dispute. I have no reason to doubt this explanation and I am ready to extend an excusing hand to the Defendant by reason of its counsel's inadvertence. I do not for that matter believe that the Defendant was intent in delaying or destructing the course of justice through the default. It was simply out of counsel's inadvertence.

9. Has the Defendant, however, presented a tenable defence which raises triable issues in good faith?

10. I am conscious of the fact that the defence need not be one which must succeed. All a defendant needs to establish is a singular triable issue raised in good faith.

11. In its founding affidavit, made in support of the motion, the Defendant points to the following as the triable issues:

a) Whether the Defendant has overpaid the Plaintiff for the services rendered?

b) Whether the Plaintiff can claim sums of money off projects admittedly not completed.

c) Whether the Plaintiff can claim payment when final accounts are yet to be settled.

d) Whether the Plaintiff can justifiably claim monies under the contract yet the Defendant questions the standards of the works

e) Whether the Plaintiff should be paid absent any architect's certificates.

f) Whether the court is seized with any jurisdiction to determine the dispute between the parties.

12. The Plaintiff's claim was for the balance of a contractual sum for services rendered as electrical subcontractors at the request of the Defendant. In its claim the Plaintiff pointed out that the Defendant has never raised any questions on the standards and workmanship of the Plaintiff. The Plaintiff also pointed out to various meetings held in 2016 and various demands made also in 2016, which meetings and demands preambled the instant suit. The Plaintiff included as part of its documents various certificates as well as accounts reflecting the electrical contractual works undertaken.

13. Save the final issue as to jurisdiction, the issues stated by the Defendant as triable issues are, in my view, proverbial issues which are often raised by parties to any contract for works. Both employers and contractors will raise issues as to completion of projects, as to final accounts, as to certification by architects and as to contractor's workmanship. It is however not enough to raise general questions and issues. They ought to be contract specific.

14. In the instant case, the Defendant has not demonstrated which work has not been completed by the Plaintiff under the contract between the parties. There is no indication whatsoever whether the Plaintiff is claiming for that which it has not rendered and delivered, even though the Plaint is specific on the claim. Likewise, there is no indication by the Defendant on its preferred set of accounts as may lead to a dispute.

Rather, there are specific averments of meetings, not contested by the Defendant, where the parties seemed to have agreed on amounts payable. Thirdly, a part from the general assertions that the Defendant questions the Plaintiff's workmanship and want of architect's certificates, there is no pointer that the Plaintiff's claims which date back to 2016 had previously been so questioned by the Defendant.

15. I am not in the circumstances satisfied that the Defendant has a bona fide tenable defence to the Plaintiff's claim. The Plaintiff already has a judgment which is itself property and should not be taken away with ease. The general defences raised by the Defendant are of the nature oft founded in claims involving building contracts. They are however not specific to the instant claim and neither have they, in my view, been so related to and fetched upon the Plaintiff's claim. The defence set up by the Defendant in my judgment does not raise any triable issue. It is simply neither a triable nor a winnable defence. It is not a reasonable defence.

16. Indeed, even the mix-up in the amounts claimed is of no help to the Defendant given that the ultimate prayer sought the lesser of the amounts. The amount claimed is stated to be colossal but the Defendant must have a tenable defence to the claim.

17. With regard to the issue of jurisdiction, the Defendant's contention is that the court has no jurisdiction as the parties had agreed to resort to arbitration. This may be so but the clear procedural and substantive requirement is that a party to an arbitration agreement must move the court for an anti-suit injunction no later than at the time of filing its appearance: see *s.*6 of the Arbitration Act, 1995. The Defendant failed to do so with the consequent result that the court then assumed jurisdiction over the dispute. I need say no more.

18. On the counterclaim, it is to be noted that it involves monies paid in execution of the decree herein. The decree if it stands would mean the counterclaim fails. The decree stands. I do not see how the counterclaim may survive.

19. In the result, I dismiss the application dated 2 October 2017 with costs to the Plaintiff.

Dated, signed and delivered at Nairobi this 14th day of December, 2017

J.L.ONGUTO

JUDGE