



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 128 OF 2013

CORPORATE SECURITY SERVICES LIMITED.....PLAINTIFF

-VERSUS-

LINKSOFT COMMUNICATION SYSTEMS LIMITED....DEFENDANT

RULING

1. The Application before the Court is the Defendant's Notice of Motion dated **3rd October, 2014** and filed on **7th October, 2014**. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as well as **Order 22 rule 22** and **Order 25 Rule 4** of the **Civil Procedure Rules, 2010**.

2. The Defendant sought for the following orders:-

1. *(Spent)*
2. **THAT the judgment entered herein on the 24th of June 2013 in the Plaintiff's favour be stayed pending the hearing and determination of this Application.**
3. **THAT the Auctioneer's Miscellaneous Application No. 311 of 2014 for taxation of the Bill of Costs against the Applicant be stayed pending the hearing and determination of this Application.**
4. **THAT judgment entered against the Defendant on the 24th of June 2013 be set aside *ex-debito justitiae*.**
5. **THAT costs of this Application be borne by the Plaintiff.**

3. The application is based on the grounds set out therein, namely:

- a. that the Plaintiff's advocate instituted the present suit without having settled the Defendant's costs in a similar suit being High Court Civil Case No. 271 of 2012;
- b. That the Plaintiff's Advocate filed the present suit on the 4th April 2013 without settling the Defendant's costs and by dint of Order 25 Rule 4 of the Civil Procedure Rules, the Plaintiff's Advocate ought to have settled the Defendant's costs.
- c. That the Plaintiff's Advocate withdrew the suit being High Court **Civil Case No. 271 of 2012** after the Defendant raised a preliminary objection as to the practising status of the Advocate, **Katsoleh Geoffrey Kahindi**, practising in the style **Katsoleh & Company Advocates**.
- d. That the Plaintiff's Advocate requested for judgment while the parties were engaged in out of

- court negotiations in breach of the good faith as the Defendant who was keen on settling the matter out of court.
- e. That the request for and subsequent entry of judgment against the Defendant is irregular as there was a pending application filed by the Plaintiff for summary judgment and the same had not been heard or determined.
 - f. That the Auctioneer had taxed his Bill to recover costs of a suit in which the Court had restrained the Auctioneers from proclaiming and attaching the Defendant's property.

The application is supported by the affidavit of **JAMES NJEHURI**, sworn on **3rd October, 2014** as well as the supplementary affidavit sworn on **19th January, 2015** by the Defendant's Legal Manager, **NJOMO KAMAU**.

4. The Defendant averred that the Plaintiff's Advocate withdrew a suit being **High Court Civil Case No. 271 of 2012**, after their Advocates raised a Preliminary Objection as to the practising status of the said Advocate. A copy of the Notice to Withdraw Suit was attached to the supporting affidavit and marked Annex JN1. It was therefore the contention of the Defendant that, for the reason that the Plaintiff filed the present suit before settling the Defendant's costs in the earlier suit, the instant suit should accordingly be stayed.

5. It was further the Defendant's case that the Plaintiff's Advocate proceeded to request for Judgment while parties were engaged in out of Court negotiations yet the Defendant was keen in settling the matter out of Court. The Defendant further averred that on the **19th of July, 2013** the Court noted that the parties were engaged in out of Court negotiations and allowed the Defendant to settle the Decretal sum by instalments of **Kshs. 500,000/-**, and that pursuant thereto, the Defendant had since paid **Kshs. 6,336,592/-**. It was therefore the Defendant's position that the Plaintiff's Advocate acted in bad faith by requesting for judgment in total disregard of the ongoing negotiations and further went ahead to instruct Auctioneers to levy attachment. The Defendant further argued that the request for judgment and subsequent entry of judgment against them was also irregular on the ground that there was a pending application filed by the Plaintiff for summary Judgment which had not been heard or determined.

6. It was further the Defendant's case that the Auctioneer had taxed his Bill vide **Miscellaneous Civil Application No. 311 of 2014** in respect of a suit in which the Court had restrained them from proclaiming or attaching the Defendant's property pending the determination of a pending Application.

7. In view of the foregoing, the Defendant urged the Court that it was in the interest of justice that the Bill of costs and Judgment entered herein be stayed and set aside until the issue of the Defendant's costs is settled in **High Court Civil Case No. 271 of 2012**.

8. In response to the application, the Plaintiff filed the Replying Affidavit sworn on **17th December, 2014** by its Managing Director, one **PERMINUS MWANGI GITHINJI** in which the deponent averred that the interlocutory judgment obtained herein on **24th June, 2013** was so obtained in accordance with the rules of procedure. He further deposed that following the said Judgment, the Defendant rushed to Court on **18th July, 2013** and sought among other prayers that the Court do allow them to pay the decretal sum by instalments of **Kshs. 500,000/=** until payment in full.

9. According to the Plaintiff, the prayer for payment by instalments was never granted by the Court, a fact borne out by the court record. The proceedings confirm that the Defendant's application dated **18th July, 2013** in which they were seeking to pay the decretal sum by instalments was marked as withdrawn on **11th December, 2014**. With regard to the out of court negotiations, the Plaintiff averred that the same were privileged and could not be produced before Court to prejudice its position.

10. The Plaintiff further averred that **Civil Suit No. 271 of 2012** had been withdrawn before it had been set down for hearing and therefore no input was required from the Defendant. It was also the Plaintiff's assertion that non-payment of costs in the withdrawn suit could not be a ground under the law for setting aside of a Judgment.

11. On the Auctioneers Bill of Costs, it was the Plaintiff's case that the same was in a completely different file from the present suit and that they were not a party to the same. The Plaintiff averred that the same could only be properly handled in the said **Miscellaneous Application No. 311 of 2014** and not in the present suit.

12. In the circumstances foregoing, it was the Plaintiff's case that the Defendants' application ought to be dismissed with costs.

13. The parties canvassed this application by way of written submissions. The Defendant filed its written submissions dated **2nd February, 2015** on **4th February, 2015** while the Plaintiff filed its submissions dated **17th February, 2015** on **19th February, 2015**. The submissions were thereafter highlighted before the Court on **30th November, 2015**.

14. I have considered the grounds upon which the instant Notice of Motion has been brought, the averments in the supporting and replying affidavits as well as the pleadings, proceedings to date and the written submissions by Counsel. Having done so, I take the following view of the matter:

15. With regard to the Auctioneers Bill of Costs, I agree with the Plaintiff that the same can only be properly raised in **Miscellaneous Application No. 311 of 2014**. This Court is not privy to the proceedings therein and does not have jurisdiction to give any orders of stay in a matter that is competently before another Court. In any case, the Defendant was seeking for a stay of taxation of the Auctioneers Bill of costs pending the hearing of this application meaning that the same has been overtaken by events.

16. In the premises, the main issue for determination in this matter is whether the Defendant is entitled to the discretion of this Court in setting aside the default Judgment entered on **24th June, 2013**. It is not disputed that a default Judgment in this case was entered on **24th June, 2013** and from the Court record a decree issued therefrom on **2nd July, 2013**. The Judgment was regular as the Defendant had failed to file a Defence and the interlocutory judgment was entered by the Court upon the Plaintiff's request for Judgment as envisaged under **Order 10 rule 4 (1)** of the **Civil Procedure Rules**.

17. Nevertheless, it is trite law that the setting aside of an interlocutory judgment by the Court is discretionary. In **Patel Vs EA Cargo Handling Services [1974] EA 75** the Court observed that there are no limits or restrictions on the Judge's discretion except that, if he/she does vary the judgment, it should be on such terms as may be just. It is now trite that the said discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought to obstruct or delay the Course of justice (see **Shah Vs. Mbogo (1967) EA 116**).

18. The Defendant's case is that prior to filing this suit, the Plaintiff had filed a similar suit in **HCCC No. 271 of 2012** which it subsequently withdrew and up to date the Plaintiff has not paid the Defendant's costs. The Defendant placed reliance on **Order 25 Rule 4** of the **Civil Procedure Rules, 2010** which provides that:-

"If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid." (Emphasis supplied)

19. However, in **Order 25 Rule 3** of the **Civil Procedure Rules**, it is provided that:-

"Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn."

20. There is nothing on the record to show that the Defendant requested for and obtained Judgment for the

costs of the withdrawn suit. There is also no evidence to show that the Defendant had demanded for the costs of the previous withdrawn suit and the Plaintiff refused to pay. In the circumstances, I would agree with Counsel for the Plaintiff that the case of **Patrick Kigera Mathia & Another. Vs Dr.Peter Mungai Ngugi and 2 Others (2011) eKLR**, that was relied on by the Defendant is easily distinguishable from the present case. In the said case, judgment for costs in the discontinued case had been awarded and a certificate issued. The Defendant sent several demand letters to the Plaintiff reminding them to pay such costs and they also indicated that they would file an application for the stay of the subsequent suit if such costs were not paid. I therefore take the view that before a party can invoke the provisions of **Order 25 rule 4 of the Civil Procedure Rules**, there has to be a judgment and certificate for costs of the discontinued suit of which the Defendant must have taken steps to obtain and realize, but failed

21. The second plank of the Defendant's case was that the interlocutory Judgment should be set aside on the ground that there is a dispute as to the amount owed which, according to it, is a triable issue. In the case of **Shah Vs Mbogo [1967] EA 116**, the Court of Appeal held that:-

“... I agree that where it is a regular judgment as in this case here the court will not usually set aside judgment unless it is satisfied that there is a defence on the merit.

Similarly the Court of appeal in **Kingsway Tyres & Automat Limited & Automat Limited Vs Rafiki Enterprises Limited Civil Appeal No. 220 of 1995** held that: - notwithstanding the regularity of an ex parte judgment, a court may set aside the same if he has reasonable defence on the merits. (See also **Fredrick Chege Kamenwa Vs Aron K. Kandie [2001] eKLR**)

22. In the present application, the Defendant did not annex a draft defence and therefore the Court is not in a position to make a determination as to whether or not it has an arguable case against the Plaintiff to be canvassed at a full trial. Be that as it may, it was the Defendant's assertion that it had fully paid what was due and owing to the Plaintiff and that there was a disparity with regard to the amount that was due. Even then, there is no evidence on the Court record to show that the Plaintiff has fully paid what was due to the Plaintiff. The Defendant has also not demonstrated to this Court the disparity or any dispute as to the amount due to the Plaintiff, aside from the averment in paragraph 6 of the supporting affidavit to the effect that there is a dispute as to the amount owed of Kshs. 1,392,920/-. In the circumstances, besides not annexing a Defence to its application, the Defendant has not demonstrated any triable issues against the Plaintiff that would amount to a defence on the merits.

23. The Defendant also contended that the Interlocutory Judgment was not obtained in good faith as the parties were engaged in Out of Court negotiations. The Defendant relied on communication between the Plaintiff and itself which were mostly on **‘without prejudice’** basis. As a general rule, communication made between parties on **“without prejudice”** basis is not admissible (see **Black's Law Dictionary**). In the case of **Cooperative bank of Kenya Ltd vs. Shiraz Sayani MBA HCCC 23/99, Waki J, (as he then was)** stated thus in this regard:

“The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. The rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it is to have no effect at all”. It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements.”

24. In the present case the negotiations were on a “without prejudice basis”. I therefore would agree with the submissions of the Plaintiff's Counsel that to the extent that the negotiations are still privileged they cannot be relied on herein as the Defendant has tried to do. In any case, the communication between the parties did not lead to any settlement or consent as had been anticipated. Moreover, the negotiations were not a bar to the Plaintiff progressing this matter if he was not satisfied with the pace or outcome thereof.

25. Last but not least, the application for setting aside was not made timeously. The present application was filed on **7th October, 2014**, over a year since the interlocutory judgment was entered on **24th June 2013**. The Defendant did not offer any plausible reasons for the said delay. They had all along acquiesced to the said interlocutory judgment by offering to pay the amount due in instalments, and pursuant thereto, a substantial portion of the debt has been paid by the Defendant.

26. In view of the foregoing, it is the Court's resultant finding that the Defendant has not demonstrated that he has a defence on the merits, or that there is a good cause to warrant the setting aside of the Interlocutory Judgment entered on **24th June, 2013** which was regularly entered. The application dated **3rd October 2014** is therefore dismissed with costs to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016.

OLGA SEWE

JUDGE