

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 15 OF 2015

NIMRAJ LIMITED PLAINTIFF

VERSUS

SALAMA BEACH HOTEL LIMITED DEFENDANT

RULING

The application dated 29th June, 2015 is seeking to set aside the interlocutory judgement entered herein against the defendant and also to grant leave to the defendant to file its defence out time. The application is supported by the affidavit of HANS JUERGEN LANGER sworn on the same date and a further affidavit of the same person sworn on 16th February, 2016. The respondent filed a replying affidavit sworn by DHANJI NARAN on 18th August 2015. Parties agreed to determine the application by way of written submissions.

Mr. Ndegwa, counsel for applicant submitted that the defendant was served with the summons and duly entered appearance within time. During the same period there were court orders which affected the directorship of the defendant company and it became impossible to file defence. The court later gave clarity on the orders but by then the time to file defence had lapsed and the application was immediately filed. The defendant has a good defence and a draft has been annexed. The dispute involves delivery of goods worth Kshs.32 million and the defence is that the amount has been paid. The defendant paid a total of Kshs.23 million and there is a dispute on the value of goods delivered. This raises triable issues. There was a problem involving the execution of the contract. There is a good reason as to why the defence was not filed on time.

Mr. Kagram, counsel for the respondent relied on his replying affidavit as well as the written submissions. Counsel contends that the defendant is trying to hide behind the dispute involving the directorship of the defendant. The order of the court relating to the directorship of the defendant was issued on 30th April, 2015 and it was immediately stayed for fourteen (14) days. The stay orders were extended to 19th May, 2015. Therefore the directors of the defendant company was still in place. The dispute involving the directorship cannot be used to defeat the rights of creditors. Counsel further maintains that the draft defence alleges that it is another company which is supposed to pay the debt and that the agreement was not sealed. There is correspondence indicating that the two parties were clearly dealing with each other. There is an email which indicate that the last payment was to be made. Counsel further contends that the applicant is seeking the discretion of the court which has to be exercised judiciously. Should the court allow the application then the amount claimed should be deposited in a joint account.

I have read the written submissions by both counsels as well as the rival affidavits. The submissions mainly raise the same issues as those submitted orally by the counsels. Both parties have cited the case of **PATEL VS EAST AFRICA CONGO HANDLING SERVICES LIMITED [1974] E.A. 75**. According to the authority, a regular judgement will normally not be set aside unless the court is satisfied that there is a defence which is merited. The judgement can also be set aside on terms which are just. Counsel for the respondent also cited the case of **MBOGO VS SHAH (1968) E.A. 93** where it was held

that a regular judgement can be set aside if it will be just and reasonable. A judgement cannot be set aside to assist a person who has deliberately sought to obstruct or delay the course of justice.

The record shows that the claim was filed on 14th April, 2015. A memorandum of appearance was filed by a firm of Ndegwa and Kiarie Advocates on 29th April, 2015. No defence was filed. A request for judgement was filed on 22nd May, 2015. The plaintiff is claiming a sum of Kshs.8,664,950/= being the balance of monies due from the payment for various works at the defendant's premises. It is therefore clear that the judgement was entered properly and is regular. For it to be set aside, the defendant has shown good reasons as to why the defence was not filed on time and also to show that indeed there is a good defence. On the first issue of non-filing of the defence on time it is submitted that there was a court order which affected the directorship of the defendant company. The order was issued on 30th April, 2015 just a day after the appearance was filed. The defence was to be filed fifteen (15) days from 29th April, 2015 but it wasn't. The current application was filed on 29th June, 2015 about one month from the date of the appearance. It is true that there were court orders involving the directorship of the defendant and it could be possible that although the orders were stayed, the circumstances were not conducive to giving further instructions to the defence advocate. I do find that the current application was filed without undue delay.

The next issue is whether there is a prima facie defence. Ordinarily this does not mean a defence which must succeed. All what is required is a defence which raises triable issues. The defendant contends that there is a dispute as to the value of the works done and it is also alleged that the works were done in favour of the 3rd party (VENTAGLIO SA). The plaintiff has annexed email correspondence between the parties and it is established that parties were negotiating on the amount payable. The correspondence does not acknowledge any specific amount which is admitted. The plaintiff is also apprehensive as Hans Juergen Langer filed a winding up petition No. 27 of 2010 before the Milimani Court which sought to wind up the defendant.

Given the pleadings herein, I do find that the defence raises triable issues. However, the judgement was regularly obtained and the plaintiff legitimately expected to benefit from the judgement. The discretion of the court to set aside that judgement ought to be conditional as no blame can be apportioned to the plaintiff. I do grant the application dated 29th June, 2015 on condition that the defendant do deposit a sum of Kshs.2,000,000/= either in court or in a joint account of counsels for both parties within ninety (90) days hereof. The defendant to file and serve its defence within fourteen (14) days hereof. In default of depositing the sum of Kshs.2,000,000/= as directed herein, the interlocutory judgement shall automatically be restored and the plaintiff shall be at liberty to execute. Costs of the application shall follow the outcome of the suit.

Dated and delivered in Malindi this 14th day of June, 2016.

S.J. CHITEMBWE

JUDGE