



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. CIVIL APPLICATION NO. 178 OF 2015

PETER JUMA KURIAH T/A SCOPE DESIGNS SYSTEMS.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL (sued on behalf of

MINISTRY OF INDUSTRIALIZATION.....1ST DEFENDANT

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....2ND
DEFENDANT**

RULING

[1] The Chamber Summons application dated **29 February 2016** seeks orders that leave be granted for judgment to be entered in favour of the Plaintiff against the 1st Defendant, the Attorney General, in default of filing a Defence herein on behalf of the Ministry of Industrialization, and that costs of the application be provided for. It was brought pursuant to Sections **1A** and **3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 10 Rule 8 of the Civil Procedure Rules, 2010** on the grounds that the 1st Defendant was served with Summons to Enter Appearance on **30 June 2016**, and that although the 1st Defendant entered appearance herein on **16 July 2015**, no Defence had been filed by the 1st Defendant by **1 April 2016** when the instant application was filed.

[2] The application is supported by the affidavit annexed thereto sworn by **Job Odhiambo Ochieng'**, and Advocate in the firm of **M/s Ogola Okello & Company Advocates**, who are on record for the Plaintiff. It was deponed therein that upon being served with Summons to Enter Appearance, the 1st Defendant entered appearance on **16 July 2015**, but neglected to file a Statement of Defence; and that since no judgment in default of filing Defence can be entered against the 1st Defendant without leave of the Court, the instant application was filed for the specific purpose of obtaining the requisite leave.

[3] The application was opposed by **Barbara Nguyu**, a Litigation Counsel in the Office of the 1st Defendant. In the Grounds of Opposition filed herein on **8 June 2016**, she contended that the Office of the Attorney General is keen on defending this suit on behalf of the Ministry of Industrialization and Enterprise Development and should therefore not be condemned unheard. She added that the matters at hand are of great public interest, which might be prejudiced, to the detriment of the 1st Defendant, if the orders sought are granted. Thereafter, on **20 June 2016**, the 1st Defendant filed an application for enlargement of time within which to file a Statement of Defence. Attached to that application was a draft Defence, which, in the contention of the 1st Defendant, raises triable issues. It was reiterated therein that

the 1st Defendant stands to suffer irreparable loss to the tune of **Kshs. 2,000,000,000** and should therefore not be condemned unheard. **Ms. Nguyu** added that the Plaintiff, on the other hand will not suffer any prejudice or detriment should the 1st Defendant be granted leave to defend this suit. She highlighted the foregoing averments in her oral submissions before the Court.

[4] In his submissions made herein on **27 July 2016**, **Mr. Odhiambo Ochieng** urged the Court, on behalf of the Plaintiff, to note that, thus far there is no Defence on the record, and that even in the subsequent application for leave to file Defence out of time, no attempt was made to explain either the inordinate delay or the inaction by the 1st Defendant since **16 July 2015** when appearance was entered. According to him, the allegation by **Ms. Nguyu** that she was taken ill and had to take leave of absence was not supported by any document proof, and was therefore simply a mere allegation. He further posited that the Attorney General should not be allowed to plead public interest, since public interest also requires that the Attorney General acts timeously and diligently. He thus urged the Court to allow the application so that this matter can be brought to a close.

[5] Having carefully perused and considered the application, the Supporting Affidavit, and the Grounds of Opposition filed herein in the light of the pleadings filed, it is apparent that there is no dispute that the 1st Defendant was served with Summons to Enter Appearance, and that whereas a Memorandum of Appearance dated **14 July 2015** was filed herein on **16 July 2015**, thereby providing the 1st Defendant with 14 more days within which to file a Defence, by dint of **Order 7 Rule 1 of the Civil Procedure Rules**, the 1st Defendant did not file any Defence, thus the Plaintiff moved the Court, in compliance with **Order 10 Rule 8 of the Civil Procedure Rules**, to file the instant application, seeking leave for judgment to be entered in the Plaintiff's favour in default of Defence. It is evident that this application is what jolted the 1st Defendant into action, prompting the filing of the subsequent application for enlargement of time dated **17 June 2016**.

[6] The record further shows that the Plaintiff's cause of action is the proposed contract for the provision of consultancy services for Small and Medium Enterprises (SMEs) by the Ministry of Industrialization and Enterprise Development during the Financial Year 2012/2013. The Plaintiff, feeling aggrieved that the Ministry appeared to have reneged on the contract after award and acceptance of tender, moved the Court for a Permanent Injunction to restrain the Defendants from entering into any contracts with any other party in respect of the project, and a Mandatory Injunction compelling the Defendants to execute and specifically perform the contract as awarded to the Plaintiff.

[7] The 1st Defendant now contends that the project involves a large sum of money and therefore that it would be detrimental for the Defendants to be condemned unheard. The 1st Defendant further explained that the delay was on account of sickness on the part of Counsel on record. However, as was submitted by Counsel for the Plaintiff, that explanation is far from convincing for the reason that it was not backed by any documentary proof. Additionally, it is common knowledge that in such situations Counsel would cause colleagues to hold brief and ensure what needs to be done to progress the matter is done without hindrance. **Ms. Nguyu** was certainly not the only Counsel working in the Litigation Department at the Office of the Attorney General at the material time; and, in the absence of evidence to the contrary, it is doubtful that she was away on sick off for the whole period of about 8 months between **16 July 2015** and **1 April 2016** when the instant application was filed. It is needless to say that public policy requires that Counsel at the Office of the Attorney General take their dockets with the seriousness they deserve as they are obliged to assist the court in furthering the Overriding Objective as expressed in **Section 1A of the Civil Procedure Act**.

[8] Be that as it may, it cannot be gainsaid that the 1st Defendant has since filed an application for extension of time within which to file Defence, and whereas that application ought to have been argued before the instant application in view of the prayers sought therein, the same is still pending. To it is attached a draft Defence and it remains to be decided whether it does raise triable issues. I note however that in urging their respective positions in respect of the instant application, the question of whether the 1st Defendant has a reasonable Defence did come up in connection with the contention that the matters at hand are of great public interest and that Defendants stand to suffer prejudice and detriment if judgment is entered against them as sought.

[9] Taking the foregoing into account and granted that the 1st Defendant has evinced the intention to defend the suit, it is my considered view that this is a case in which the discretion of the court should be exercised in favour of the 1st Defendant, so that the case can be heard and determined on the merits. I would in the circumstances borrow the expressions made in the case of **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22**, thus:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the ... process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

[10] In the premises, I would dismiss the application dated **29 February 2016** with an order that costs thereof be borne by the 1st Defendant.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 14th DAY OF OCTOBER, 2016.

OLGA SEWE

JUDGE