



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 738OF 2012

BARAKAT EXPLORATION INC.....PLAINITFF

VERSUS

TAIPAN RESOURNCES INC.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant filed two (2) applications which are the subject matter of this consolidated ruling. Although in its Written Submissions the Defendant had indicated that when making joint reference to the aforesaid applications, it would refer to the same as “**the Applications**”, the court found it prudent to deal with the two (2) applications under separate heads.

I. THE DEFENDANT’S NOTICE OF MOTION APPLICATION DATED AND FILED ON 29TH AUGUST 2015

2. The Defendant’s Notice of Motion application dated and filed on 29th August 2015 had been brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 10 Rules 10 and 11, Order 51 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The Defendant sought the remaining following prayers:-

1. **Spent.**
2. **Spent.**
3. **THAT this Honourable Court do set aside the judgment in default of defence entered against the Defendant on 27th May 2014 and all orders consequential thereto.**
4. **THAT this Honourable Court be pleased to grant the Defendant leave to file a Statement of Defence and all requisite accompanying documents out of time.**
5. **THAT the costs of the application be in the cause.**

THE DEFENDANT’S CASE

3. The said application was supported by the Supporting Affidavit of Joel Dumaresq, the Defendant’s Chief Financial Officer. The same was sworn on 29th August 2014. The Defendant’s Written Submissions, List and Bundle of Authorities in respect of the two (2) applications herein

- were all dated and filed on 4th November 2014.
4. The Defendant's case was that it had only recently learnt that interlocutory judgment was entered against it on 27th May 2014. It stated that it had been awaiting the court's ruling of its Notice of Motion application dated and filed on 19th March 2013 in which it had sought to have the Plaintiff's suit struck out on the ground that the same had been premised on a non-existent contract/agreement.
 5. It was its contention that if the suit had been struck out, there would have been no need for it to have filed a Statement of Defence as the suit would automatically have been terminated. Alternatively, the dispute would have been referred to a jurisdiction that was outside this court. It explained that it did not file its defence because it was not aware of the delivery of the court's Ruling in which its application dated and filed on 19th March 2013 was dismissed on 21st May 2014.
 6. As it had a good defence, it had been greatly prejudiced by the entry of the said interlocutory judgment and therefore sought to have the said interlocutory judgment that was entered against it in the sum of CAD \$ 626,000, set aside to enable it file a Statement of Defence.

THE PLAINTIFF'S CASE

7. In opposition to the said application, Azim Nathoo, the Plaintiff's Director, swore a Replying Affidavit on 22nd September 2014. It was filed on the same date. Its Written Submissions were dated 2nd December 2014 and filed on even date. Its List of Authorities was also dated and filed on the 2nd December 2014. The said Written Submissions were also in respect of the two (2) applications herein.
8. The Plaintiff averred that it saw the notification of the delivery of the Ruling of 21st May 2014 in the cause list of the same date and sent a representative of the firm to attend court for the delivery of the same. Thereafter it filed its Request for Judgment on 23rd May 2014 whereupon Interlocutory Judgment was entered on 27th May 2014. It subsequently served the Defendant with a Notice of Intention to Execute.
9. It termed the Defendant's present application an abuse of the court process and urged the court to dismiss the same with costs to it.

LEGAL ANALYSIS IN RESPECT OF THE 1ST APPLICATION

10. The Defendant argued that Order 10 Rule 11 of the Civil Procedure Rules, 2010 as read together with Rule 10 of the same order gave the court unfettered discretion to set aside an *ex parte* judgment entered in the event of default of filing an appearance or a defence. It was emphatic that the Court of Appeal and this court had on various occasions reiterated the principles governing the setting aside of *ex parte* judgments.
11. It placed reliance on several cases where the common thread was that the court had wide and unfettered discretion to set aside irregular judgments- **See Patel vs E.A. Cargo Handling Services Ltd [1974] EA 75, Remco Limited vs Mistry Jadva Parbat and Co Limited & Others [2002] 1 EA 227** amongst other cases.
12. Even without relying on any provisions of the law, it is indisputable that parties are entitled to a notice before delivery of any decision by the court. That is a basic tenet of the principle of rules of natural justice. The question that begs an answer is whether or not the delivery of the Ruling of 21st May 2013 had any connection with request and entry of interlocutory judgment and if failure of notification of delivery of the Ruling had a direct correlation to the entry of the said judgment against the Defendant.
13. As was rightly submitted by the Plaintiff, entry of interlocutory judgment was not entered as a result of the delivery of the said Ruling of 21st May 2014. The Defendant was duly served with Summons to Enter Appearance pursuant to which it entered a Memorandum of Appearance. It was required to file a Defence within fourteen (14) days of the filing of the said Memorandum of Appearance.
14. Its failure to have filed a Defence within the stipulated period had absolutely nothing to do with its

- application for striking out of the suit herein. There is no provision under the law that stipulates that a defendant who seeks to strike out a plaintiff's suit ought to have such an application determined before it can file its defence. Indeed, the Plaintiff herein was entitled to apply for entry of interlocutory judgment at any time after the Defendant failed to file its Defence and need not have waited for the outcome of the court's Ruling that was delivered on 21st May 2014.
15. The question of jurisdiction of this court would also not have prevented the Defendant herein from filing a Statement of Defence as it could have raised the issue that the court lacked jurisdiction in its said Statement of Defence. In any event, in Paragraph 56 of the said Ruling of 21st May 2014, the court concluded that by filing a conditional Memorandum of Appearance, the Defendant had already submitted itself to the jurisdiction of this court.
 16. If the Defendant was still contesting the jurisdiction of this court, then it would not be seeking to file its Statement of Defence at this stage because its views about the jurisdiction of this court had not changed. Its intention to file its Statement of Defence now would mean that it was aware at all material times that it was required to file the said Defence.
 17. The court was thus not persuaded by the Defendant's arguments that the interlocutory judgment that was entered against was irregular by virtue of the fact that the judgment in default arose directly from the dismissal of the striking out application vide the Ruling that was delivered on 21st May 2014 that was read in its absence or its counsel on record. Notably, the Plaintiff applied for judgment in default of defence on 22nd May 2014, a day after the delivery of the Ruling as above mentioned whereupon the said Judgment was entered against the Applicant on 27th May 2014.
 18. Indeed, the Plaintiff was perfectly entitled to apply and obtain entry of judgment when the Defendant defaulted in filing a Statement of Defence and need not have waited for the delivery of judgment. The Defendant's advocates were not diligent enough in safeguarding the Defendant's interests and appeared to want to rely on the delivery of the Ruling of 21st May 2014 without notice to it to conveniently remedy their omission and/or negligence in filing a defence.
 19. The cases the Defendant relied upon to support its argument that the interlocutory judgment that was entered against it was irregular were not of any assistance to it. The case of **Ngoso General Contractors Ltd vs Jacob Gichunge [2005] eKLR** was distinguishable from the facts of this case for the reason that the ruling therein had a direct impact on the applicant's right to safeguard its interests. In the instant case, the court's Ruling had nothing to do with the failure by the Defendant to have filed its Defence within the prescribed period under the Civil Procedure Rules, 2010.
 20. That notwithstanding, the court has wide and unfettered discretion to set aside any interlocutory injunction under Order 10 Rule 11 of the Civil Procedure Rules, 2010. The said Order provides that:-

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

21. The court's discretion must be exercised judiciously and be supported by the facts of the case with a view to avoiding injustice or hardship to a party resulting from accident, inadvertence or excusable delay by its advocate. It is not intended to assist a party to evade or obstruct the course of justice as could be seen in the case of **Patel vs E.A. Cargo Handling Services Limited** (Supra) that was relied upon by the Defendant.
22. The Defendant had filed a Notice of Appeal for the determination of the question of whether or not there was a contract and/or agreement between itself and the Plaintiff herein. In its draft Defence that was annexed to its Supporting Affidavit, it contended that the Plaintiff never provide it any services and that there was no meeting of minds in respect of the Proposed Consultancy Agreement. This, amongst other issues that were raised in the said draft Statement of Defence, were matters that were best dealt with at trial.
23. The court observed that all things remaining constant, the Defendant's advocates also failed to exercise due diligence in following up on the fate of their application for striking out the Plaintiff's suit bearing in mind that the same was reserved for Ruling on 11th March 2014 and the sixty (60) days it had argued was stipulated for delivery of rulings had long past. On the other hand, the Plaintiff was able to pursue the progress of the delivery of the Ruling and indeed

- attended court on 21st May 2014. The court did not want to analyse the submissions regarding the meaning of judgment and ruling as that was not an issue for determination by the court.
24. Although, the court had found that Defendant's advocates were negligent in not filing the Statement of Defence at the appropriate time, the Defendant ought to be given an opportunity to a fair trial as provided for in Article 50 of the Constitution of Kenya, 2010. It ought not be punished for the mistake of its advocates.
 25. For the foregoing reasons, having considered the pleadings, affidavit evidence, oral and written submissions and the case law in respect of the 1st application herein, the court came to the conclusion that it was just and equitable that the interlocutory judgment entered against the Defendant on 27th May 2014 and all consequential orders thereto be set aside and the Defendant given an opportunity to ventilate its case at full trial.
 26. Having said so, the court noted the Plaintiff's submissions that the sole intention of the Defendant was to delay the just conclusion of the suit herein. It contended that the Defendant had filed its application seeking to strike of its suit almost two and a half (2 ½) months from the date it was to file its Statement of Defence and almost one and a half (1½) years before it applied for and obtained interlocutory judgment against the Defendant.
 27. It was the finding and holding of the court that any prejudice suffered by the Plaintiff on account of being taken backwards in this matter could be adequately compensated by an award of costs. The court was, however, unable to state with certainty if the application herein had been filed timeously as it could not authoritatively verify if the Defendant became aware of the delivery of this court's Ruling on 15th July 2014 as it had contended or earlier than that.
 28. The court, however, not opted to place too much importance to this argument purely because it had found that the Defendant's draft Statement of Defence had raised triable issues requiring determination at full trial.

II. DEFENDANT'S NOTICE OF MOTION APPLICATION DATED AND FILED ON 16TH SEPTEMBER 2014

29. The second Defendant's Notice of Motion application dated and filed on 16th September 2014 was brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Section 7 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 of the Constitution and all enabling provisions of the law. It sought the following orders:-
- a. **THAT this Honourable Court be pleased to grant Taipan Resource Inc ("the Applicant") leave to file its notice of appeal and appeal out of time against the High court's decision dated 21st May 2014.**
 - b. **THAT this Honourable Court be pleased to grant the Applicant seven (7) days within which to file its notice of appeal after the grant of the above said leave and sixty (60) days after filing the Notice of Appeal to file the Appeal.**
 - c. **THAT this instant application be canvassed together with that Notice of Motion application dated 29th August 2014 and filed by the Applicant on even date.**
 - d. **THAT the costs of this application be in the cause.**

THE DEFENDANT'S CASE

30. The said application was supported by the Affidavit of George Muchiri, an advocate in the Defendant's advocates' firm. The said Affidavit was sworn on 16th September 2014.
31. It was the Defendant's contention that it did not file its Notice of Appeal as it had not been aware of the court's Ruling that was delivered on 21st May 2014 and that by the time it became aware of the said Ruling on 15th July 2014, fifty five (55) days had since lapsed.
32. The deponent averred that there had been massive re-organisation of the law firm that was

representing it and the firm had been inundated with a heavy workload which meant that the instant application could not have been filed earlier than when it was filed. The Defendant therefore urged the court to allow the said application as it had been filed timeously.

THE PLAINTIFF'S CASE

33. On 23rd September 2014, the Plaintiff filed its Grounds of Opposition of even date. The said Grounds could be summarised as follows:-

- a. **THAT the application had been filed after an inordinate delay.**
- b. **THAT the Plaintiff would be greatly prejudiced if the said application was allowed.**
- c. **THAT the intended appeal had no merit and being incompetent, the same should be struck out.**
- d. **THAT the said application was misconceived, mischievous, in bad faith, frivolous and vexatious.**

34. It therefore urged the court to dismiss the Defendant's said second application with costs to it.

LEGAL ANALYSIS IN RESPECT OF THE 2ND APPLICATION

35. The Defendant argued that its right of appeal against the Ruling that was delivered by this court was guaranteed under the provisions of Article 50 of the Constitution. It also submitted that this court had unfettered jurisdiction to extend time within which it could file its Notice of Appeal and appeal against the said Ruling as was provided by Section 7 of the Appellate Jurisdiction Act, Cap. 9 of the Laws of Kenya.

36. It stated that all the court was required to consider was the period of delay between the delivery of the Ruling and the filing of its 2nd application, the reason for the delay between the delivery of the Ruling and the filing of its application, the arguability of the intended appeal and the prejudice that was likely to be suffered by the Plaintiff herein. It referred the court to the case of **Njogu Macharia vs Paul Wairuri Mwangi [2009] eKLR** in this regard.

37. The issue of the reorganisation of the Defendant's firm of advocates would not have persuaded this court to allow the Defendant file a Notice of Appeal out of time. What was of concern to the court was the ramification or otherwise of notification of the delivery of its Ruling of 21st May 2014 as regards the Defendant's right of appeal.

38. The court combed through the court file but did not find the Notice of delivery of the Ruling therein. It was therefore not clear whether or not the said Notice was served upon by the parties by the Court Process Server. It was, however, evident that from Paragraph (8) hereinabove that the Plaintiff's advocate saw the notification of the delivery of the said Ruling in the cause list of the same date and sent a representative of the firm to attend court for the delivery of the same.

39. As the court had pointed hereinabove that notification of the date of delivery of a decision by the court was critical in view of the natural rules of justice, lack of a notice of the said ruling in the court file or Affidavit of Service evidencing service of the same upon the Defendant would persuade the court to give the Defendant benefit of doubt and conclude that it was never served with the said notice.

40. In the circumstances, the Defendant would therefore have been prejudiced for not having been given an opportunity to appeal against the court's Ruling at the time of its delivery as it had an automatic right of appeal under Order 43 of the Civil Procedure Rules from an application that had been brought pursuant to the provisions of Order 2 Rule 15 of the Civil Procedure Rules. The delay in filing its Notice of Appeal could thus be explained by the fact that it had not been aware of the delivery of the said Ruling.

41. The facts of the case of **Nicholas Kiptoo Salat vs The Independent Electoral & Boundaries Commission & 7 Others [2007]** that was relied upon by the Plaintiff were therefore distinguishable from the facts of this case as the Defendant could not be said to have acted inequitably.

42. The Defendant sought to appeal against the Ruling on various grounds some of which had been set out in the draft Memorandum of Appeal annexed to the supporting affidavit of George Muchiri sworn and marked as Exhibit "GM5", the key one being that this court had made a factual error when it held that there existed a contract between itself and the Plaintiff.

a. At Paragraph 48 of the said Ruling, this court held that:-

“...this court hereby rejects the Defendant’s submissions that there was no valid and binding contract between it and the Plaintiff because the latter had made it a counter offer on the clause of the governing clause which it had not acceded to as [sic] the time it filed the application herein...”

43. At Paragraph 46 of the said Ruling, this court also stated as follows:-

“...Neither party herein can invoke the parole evidence rule to adduce oral evidence so as to deny the validity or existence of the said contract or evade certain terms when it suits them for the reason that the contract herein was evidenced in writing...”

44. Whether the issue the Defendant was arguable or not is not an issue this court would wish to delve into as that was well within the purview of the Court of Appeal as the court had made its finding on the said issue.

45. While the Plaintiff argued that it would be prejudiced if the court granted leave to appeal for the reason that the status of the Defendant was not known in Kenya and that there was a possibility of non-availability of witnesses, the court was not persuaded at all that this would happen for the reason that in the absence of any stay of proceedings, the Plaintiff was perfectly entitled to prosecute its case to its logical conclusion. Indeed, granting such leave would not amount to stay of proceedings in the court herein. What the court was certain of was that the Plaintiff would not be prejudiced if the court were to grant leave to the Defendant to appeal against its said Ruling.

46. Having said so, this court can entertain applications to allow a party to file a **Notice of Appeal or to file applications seeking to leave to appeal out of time**(emphasis court) and not give directions within which an appeal at the Court of Appeal ought to be filed. The court did not therefore agree with the Plaintiff’s submissions that this court only had jurisdiction to allow an application to file an appeal out of time only.

47. Indeed, Section 7 of the Appellate Jurisdiction Act provides as follows:-

“The High Court may extend the time for giving notice of intention to appeal(emphasis court) from a judgment of the High Court or making an application for leave to appeal(emphasis court) ... notwithstanding that the time for giving such notice or making such an appeal may have expired.”

48. However, an application for the extension of the filing of appeal under Rule 75 of the Court of Appeal Rules and all that appertains to such an appeal would be within the jurisdiction of the Court of Appeal as provided in Rule 4 of the Court of Appeal Rules which provides as follows:-

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time be extended.”

49. The court must be ready and willing to accept the fact that its decision could be set aside and/or overturned on appeal. In view of the fact that the court found that the Plaintiff would not be prejudiced if the Defendant argued its appeal at the Court of Appeal and that the Defendant had been entitled to an automatic right of appeal to the Court of Appeal against its Ruling of 21st May 2014, the court found that this was a suitable case to grant leave to Defendant to give its intention to give notice of intention to appeal out of time.

DISPOSITION

50. The upshot of this court’s ruling was that the Defendant’s Notice of Motion application dated and filed on 29th August 2014 was merited and the same is hereby allowed in terms of Prayer Nos(3) and (4) therein.

- a. **The court hereby grants leave to the Defendant to file and serve upon the Plaintiff its Statement of Defence within fourteen (14) days from the date of this ruling.**
- b. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence if any to the Defendant's Statement of Defence within fourteen (14) days from the date of service of the Defendant's Statement of Defence.**
- c. **The Defendant shall pay to the Plaintiff thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from the date of this ruling.**
- d. **In the event the Defendants shall fail to comply with order 50 (c) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**

51. The Defendant's Notice of Motion application dated 16th September 2014 and filed on 17th September 2014 was merited and the same is hereby allowed in terms of Prayer No (1) therein.

52. Costs of both applications shall be in the cause.

53. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of March 2015

J. KAMAU

JUDGE