



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1144 OF 2013

SALIMA ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

NAIROBI CITY COUNTY..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd July 2014 in which the Defendant/Applicant seeks for the following orders:

1. Spent.
2. That this Honorable Court be pleased to order a stay of execution of Judgment of this Honorable Court dated 4th July 2014, the decree extracted therefrom and or any other consequential order pending the hearing and determination of this Application.
3. That this Honorable Court do order that this Application and all the other pleadings be served on the office of the Attorney General and the Attorney General's office be at liberty to file a response thereto within 14 days from the date of the order and service.
4. That this Honorable Court be pleased to issue an order that the Attorney General be enjoined to this suit as the 2nd Defendant in view of the fact that the transaction the subject of this case was negotiated agreed and thereafter breached by the office of the Deputy Prime Minister and the Minister for Local Government and the Attorney General's office be at liberty to file any necessary documents in response to the main suit.
5. That this Honorable Court be pleased to set aside and/or review the Judgment of this court dated 4th July 2014 upon any conditions it deems just and expedient in the public interest.
6. That all orders and actions consequential upon the said Judgment be set aside until disposal of this suit.
7. That the Defendant/Applicant be given leave to defend this suit and the Defendant/Applicant's draft defence annexed thereof be deemed to be duly filed upon payment of the requisite filing fees.
8. That the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Karisa Iha, the Defendant's Director Legal Services, sworn on 22nd July 2014 in which he averred that this suit was filed by the Plaintiff on 25th September 2013 and upon being served, the Defendant/Applicant instructed the firm of Cootow & Associates Advocates to take up the conduct of this matter. He confirmed that the said law firm filed a Memorandum of Appearance on 30th September 2013

coming on record for the Defendant/Applicant. He averred further that on diverse dates, the said law firm wrote various letters to the Defendant/Applicant seeking for instructions and information to enable them to defend this suit which letters were drawn to the attention of one of the Defendant/Applicant's employee going by the name Abwao Erick Odhiambo who works in the legal department. He confirmed that the said letters were received in the Defendant/Applicant's front office but this information was never delivered to the persons concerned for action in order to protect the interest of the Defendant/Applicant and the public at large. He added that the Defendant/Applicant has initiated internal investigation into the issue with a view of commencing disciplinary measures upon any person found to have deliberately concealed the information. He stated that in view of the foregoing, the law firm did not have the relevant information and materials to enable them to defend this suit. He stated further that failure to file a defence and tender evidence on the part of the Defendant/Applicant in this case was not deliberate but curtailed by the circumstances disclosed above. He added that the Defendant/Applicant has a strong defence and sufficient documentary materials to support the said defence and had the same been availed to the court during the hearing of this suit, this court could not have reached the finding contained in the Judgment delivered on 4th July 2014.

The Application is not contested though the Plaintiff/ Respondent and the Defendant/Applicant filed their respective written submissions.

The main issue I am called upon to determine is whether I should set aside that Judgment and allow the Defendant herein to file its Defence for a re-hearing of this suit. Indeed, Judgment in this suit was delivered by this court on 4th July 2014. It is true that the Defendant did not file any defence in this suit and the hearing proceeded without the participation of the Defendant. The applicable law on this issue is **Order 10 Rule 11** of the **Civil Procedure Rules, 2010** which provides as follows:

“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.”

It would appear that whether or not to set aside or vary a judgment entered under Order 10 is really an exercise of judicial discretion. Should I exercise my judicial discretion to set aside or vary the judgment entered in this suit? Having written the judgment myself, I must say that I was disappointed by the failure of the Defendant to defend this suit bearing in mind the amounts claimed by the Plaintiff which would ultimately be paid from tax payers money if the Plaintiff was successful which it was. Unfortunately, the Defendant failed to file a defence and, though represented in court during every single court appearance including the hearing, the Defendant remained a spectator in this suit. I have carefully considered the reason advanced by the Defendant/Applicant as to why they failed to defend this suit. The reason given is that the employee mandated to handle this matter failed to inform other persons who are not named who presumably have the authority to give instructions in this matter. It appears that even the counsel for the Defendants, Cootow & Co. Advocates, were frustrated by the failure of the Defendant to give them instructions on how to defend this suit. On the other hand, the Plaintiff took all the necessary precautions to ensure that the Defendant was aware of these proceedings and they prosecuted their suit with diligence. In the circumstances, I have to say that I do not consider it just to interfere in any way with the Judgment entered herein. The Defendant has failed to convince me that they deserve to have this court's discretion exercised in their favour. The internal problems and issues that the Defendant is facing cannot be used as an excuse to deny the Plaintiff justice.

In light of the foregoing, I hereby dismiss this Application with no order as to costs.

DELIVERED AND DATED IN NAIROBI THIS 12TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE