



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 209 OF 2015**

**KENYA BROADCASTING CORPORATION .....PLAINTIFF**

**VERSUS**

**NATIONAL AUTHORITY FOR THE CAMPAIGN AGAINST  
ALCOHOL AND DRUG ABUSE (NACADA) .....DEFENDANT**

**RULING**

By a plaint dated 9<sup>th</sup> June 2015 the plaintiff Kenya Broadcasting Corporation instituted this suit against the defendant National Authority for the campaign against Alcohol and Drug Abuse seeking to recover a liquidated sum of kshs 47,792.000 being an amount due and owing on a contract dated 4<sup>th</sup> June 2014 in which the plaintiff is alleged to have agreed to facilitate the airing of some items under the silver sponsorship of the world cup, carrying messages of the defendant.

The plaintiff also claimed for damages for breach of contract, costs an interest. Upon receipt of summons to enter appearance and plaint, the defendant did on 2<sup>nd</sup> July 2015, by a Memorandum of Appearance dated 1<sup>st</sup> July 2015 enter an appearance to the summons. No defence was filed.

On 16<sup>th</sup> July 2015, the defendant did file a Chamber Summons dated the same day seeking orders that:

- The suit be stayed pending its determination through arbitration as provided for in the space order that was entered into between parties to the suit herein.
- That the dispute between the parties be referred to arbitration.
- That the defendant be at liberty to apply for such further or other orders and or directions as the court may deem fit and just to grant in the circumstances.
- That costs of the application be provided for.

The application acknowledged that indeed the plaintiff and the defendant signed a space order dated 4<sup>th</sup> June 2014 for a consideration of 47,792,000 wherein the defendant engaged the plaintiff to provide media buying and production services. On the airing of some items under the silver sponsorship of the world cup which space order, clause 3.13 thereof provided for settlement of disputes between the parties by reference to arbitration. The defendant accused the plaintiff of moving to court over the dispute instead of settling it through ADR and urged the court to stay these proceedings pending settlement through arbitration as per the space order clause.

That application was never served upon the plaintiff's counsel and neither did the defendant fix any

hearing date for its consideration by the court and disposal.

On 31<sup>st</sup> July 2015, the plaintiff's counsel filed a request for interlocutory judgment under Order 10 Rule 10 of the Civil Procedure Rules for the liquidated claim of KShs 47,792,000 and asked the Deputy Registrar to list the matter for formal proof on the unliquidated damages claimed, which judgment in default of defence was entered on 3<sup>rd</sup> August 2015 and on 6<sup>th</sup> August 2015 the plaintiff requested for a date for formal proof hearing.

It was then on 17<sup>th</sup> August 2015 that the defendant vide an application dated the same day 2015 sought under certificate of urgency, leave to be heard during the vacation and also filed an application seeking for orders setting aside the interlocutory judgment entered on 3<sup>rd</sup> August 2015 against it. The defendant also sought stay of these proceedings pending hearing and determination of the application for setting aside judgment and for an order that the application seeking to refer the dispute herein to arbitration dated 16<sup>th</sup> July 2015 be heard and determined on its merits.

The application is supported by grounds on the face thereof and supporting affidavit sworn by Kevin Wakwaya advocate. According to the defendant, the interlocutory judgment entered was irregular since there was a pending application on record at the time of entry of the said interlocutory judgment and that they only learnt of it when they were trying to fix a hearing date and that it is trite that no judgment can be entered if and when there is a pending application on the court record and that since the suit was scheduled for formal proof hearing on 5<sup>th</sup> October 2015, if the same is allowed to proceed it will greatly disadvantage the defendant as it will be condemned to pay to the plaintiff liquidated damages claimed without having been given a chance to defend the claim against it, which decree would be based on an irregular judgment thereby infringing on the defendant's constitutionally protected right to a fair trial.

The defendant urged the court to exercise its power and discretion to set aside interlocutory judgment entered in default of defence for the ends of justice to be met. The affidavit of Kevin Wakwaya advocate for the defendant reiterated the grounds upon which the application was predicated.

The respondent/plaintiff opposed the application by the defendant/applicant. It filed grounds of opposition dated 2<sup>nd</sup> September 2015 contending that :

- The application is incompetent, bad in law, and an abuse of the court process; the application dated 16<sup>th</sup> July 2015 contravenes the Arbitration Act as it was not presented together with the Memorandum of Appearance hence it is statute barred;
- there is no existing arbitration agreement between the plaintiff and defendant; there is no real dispute requiring referral to arbitration as the defendant's indebtedness to the plaintiff is not denied;
- the application herein is a delaying ploy to delay the determination of the matter;
- and that the defendant had not demonstrated sufficient cause or grounds upon which the court can or should grant the orders sought.

The plaintiff also relied on replying affidavit sworn by Paul Jilani on 3<sup>rd</sup> September 2015 giving a vivid history of the matter. Parties advocates canvassed the application by way of oral submissions before me on 10<sup>th</sup> September 2015. Mr Wakwaya advocate for the defendant/applicant submitted, reiterating the contents of the application, supporting affidavit and grounds on support of the application. He submitted that the interlocutory judgment as entered was irregular as there was pending an application dated 16<sup>th</sup> July 2015 filed by the defendant and that this court cannot countenance an irregular judgment.

Further, it was submitted on behalf of the defendant that since there was the application challenging jurisdiction of the court, that application ought to have been considered before entering judgment. He relied on the case of **West Mont Power (K) Ltd V Kenya Oil Company Ltd CA 154/2003** where the Court of Appeal held that Section 6 of the Arbitration Act does not permit parallel proceedings before a court and an arbitrator. He also relied on the case of **Mlink Communication Ltd V Communications**

**Commission of Kenya & Telkom(K) Ltd** which also espoused the above position in **Westmont Power case(K) Ltd**.

In Mr Wakwaya's submissions, he emphasized that every party has a right to be heard on a matter that affects them, and therefore judgment must be set aside to facilitate the interpartes hearing of the pending application for referral of the suit to an arbitrator as per the arbitration agreement. He submitted that justice will only be served if the application herein is allowed.

In opposition, and relying on the filed grounds of objection and replying affidavit of Mr Paul Jilani, the plaintiff's counsel Mr Ogetto submitted that the application for referral of the matter for arbitration was filed 14 days after entering an appearance which is contrary to Section 6(1) of the Arbitration Act. That the above provisions mandated that a party invoking arbitration provisions in an agreement must file the referral application on the same day as the Memorandum of Appearance hence, the application dated 16<sup>th</sup> July 2015 was void ab initio.

Further, that the application was never served upon the respondents and therefore they were never aware of its existence as at 31<sup>st</sup> July 2015 when they filed their request for judgment. The said application was allegedly served on 12<sup>th</sup> August 2015 several days after the judgment had been entered.

Mr Ogetto maintained that the judgment entered in default of defence was regular contrary to the defendant's assertions since there was no competent application on record that would have precluded the court from entering such judgment as requested. In his view, setting aside of *ex parte* judgment is a discretionary power, and therefore this court should not merely set aside judgment on account that there was an application pending.

In addition, Mr Ogetto submitted that in considering whether or not to set aside the *ex parte* interlocutory judgment, this court should also consider the merits of and competence of the application on record and the basis upon which the defendant wishes to have the judgment set aside, contending that the alleged fact that there is an arbitration agreement between the parties in itself was not sufficient as no such agreement was in court since the annexed document was an unsigned/unexecuted by the defendant hence the defendant cannot rely on an agreement that it had not signed. Reliance was placed on the case of **Charles Njogu Lofty V Bedouin Enterprises Ltd (2005) e KLR** wherein the Court of Appeal held that even if the condition set out in Section 6(1) of the Arbitration Act were satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so was not made at the time of entering an appearance, or if no appearance was entered, at the time of filing any pleading or at the time of taking any step in the proceeding.

The plaintiff's counsel also relied on the case of **Eunice Soko Mlagui V Suresh Parmar (2013) e KLR** wherein the High Court elaborately interpreted the words used in Section 6(1) of the Arbitration Act

**“Not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay proceedings is sought.....”**

On the issue of an unsigned agreement not being a proper basis for establishing an arbitration clause, the plaintiffs counsel relied on the case of **George Ngatiri t/a Naivasha Millers 1987 V Naphtah J.N. Mureithi & Another (2005) e KLR** where the court rejected a document stating that it could not be described as a binding agreement between the parties to it as it was not signed by the plaintiff since it lacked the essentials and basic ingredients of a valid contract, in that it must be signed by all the parties to the contract.

In Mr Ogetto's view, the application herein is intended to delay resolution of the matter as there was no issue that could be referred to arbitration, relying on the holding by Honourable Justice Gikonyo in **Telkom (K) Ltd V Rapid Communication Ltd (2015) e KLR**.

On the authority of **Westmont (K) Power Ltd (supra)** Mr Ogetto submitted that it was distinguishable.

That in that particular case, there was a valid arbitration agreement unlike in the present case as such there was no basis for this court to exercise its discretion in favour of the defendant/applicant.

In a brief rejoinder, Mr Wakwaya contended that the plaintiff's counsel had jumped the gun in the matter before court and submitted on the merits of the application for referral of the matter to arbitration. He submitted that the defendant could not file defence where it wished to rely on the arbitration agreement, citing the case of **Mlink Communications(suprs)**. Further, that the futility of referral to arbitration or the application for referral being time barred could only be urged in that application.

In Mr Wakwaya's view, there is no discretion to be exercised where the judgment entered is irregular like in this case and that under Order 10 Rule 11 of the Civil Procedure Rule, this court can set aside judgment on terms that are just. He stated that they had not served the application because they had not filed it under certificate of urgency and as it had no date but that notwithstanding, that this court had not determined the competency of that application for referral hence the judgment as entered was irregular. Mr Wakwaya dismissed the authorities relied on by the plaintiff's counsel for reasons that they all touched on the substance of the application for referral and not on the merits of the application for setting aside of interlocutory *ex parte* judgment.

### **Determination**

I have carefully considered the application by the defendant for setting aside of *ex parte* judgment entered against it on 3<sup>rd</sup> August 2015, the grounds thereof, the supporting affidavit, grounds of opposition, replying affidavit, the rival submissions by the respective parties advocates and the authorities relied on.

I have also considered the law applicable in this case.

The only issue for my determination is whether the defendant has made out a case for the exercise of this court's discretion to set aside *ex parte* interlocutory judgment entered on 3<sup>rd</sup> August 2015. Ancillary to that main issue are other key questions that this court must answer and among them, is whether the judgment entered against the defendant was regular.

The law applicable for setting aside *ex parte* interlocutory judgment in default of appearance or defence is Order **10 Rule 11** if the Civil Procedure Rules in addition, the power to set aside an *ex parte* default judgment is a discretionary power exercised with the main aim of doing justice between the parties.

In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-1988) KAR page 1036**, the Court of Appeal while dealing with an appeal against refusal to set aside *ex parte* judgment in default stated:

***“ The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani V MC Connell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue”.***

In **Jomo Kenyatta University of Agriculture and Technology V Musa Ezekiel Oebal (2014) e KLR CA 217/2009**, the Court of Appeal stated that the object of clothing the court with discretion to set aside judgment obtained *ex parte* has been pronounced in many decisions and sampled the following: “ To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought ( whether by evasion or otherwise) to obstruct or delay the cause of justice .....” See **Shah V Mbogo & Another (1967) EA 116**.

**In Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P at page 76** stated:

***“The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.***

**I Sebei District Administration V Gasyali & others (1968) EA 300** Sheridan J remarked:

***“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”*** Emphasis added

Overall, the effect of those pronouncements in the above decisions is that where a defendant raises a reasonable defence to the plaintiffs claim and the defendant has not been privy to obstruction of justice, the court should exercise its discretion in favour of the defendant, even where the judgment entered is regular.

Applying those principles to this case, it is not in dispute that summons to enter appearance were served upon the defendant who entered an appearance on 2<sup>nd</sup> July 2015. Later on 16<sup>th</sup> July 2015, the defendant filed a chamber summons pursuant to Section 6(1) of the Arbitration Act, Rule 2 of the Arbitration Rules and Section 3A of the Civil Procedure Act seeking stay of proceedings / suit pending its determination through arbitration as provided for in the space order that was signed between the parties to the suit and that the dispute be referred to arbitration.

However, the said application was never served upon the plaintiff and no date was fixed for its hearing and disposal.

On 31<sup>st</sup> July 2015, the plaintiff, unaware of the pending filed application, requested for judgment for a liquidated sum of kshs 47,792,000 and interlocutory judgment on the prayer for general damages for breach of contract which judgment was entered on 3<sup>rd</sup> August 2015 and a date for formal proof hearing sought and obtained.

Upon learning of the interlocutory judgment, the defendant, filed this application seeking to set it aside and urging that the same was irregularly entered against them. Further, that since their application for stay of proceedings and for referral of the dispute to arbitration was on record, the Deputy Registrar should not have entered judgment in default of defence since the defendant could not have filed a defence where it was relying on arbitration agreement. The plaintiff on the other hand maintains that the judgment as entered was regular as the application dated 16<sup>th</sup> July 2015 was *void ab initio* and could not have precluded the Deputy Registrar from entering judgment against the defendant since it was time barred for not being filed together with the Memorandum of Appearance and secondly; that there was no such valid arbitration agreement binding upon the parties or even a dispute capable of being referred to arbitration. The plaintiff contends that the purported annexed agreement is not signed by the defendant and further, that the defendant’s indebtedness to the plaintiff has never been denied hence it would be a futile attempt to set aside the judgment only to achieve nothing but delayed justice for the plaintiff.

In view of the above rival position, this court must therefore determine whether the judgment entered on 3<sup>rd</sup> August 2015 was regular and if so, what orders should this court make.

As stated above, the defendant contends that the interlocutory judgment entered was irregular since there was a pending application for stay of suit and for referral of the dispute to arbitration whereas the plaintiff maintains that the judgment entered was regular since there was nothing that precluded the

Deputy Registrar from entering judgment as the application was filed out of time contrary to Section 6(1) of the Arbitration Act and that there was no such arbitration agreement.

To determine the above issue, the case of **Westmont Power (K) Ltd V Kenya Oil Company Ltd (supra)** is instructive. In that case, the High Court refused to set aside interlocutory judgment entered when the application for stay of suit and for referral of the dispute to arbitration was pending.

The learned Judge was of the view that as the application for referral to arbitration and stay of suit had been made after the time stipulated under Section 6(1) of the Arbitration Act, the court had no jurisdiction to refer the matter to an arbitrator and that it would have been an exercise in futility to set aside judgment.

On appeal, the Court of Appeal S.E. Bosire, P.N Waki and Alnashir Visram JJA reversed the High Court order and held that:

***“We are unable to agree with Mr Esmail’s proposition that it was incumbent upon the appellant to demonstrate that he had a good defence to the claim for the exparte judgment to be set aside. There is no question here of the appellant wanting to, or being subjected to, the filing of a defence, when the appellant says clearly that the parties are subject to an arbitration agreement and have chosen to resolve their dispute in a different forum. That was the only issue that the superior court was obliged to determine, that is, whether the matter was one that ought to be referred to arbitration, but it chose to ignore the application dated 13<sup>th</sup> March 2002, and entered exparte judgment. We repeat that this court said in the case of Omino V Lalji Meghji Patel & Company Ltd (1995-1998) IEA 264 that when an application under Section 6(1) of the Act is made by a party to an arbitration agreement, it is incumbent upon the court to which such application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the agreement.....***

***We would emphasize strongly that it was incumbent upon the Learned Judge to allow the application for referral to arbitration dated 13<sup>th</sup> March 2002 to be heard on its merits and that could only be possible if the exparte judgment was vacated. It is in dealing with that application that Mr Esmail’s other arguments such as the application being time barred, and the futility of referral to arbitration, could have been ventilated. However in taking the course he did, the learned Judge denied the appellant the opportunity to be heard on its application, and condemned it unheard. The exercise of judicial power imposes upon a court the duty to hear both sides on merit. It was wrong, in our judgment, for the Learned Judge not to have set aside the exparte judgment in the face of an undetermined application to refer the matter to arbitration”.***

Following the above decision, the Court of Appeal allowed the appeal, set aside exparte judgment entered against the appellant and ordered the appellant’s application under Section 6(1) of the Arbitration Act dated 13<sup>th</sup> March 2002 be set down for hearing in the superior court.

In my humble view, the above decision of the Court of Appeal dealt with a situation that is in *pari materia* as the case before me, albeit the plaintiff contended that the above Court of Appeal decision is distinguishable from this case as there was an arbitration agreement in that case unlike in the instant case and that there is no dispute herein capable of being referred to arbitration. I beg to differ.

In my view, the issue of whether or not the annexed space order is valid, or whether there is a dispute capable of being referred to arbitration is one that has to be determined in the pending application dated 16<sup>th</sup> July 2015 on merit. In my view, that application does not serve as a ‘defence’ to the plaintiff’s claim and therefore it would be erroneous for this court to delve into its merits or demerits, especially, with hindsight that both parties are in agreement that there was a contractual relationship between them giving rise to the present cause of action. In addition, whether the application filed on 16<sup>th</sup> July 2015 was filed out of time and hence the futility of considering it, or whether there is a

dispute capable of referral to arbitration is a matter that can only be canvassed in the application filed on 16<sup>th</sup> July 2015 by the defendant/applicant herein.

I am also in agreement with the decision in **Niazons (K) Ltd v Chira Road & Bridge Construction (K)(2001) 2 EA 302** and add that once a defendant files an application for stay of suit and seeks for referral of the matter for arbitration, he/she is not expected to file a defence to the claim, until or unless the court determines that application dismissing it thereby paving way for an opportunity to file defence. This is, however, not to say that the application for stay of suit or for referral to arbitration is *per se* arbitration proceedings. It is an attempt to refer the matter to arbitration, which at the end of it all, the defendant must satisfy the court that the proceedings are arbitrable, to warrant an order of the court in its favour.

It is for the above reasons that I find that the interlocutory judgment entered against the defendant on 3<sup>rd</sup> August 2015 in default of defence was improper, and I would proceed to set it aside *ex debito justitiae* to pave way for the setting down for hearing the defendant's application filed on 16<sup>th</sup> July 2015 *inter partes*.

I appreciate the authorities relied on by the plaintiff's counsel in his submissions but I concur with Mr Wakwaya that in all those decision, the courts were considering the merits of an application for referral of the matter to arbitration, and not whether or not interlocutory judgment could be entered when an application seeking stay of suit and referral to arbitration was pending on record and therefore distinguishable from the circumstances of this case. The said authorities will indeed serve useful purpose when considering the application dated 16<sup>th</sup> July 2015. This court is conscious of the need to dispense justice without undue delay and without undue regard to technicalities as espoused in Article 159 of the Constitution. Nonetheless, it must indeed act within the confines of the law and guard against the temptation to dispense justice through short cuts which are wrong cuts which are likely to deny justice to a party. It would be a travesty of justice, in my view, if a court of law would refuse to hear a party on a pending application merely because it lacked merit without first hearing both parties on its merits and demerits and or dispensing with it as provided for by law. To deny the subject a hearing should be the last resort of a court. I also find that no prejudice will be occasioned to the plaintiff if the *ex parte* judgment is set aside.

In the end, I allow the application for setting aside of the *ex parte* interlocutory judgment entered on 3<sup>rd</sup> August 2015 and all consequential orders and order the application for stay of proceedings heard on the same day when this suit was to be heard on formal proof. The plaintiff is granted leave to file and serve a replying affidavit/grounds of opposition within 7 days from the date hereof.

Costs are in the discretion of the court and in any event to the successful party. However, in this case, the defendant filed an application for stay of proceedings /referral of suit to arbitration and retreated to slumber. They never served the plaintiff with the said application and neither did they fix a hearing dated. They were awoken by the plaintiff's vigilance to have their suit prosecuted. Parties cannot be allowed to use the court for archiving of their disputes. When parties approach the seat of justice, it is for the purpose of resolving disputes justly, fairly and expeditiously.

In this case, the defendant failed to act with alacrity which in my view would delay justice and create the so called back log unnecessarily. In the premises, I decline to grant them costs of this application. I order that the defendant bears the costs of the application dated 17<sup>th</sup> August 2015, which are awarded to the plaintiff.

Dated, signed and delivered in open court at Nairobi this 16<sup>th</sup> day of September 2015.

**R.E ABURILI**

**JUDGE**

16.9.2015

Coram R.E. Aburili J

C.A. Adline

Mr Kulecho holding brief for Wakwaya for defendant/applicant

Miss Gekone for plaintiff /respondent

**Court-** Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

16/9/2015

**Court-** Ruling to be typed and copies availed to parties' advocates upon payment of requisite fees.

R.E. ABURILI

JUDGE

16.9.2015