



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 96 OF 2015

GLOBE RDE (K) LIMITED ::::::::::::::: PLAINTIFF

VERSUS

EWASO NG'IRO RIVER BASIN ::::::::::::::: DEFENDANT

R U L I N G

1. The **Notice of Motion** application dated **5th August 2015** filed by the Defendant seeks to secure the following orders:-
 1. *That the application be certified as urgent and be heard on priority basis.*
 2. *That the Honourable court be pleased to grant a stay of execution of any decree issued in this suit pending the hearing and determination of this application.*
 3. *That this Honourable court be pleased to set aside the ex-parte judgement entered against the Defendant on 28th July 2015.*
 4. *That the defence filed on 28th July 2015 be deemed as filed and served*
 5. *That the costs for the applications be in the cause.*
2. The grounds in support are set out in the application, which is also supported by the affidavit of Omar Sheikh sworn on 5th August 2015 and a supplementary affidavit sworn on 16th September 2015.
3. In brief, the Applicant's case is that judgement in default of defence was entered herein for the Plaintiff on 28th July 2015, on the same day the Defendant filed its defence. The Applicant's case is that the court file had gone missing soon after the matter was filed in March 2015. When they finally located the court file, on 28th July 2015, they found to their shock that judgement had been entered for the Plaintiff for the sum of Kshs25,743,346.21 as claimed in the Plaint. The Defendant's case is that they have a good defence which merits the hearing of the matter in a full trial. The defence was filed on 28th July 2015.
4. The application is opposed by the Plaintiff through a replying affidavit of **Joseph Nyamuthe** sworn on **11th September 2015**, and a further replying affidavit on the same person sworn on **24th September 2015**. The Respondent's case is that a regular judgment of this court was entered on 28th July 2015, while the suit was filed on 3rd March 2015. In the circumstances, the Respondent believes that the failure to file a defence was intentional and that this application should not be allowed.
5. Parties made oral submissions which I have considered. In my view, the following issues are relevant for consideration:-
 1. *Whether the Defendant has a good defence to the suit.*

2. Under what terms and conditions can the judgement herein be set aside.

6. On the face of the suit, the same appears to be straight forward. The Plaintiff was awarded a Tender No. ENNDA/2010-11/Z2 LOT 26 for the construction of Forosa Pan at the price of Kshs.19,517,046.40. From the Plaintiff and the supporting documents, the Respondent's case is that it performed the Tender, and was supervised by Messers Otieno Odongo & Partners, the engineers appointed by the Defendant. The said engineers evaluated the construction and raised payment certificates amounting to the sum claimed in the Plaintiff, including interests. The said certificates, however, were not paid, hence the filing of this suit for the same.
7. The Defendant's/Applicant's case, however, is that while the said Tender was indeed awarded to the Plaintiff, the Plaintiff has not performed the Tender. The Defendant avers that the Plaintiff has not even visited the site and that the alleged supervisors and the certificates issued by M/s Otieno Odongo & Partners are in fact forgeries. The Defendant further states that the suit herein is a calculated scheme to steal public money as no work was ever done by the Plaintiff. The Defendant's case is that all the supporting documents are forgeries and so the court should allow the application to ensure justice is done and that the public money is not stolen.
8. I have carefully considered these submissions. The question that I ask myself is this: where was the Defendant since 3rd of March 2015 when the suit herein was filed? The Defendant alleges that the court file went missing. That may have been the case, but for how long? There is no demonstrated attempt by the Defendant to ensure the court file was located. There is only one letter "JWL1A" dated 21st April 2015 which the Defendant's counsel wrote to the Deputy Registrar seeking that the file be located to enable them file their client's documents. They do not even say that they wanted to file a defence. The second letter "JWL1B" is dated 28th April 2015, also addressed to the Deputy Registry. However, their request is for help to locate the court file to enable them file an application dated 20th April 2015. Since 28th April, 2015, there is no effort spent by the Defendant to file its defence to the suit. It is my view that the failure to file a defence herein was either intentional on part of the Defendant, or a gross negligence on the part of the Defendant's advocates.
9. The other issue is the defence filed herein on 28th July 2015. That it raises the issue of corruption and collusion between the Plaintiff and the project engineers, and states that the interim certificate issued were meant to defraud the Defendant. The issue which arises now is when did the Defendant discover corruption and fraud in the project. The project contract is dated April 2011. There are communications between the parties since April 2011. The Certificate for Final Payment was written by the said engineers to the Defendant on 27th November 2014. There is no evidence that the Defendant raised any issues of corruption or collusion until the same is raised in the defence and in the supporting affidavit herein. On the face of it the defence filed herein seems to me to be a sham and only meant to create non-excising issues to delay the suit.
10. The above notwithstanding, there are allegations of corruption, conspiracy and falsification of the documents in support of the suit herein. Those kind of allegations cannot be taken lightly by a court of justice. They merit hearing and evaluation through evidence in a full trial. It is on this basis that the court can allow this application. Even then, that can only be done upon appropriate conditions, given that there is a regular judgment on record.
11. In the upshot, I allow the application dated 5th August 2015 on the following terms:-
 1. ***The entire decretal sum now due shall be deposited in an interest earning account in the joint names of the parties' advocates within 21 days from today.***
 2. ***The defence filed herein on 28th July 2015 is deemed duly filed.***
 3. ***Cost of this application shall be for the Plaintiff/Respondent.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Owino for the Plaintiff

M/s Kariuki for the Defendant

Teresia – Court Clerk