



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 550 OF 2011

ALPHA LOGISTICS KENYA LIMITED PLAINTIFF

VERSUS

EDCOM LIMITED 1ST DEFENDANT

NELSON GITHUA 2ND DEFENDANT

RULING

1. The principal prayer sought in the Defendants' Notice of Motion dated 11th September 2013 as before this Court is that the Judgement entered herein and consequential orders in relation thereto, be set aside and/or vacated and that the Defendants be allowed to defend the Plaintiff's Re-amended Plaintiff on record. The Application is brought under the auspices of **Order 10 rule 11** and **Order 51 rule 1** of the *Civil Procedure Rules, 2010* and **sections 1A and 1B** of the *Civil Procedure Act*. The Application is based on the following grounds:

“(a) THAT the defendants advocates were served with and duly acknowledged service of the re-amended plaintiff on 7th June 2013.

(b) THAT through inadvertent omission and/or mistake on the part of the defendants' advocates, no defence was filed within the time allowed by law.

(c) THAT at all material times prior to and after the service of the re-amended plaintiff, there were serious negotiations between the parties which distracted the defendants' advocates.

(d) the defendants' advocates have taken full responsibility of their honest mistake and it would be unjust to visit their mistakes upon the defendants.

(e) The defendants are and have always been keen to defend this suit and they have a defence and counterclaim that raises triable issues.

(f) This motion is no attempt to delay or defeat justice and it has been filed timeously.

(g) No notice of entry of judgment has been served rendering the judgment irregular.

(h) The Defendant stands to suffer irreparable damage if the orders sought are not granted otherwise it would be against the tenets of natural justice and breach of articles 50 (1) of the Constitution for a party to be condemned unheard.

(i) It is only fair and in the wider interest of justice that the orders sought be granted.

(j) The plaintiff does not stand to suffer any prejudice, as it will have its day in court”.

2. The Defendants’ said Application was supported by the Affidavit (wrongly termed a Replying Affidavit) of its counsel **Alex Ngatia Thangei** sworn on even date. The deponent recited the history of the case recording that the Plaintiff was filed herein on 5th October 2011, the Defence and Counterclaim were filed on 13th January 2012 and the Reply to Defence and Defence to Counterclaim by the Plaintiff were filed on 24th January 2012. He also noted that the Plaintiff filed a motion to re-amend its Plaintiff on 1st October 2012 which was compromised by consent on 29th May 2013. Mr. Thangei detailed that, at the time of the consent Order, negotiations were going on between the parties in that the Plaintiff had sought to break the Lease being the subject matter of the suit and the Defendants had agreed to that proposal on the condition that the suit was withdrawn. In the meantime, the Re-amended Plaintiff was served upon the Defendants’ Advocates’ firm on 7th June 2013 but, the advocates being distracted by the negotiations, failed to file a defence to the Re-amended Plaintiff whereupon the Plaintiff sought and obtained Judgement in default. The deponent maintained that the failure to file the Defence to the Re-amended Plaintiff was an inadvertent omission and he gave details thereof. Finally, Mr. Thangei attached to his Affidavit, a draft of the Defendants’ proposed Amended Statement of Defence and Counterclaim and stated that he believed that that the Defendants had a strong Defence and Counterclaim.
3. The Replying Affidavit of **Michael Njeru**, a director of the Plaintiff company, was sworn on 30th September 2013. He noted that leave to amend its Plaintiff was obtained by the Plaintiff on 29th May 2013. The Defendants had been served with the Re-amended Plaintiff on 7th June 2013. The Defendants had failed to file their Defence and Counterclaim thereto within the prescribed time or within 21 days as agreed by the parties by consent on 29th May 2013. The deponent went on to say that the negotiations as between the parties collapsed on or about 8th July 2013 when the Defendants detailed a condition to the Plaintiff that was unacceptable. Despite the negotiations collapsing, the Defendants had still failed to file their Defence. As a result, the Plaintiff had applied for and obtained its interlocutory judgement against the Defendants on 24th July 2013. The deponent went on to say that he believed that it was unfair and unjust to remove the Plaintiff from enjoying the fruits of its judgement, regularly and lawfully obtained. He also believed that the negligence or inadvertence of the Defendants’ advocates should not be visited upon the Plaintiff. He had perused the draft Defence and Counterclaim of the Defendants as annexed to the Affidavit in support of their Application before Court. In his view, Mr. Njeru considered that the draft constituted a general denial of the Plaintiff’s claim and that the Defendants’ Counterclaim was a sham, spurious, noxious and vexatious. Finally, the deponent noted that the Plaintiff had moved out of the suit premises, had reinstated the same to its original condition and were now demanding the deposit that it had paid in regard to the Lease which the Defendants were unreasonably withholding.
4. The Defendants’ submissions as regards their Application were filed on 10th December 2013. They noted the Application brought before Court as well as the grounds supporting the same. Thereafter, the Defendants laid the background and facts of the case referring to details of the pleadings filed herein. The Defendants’ main argument was the fact that the default judgement entered herein in favour of the Plaintiff on the 24th July 2013 was irregular and unprocedural as the Defendants’ Defence and Counterclaim filed on 24th January 2012 was still in force and had not been struck out. They went on to say that the Application was premised on **Order 8 rule 1 (6)** of the *Civil Procedure Rules, 2010*. It submitted that from that provision of the Rules, it was clear that where the Defendants failed to file their Amended Defence and Counterclaim within 21 days of service, they were barred from filing the same. However, the Defendants’ original Defence and Counterclaim as filed on 24th January 2012 still stood and the Deputy Registrar’s act of entering

default judgement was illegal. To this end, the Defendants relied upon the authorities of **Armstrong Freddie Kasuku v Standard Chartered Bank Kenya Ltd (2013) eKLR** and **Festus Mutua & 51 Ors v Eveready Batteries Kenya Ltd (2004) eKLR**.

5. The Plaintiff's Submissions were filed herein on 16th January 2014. They commenced by setting out the details of the Application before Court and the background facts thereof. As regards the law, the Plaintiff noted that **Order 10 rule 11** of the *Civil Procedure Rules, 2010* gave the Court the inherent power and discretion to set aside a default judgement. The Plaintiff maintained that it had obtained its Judgement regularly and in accordance with the law. Service of the Re-amended Plaintiff had not been disputed. It referred the Court to the case of **Kodak Kenya Ltd v Edward Kamau Ndungi (2005) eKLR**. In its view, the Re-amended Plaintiff brought in a new claim as against the Defendants which required a fresh Defence to be entered thereto. The Plaintiff maintained that there was no defence to its additional claim at paragraphs 8 and 9 of the Re-amended Plaintiff. As regards the mistake of the Defendants' advocates, the Plaintiff referred to the case of **Thrift Homes Ltd v Kays Investment Ltd HCCC No. 1512 of 1998 (unreported)** in which this Court had ruled that not all mistakes by advocates are excusable as the litigant had a cause of action as against the advocate in damages. Thereafter in reference to the Defendants' draft Counterclaim, the Plaintiff referred to the case of **Dubai Bank Kenya Ltd v Frederick Kimani Njoroge (2004) eKLR** where it was held that the Court could set aside a judgement where the defence was a sham and did not raise substantial issues. The Plaintiff, referring to the Affidavit in support of the Application, maintained that the Defendants had not adequately explained just why the amended Defence had not been filed within the specified period despite the Defendants having acknowledged service of the Re-amended Plaintiff.
6. I have perused the pleadings herein commencing with the Plaintiff dated 5th December 2011, the Defence and Counterclaim dated 12th January 2012 and the Replying to Defence and Counterclaim dated 24th January 2012. I don't concur with the Plaintiff herein that the Defence contains mere denials in relation to the Plaintiff. Further, I believe that the Counterclaim sets up major issues as regards the subject matter of the suit being the Lease Agreement dated 5th February 2009 and the payment of rent thereunder. I have also carefully perused the paragraphs referred to by the Plaintiff as setting up a new cause of action as against the Defendants. In my view, those paragraphs have direct relation to the Defendants' Counterclaim and it would have been better for the same to have been included in the Defence to the Counterclaim rather than the Plaintiff maintaining that that they raised a new cause of action. In any event, the Defendants in their draft Amended Defence and Counterclaim annexed to the Supporting Affidavit to the Application, clearly denied those paragraphs detailing that it was the Plaintiff's obligation under the said Lease to pay rent as opposed to the Defendants having to collect the same.
7. As regards the law in this matter, I have no hesitation in adopting the holding of **Musinga J.** (as he then was) in the **Festus Mutua** case as referred to by my learned brother **Mabeya J.** in the **Armstrong Freddie Kasuku** case (both supra) when he stated:

“It is..... wrong and illegal on the part of the deputy registrar to purport to enter judgement against the defendant on account of its failure to file an amended defence where there is a valid defence on record..... A Judicial Officer ought to be very cautious before he enters any kind of judgement for whatever reason and should not allow himself to be put under pressure by any person to deal with a matter in unwarranted haste that may easily cause him to overlook important legal provisions”.

I find that the Deputy Registrar in this matter, when entering default Judgement on 24th July 2013, had either overlooked or ignored the Defendants' Defence and Counterclaim already entered on the Court's record. In my view, it is not necessary for this Court to consider whether the advocates for the Defendants made an inadvertent omission and/or mistake in not filing an Amended Defence and Counterclaim as regards the Plaintiff's Re-amended Plaintiff. The fact is that Judgement was improperly entered and, as a result, I have no other course but to allow the Defendants' Notice of Motion dated 11th September 2013 with costs.

DATED and delivered at Nairobi this 22nd day of May, 2014.

J. B. HAVELOCK

JUDGE