



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 651 OF 2012

AIRTEL NETWORKS KENYA LIMITED PLAINTIFF

VERSUS

PETER WAHINYA MUIRURI 1ST DEFENDANT

ANTHONY OMARIBA OMWENGA 2ND DEFENDANT

R U L I N G

1. The application before the Court was filed by the 2nd Defendant on 16th December, 2013. The motion was filed pursuant to *Article 159* of the Constitution, **Sections 1A, 1B & 3A** of the *Civil Procedure Act* and **Order 10 Rule 11** of the *Civil Procedure Rules*. The applicant seeks for the following prayers *inter alia*:

- “1. THAT this application be certified as urgent and be heard *ex-parte* in the first instance;**
- 2. THAT there be a temporary stay of execution of this matter pending the hearing and determination of this application;**
- 3. THAT there be a stay of any proceedings in this matter pending the hearing and determination of this application;**
- 4. THAT this Honourable Court sets aside the default judgment entered against the 2nd Defendant and all consequential orders emanating therefrom;**
- 5. THAT the 2nd Defendant be granted leave to file defence out of time;**
- 6. THAT the costs of this application be in the cause”.**

2. The application is predicated upon the grounds that allowing the relief sought would be in the interests of justice, and that the Applicant stands to suffer irreparable harm if the reliefs prayed for are not granted. Further, the Applicant contends that the failure to file Defence was caused by factors beyond his control, that the Defence has merits and the application has been brought before the Court without undue delay.

3. The application is further supported by the affidavit of **Anthony Omariba Omwenga** sworn on 11th December, 2013. The deponent contends that the failure to file his Defence was caused by

factors beyond his control, which Defence, he reiterates, raises triable issues. The Applicant avers that if the Respondent is allowed to execute the Decree as against him, he stands to suffer prejudice and would be likely be compelled to file for bankruptcy as the amounts claimed are colossal sums. He further deponed to the fact that it would only be just and fair for the Court to allow for the filing of the Defence in the interests of justice, for the final determination of the matter between the parties.

4. The application is opposed. The Respondent filed both its Grounds of Opposition and Affidavit in reply. The Respondent alluded that the Applicant was undeserving of the discretionary relief sought, having failed to file his Defence within time, and further, that no cogent explanation was offered as to the delay in moving the Court. It was further contended that the application is incompetent and improperly before the Court, with no reasonable defence raised to the claim and such was only aimed at arresting the execution of the judgment.
5. The discretion of the Court should not be invoked to insulate a party from ineptitude and indolence. This was the gist in the determination of Newbold, J (as he then was) in **Mbogo v Shah (1968) E.A 93**. It was held in the matter *inter alia*:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error; but not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

In the interests of justice and in the aid of a party that may have been encumbered by an accident, inadvertent or excusable mistake, the Court would have to consider the particular circumstances surrounding the case in order to make a determination based on reasons advanced by the Applicant. In the case of **Standard Bank PLC & Another v Agrinvest International Inc. & Another** [2010] EWCA Civ 1400 the Court of Appeal held *inter alia*:

“In the ordinary way a Defendant who seeks to set aside a regular default judgment must be able to show that he has a real prospect of successfully defending the claim. Whatever the circumstances of the case, there is nothing to be gained, and much to be lost, by setting aside a judgment that will be reinstated after the parties have incurred the cost and delay of a trial. If that requirement has been satisfied, however, the court will still need to consider the circumstances of the case more generally before deciding whether to grant the relief sought.”

6. The circumstances in the present suit are as follows: in October, 2012 Summons was issued to enter appearance and the Applicant instructed the firm of **Masire & Mogusu Advocates** to enter appearance on his behalf. Appearance was entered on 21st November, 2012. On 12th December, 2012 (after the time for filing Defence had expired), the Applicant was charged in **Criminal Case No. 1390 of 2012**. The Applicant contended that his appointed firm of advocates could not proceed with the Defence as they were unable to contact him. On 10th December, 2012 the Plaintiff requested for judgment in default and the same was entered on 18th December, 2012. On 29th November, 2013 the Applicant was served with a Notice to Show Cause. The Applicant contends that he was unable to proceed with the filing of the Defence in the civil suit, as he had been financially incapacitated due to the legal expenses incurred in defending himself in the criminal suit. The reasons advanced as to why he had pursued filing the Defence at this time is that the applicant’s financial position has improved greatly and that, in any event, the factors for not filing the Defence in time were beyond his control.
7. In **Amos Amwayi Masika & 2 Others v Peter Manyuru Iwuoni & Another** Civil Appeal No. 15 of 2010, the Court determined that merits of the defence have to be exhibited. The Court of Appeal held *inter alia*:

“It is trite law that once the judgment is regular, before it is set aside, the applicant ought to show merits of the defence. The learned judge herein seemed to have been of the view that a proposed defence should have been exhibited by the applicant as an annexure to the application to set aside the ex-parte judgment. We think that was a misdirection on the part

of the learned judge. In our view an applicant can still demonstrate his defence in an affidavit in support of the application. In the Supreme Court Practice, 1976, Vol 1, it is stated as follows-

Regular Judgment. If the judgment is regular then it is an (almost) inflexible rule that there must be an affidavit of merits; i.e. an affidavit stating facts showing a defence as [to] the merits (Farden v Richter [1989] 23 QBD 124).

‘At any rate whether such an application is not thus supported, it ought not to be granted except for some very sufficient reason’ Per Huddleston, B at 129 approving Hopton v Robertson [1984] WN-77, reprinted 23 QBD p. 126 (n) and see Richardson v Nowell BTLR 445’.”

8. The “sufficient reason” as adduced by the Applicant is as provided in the Affidavit at paragraphs 14-16. In Haile Selassie Avenue Development Co. Ltd Josephat Mureithi & 10 Others H.C.C.C No. 2012 of 2001 and Bank of Credit & Commerce International (Overseas) Ltd (In Liquidation) v Habib Bank Ltd [1998] 1 All E.R 764 it was stated that the Court will want to be satisfied that there are sufficient merits in the Defence which the Defendant wishes to present before it allows an application for setting aside.
9. The reasons that have been advanced by the Applicant are, to this Court, insufficient so as to allow for it to set aside the default judgment. In my opinion, the Supporting Affidavit raises no triable issues so that this suit ought to go for trial. It is trite law that the Court will not indulge an indolent litigant, merely on the aspersion that he was unable to fund the litigation process. The filing fee for a Defence is minimal. The Applicant’s claim that he was depleted financially while defending his criminal case is one that the Court does not find to have any merit. In CFC Stanbic Bank v John Maina Githaiga & Another (2013) the Appellate Court referred to Ahmed v Commission of Customs & Excise (2000) 2 E.A 93 and Housing Finance Company of Kenya v Richard Ndere Johnson (2010) eKLR on the issue of setting aside an ex-parte judgment. Further in Chemwolo & Another v Kibendi (1986) KLR 492 the Court held that a regular judgment will not be set aside unless there are triable issues which raise a *prima facie* case which should go to trial.
10. Having considered the parties submissions, the application and the supporting affidavit thereto, the Court is of the opinion that the reasons advanced by the Applicant do not meet the threshold enunciated in Shah v Mbogo (supra), Bank of Credit & Commerce International (Overseas) Ltd (In Liquidation) v Habib Bank Ltd (supra) and Amos Amwayi Masika & 2 Others v Peter Manyuru Iwuoni & Another (supra). The Applicant had instructed the firm of advocates who entered appearance on his behalf on 21st November, 2012 as evidenced by the annexure to his Affidavit marked as “AOO1”. Thereafter the advocates filed an application to withdraw from acting for the Applicant which application was later withdrawn on 14th February, 2013. No action was carried out by the Applicant or the appointed firm of advocates until after 29th November, 2013 when the Applicant was served with a Notice to Show Cause. The time lapse between entering appearance and service of Notice to Show Cause was over one (1) year. Failure to file Defence and the purported intention has no nexus as to why the Defence was not filed for a period of over one (1) year a period which the Court regards as amounting to inordinate delay. The fact that the Applicant did not have sufficient funds to file his Defence is hardly excusable and amounts to an abuse of the process of the Court. As a litigant, the Applicant must have been aware of the financial implications that are attached in not defending a suit in Court.
11. The upshot is that the application by the 2nd Defendant is without merit and is hereby dismissed with costs to the Plaintiff, who is now at liberty to proceed with the execution of the Decree and Judgment entered on 18th December, 2012.

DATED and delivered at Nairobi this 18th day of June, 2014.

J. B. HAVELOCK

JUDGE