



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL SUIT NO 201 OF 2007**

**KENYA PIPELINE COMPANY LIMITED.....PLAINITFF**

**VERSUS**

**MAFUTA PRODUCTS LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion application dated 4<sup>th</sup> April 2013 and filed on 11<sup>th</sup> April 2013 was brought under the provisions of Rules (sic) Sections 1A and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya, Order III Rule 9A of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought the following orders:-
  - a. **THAT the judgment in default entered in favour of the Plaintiff against the Defendant in default of defence and all consequential decree be and is hereby orders herein be set aside.**
  - b. **THAT the Defendant be and is hereby granted leave to file defence to the claim.**
  - c. **THAT the draft Defence be deemed as properly filed and served upon payment of the requisite fees.**
  - d. **THAT costs of the application be provided for.**
2. The Defendant relied on several grounds which can be summarised as follows:-
  - a. **THAT the Defendant was never served with Summons to enter appearance and only learnt of the suit when it was served with a decree.**
  - b. **THAT the Plaintiff did not effect service of the said Summons by way of advertisement in a local daily as had been ordered by the court on 17<sup>th</sup> September 2007.**
  - c. **THAT the Defendant's claim against the Plaintiff was in excess of Kshs 50,000,000/= and that its defence raised triable issues and hence it was in the interest of justice that the Defendant had its day in court.**

**DEFENDANT'S CASE**

3. The Defendant's application was supported by Affidavit of its director, Nasser Mohamed that was sworn on 4<sup>th</sup> April 2013. He stated that the Defendant entered into a contract with the Plaintiff in respect of petroleum products, details of which were set out in his Affidavit but which the court does not need to reproduce the same in the ruling herein as they are not relevant in the

- determination of its application. He also reiterated the grounds on the face of the application.
4. In its written submissions dated 8<sup>th</sup> January 2014 and filed on 31<sup>st</sup> January 2014, the Defendant argued that the law allows a Defendant a window to file a counter-claim as envisaged in Order 10 Rule 11 and Order 7 Rule 3 of the Civil Procedure Rules and that Article 159 (2) (d) of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities.
  5. It relied on the cases of **HCCC No 1330 of 2001 Gandhi Brothers vs H.K. Njage t/a H.K. Enterprises** (unreported), **Chemwolo & Another vs Kubende (1986) KLR 492** and **Patel vs E.A. Cargo Handling Services Limited (1974) E.A. 75** to buttress its arguments and **Civil Appeal No 37 of 1978 D.T. Dobie & Co (K) Limited vs Joseph M Muchiri** where the holding was that the court ought to act very cautiously and carefully consider all the facts of the case before making a decision.

### **PLAINTIFF'S CASE**

6. In response thereto, the Plaintiff's Company Secretary, Flora Okoth swore a Replying Affidavit on behalf of the Plaintiff on 10<sup>th</sup> December 2013. It was filed on 17<sup>th</sup> December 2013. She gave a detailed account of how the Plaintiff and the Defendant tried to negotiate the matter out of court but the same did not materialise.
7. The Plaintiff admitted that it did not serve the Summons to Enter Appearance by way of advertisement as the Defendant filed a Memorandum of Appearance. It contended that following default of filing of the defence by the Defendant, it sought entry of interlocutory judgment which was granted. It averred that it was only after the Defendant was served with the decree and Certificate of Costs that the Defendant approached it to negotiate payment of the decretal sum by way of instalments.
8. In its written submissions dated 20<sup>th</sup> December 2013 and filed on 31<sup>st</sup> January 2014, the Plaintiff was emphatic that the Defendant did not give any reason why it never filed a defence after it filed its Memorandum of Appearance. It therefore urged the court to dismiss the said application as it was an abuse of the court process.

### **LEGAL ANALYSIS**

9. Whilst an application cannot be dismissed on the ground of technicalities or for want of form as contemplated under Order 51 Rule 10 (2) of the Civil Procedure Rules, 2010, the court was unable to discern what the Defendant's prayer under Order III Rule 9A of the Civil Procedure Rules, 2010 was as there is no such Order in the Civil Procedure Rules, 2010. The Defendant did not cite the relevant and specific provision of the order under which it was bringing its application but it relied on the provisions of Section 1A and Section 3A of the Civil Procedure Act.
10. Although Order 51 Rule 10 (1) of Civil Procedure Rules, 2010 envisages that the order, rule or other statutory provision must ordinarily be stated, no objection shall be made or the application refused merely because of a failure to comply with this rule. Additionally, Article 159 (2) (d) of the Constitution of Kenya, 2010 enjoins the court to hear and determine matters without undue regard to technicalities. The court therefore, deemed it necessary to consider this application on merits.
11. The Civil Procedure Rules, 2010 provides for what would happen in the event a defendant failed to enter appearance. Failure to enter appearance and/or file a defence will lead to entry of interlocutory judgment upon application by a plaintiff as has been clearly captured in Order 10 Rule 4(1) of the Civil Procedure Rules, 2010. It is provided that:-

**“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”**

12. Be that as it may, the entry of interlocutory judgment is not cast in stone as the court has discretionary powers under Order 10 Rule 11 of the Civil Procedure Rules, 2010 to set aside or vary such judgment and consequential decree or order upon such terms as are just.
13. In arriving at the said conclusion, the court has had due regard to the cases of **Civil Case No 3399 of 1992 Fredrick Chege Kamenwa vs Aron K. Kandie** (unreported) where the Court of Appeal held that “...notwithstanding the regularity of an *ex parte* judgment, a court may set aside the same if he has reasonable defence on the merits and **Civil Case No 222 of 2010 Winnie Wambui Kibinge & 2 others vs Match Electricals Limited** where the court held that, “... it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”
14. Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back the Plaintiff’s progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that a defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and Defence within the prescribed period under the Civil Procedure Rules, 2010 before it can set aside and/or vary any interlocutory judgment.
15. The purpose of Summons to Enter Appearance is to inform a defendant of the institution of a suit. If a defendant files a Memorandum of Appearance, it is deemed to have had due notice of the institution of such a suit. The Defendant filed its Memorandum of Appearance on 12<sup>th</sup> November 2008. Having failed to file its Defence within the stipulated period, the Plaintiff was entitled to request for judgment against it and for the court to enter the same accordingly.
16. There was no plausible explanation given by the Defendant why it did not file its defence after it filed the Memorandum of Appearance. Its explanation that one of its directors fell ill and died thereafter and that there were several discussions relating to this matter was not sufficient. It did not annex any documentation that would have shown a nexus between such illness and death of its director or the discussions and its failure to file its Defence. This explanation therefore falls flat on its face.
17. The issue of service of Summons to Enter Appearance by way of advertisement in the local media was overtaken by events when the Defendant filed its Memorandum of Appearance. The question of proof of the same was no longer relevant. The Defendant cannot rely on technicalities to defeat the entry of judgment against it.
18. The Defendant did not say that the interlocutory judgment entered against it and/or consequential orders were obtained in an irregular manner and/or devoid of any merit. While it may have contended that it had triable issues, a perusal of the draft Counter-Claim shows that the Defendant’s only claim was that the Plaintiff had not rendered it with a statement of accounts despite several demands. These were also not evidenced in its application.
19. In applications under Order 10 Rule 11 of the Civil Procedure Rules, 2010, the court is only interested in establishing whether or not there exist sufficient grounds to set aside and/or vary an interlocutory judgment. The court finds that the Defendant did not adequately explain why he failed to file his pleadings after he was served with Summons to Enter Appearance and the Plaintiff.
20. Interlocutory judgment was entered against the Defendant on 18<sup>th</sup> February 2009. This was almost three (3) months after it entered appearance. The application herein was filed over four (4) years since the entry of the said judgment. The only ground that the Defendant advanced before the court to have the said interlocutory judgment set aside was that it was never served with Summons to Enter Appearance and which this court found not to have been a good reason as it was aware of the suit against it at all material times.
21. However, it is the view of the court that disallowing the Defendant’s application would actually cause it injustice, prejudice and hardship as shown hereinbelow.
22. Firstly, the court is now enjoined in Article 159 (2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to technicalities, which in this case was the failure to file a suitable defence, for whatever reason. The Defendant would be denied an opportunity to access a court, a right that is enshrined in Article 50 of the Constitution of Kenya, 2010 if the court did not allow the Defendant to ventilate its case in court.
23. Secondly, a perusal of the Draft Defence shows that the Plaintiff was said to have been holding the Defendant’s petroleum products. It said that it would seek that the Plaintiff’s claim be set-off

- from the value of the said petroleum products.
- 24.Thirdly, the court has taken cognisance of the fact the suit herein was filed prior to the enactment of the Civil Procedure Rules, 2010 which requires that parties file their documentation in support of their cases at the time of filing suit. There are no documents to show how the Plaintiff's claim of Kshs 4,918010.42 (sic) plus USD 143,339.16 was made up.
- 25.It would be in the interests of justice that the Plaintiff satisfies the court that it was entitled to the payment of the said sum as it had claimed. The court would, however, have taken a different view if it would have been able to establish from documents that would have been on record that the Plaintiff's claim had been proven to its satisfaction.
- 26.Although great prejudice will be suffered by the Plaintiff if the *ex parte* judgment is set aside, there was inordinate delay and laches on the part of the Defendant that were inexcusable as the explanation was not cogent, it is the view of the court that the prejudice can be compensated by way of an award of costs. This is therefore a good case where the court should exercise its discretion in favour of the Defendant herein.
- 27.Accordingly, having carefully considered the parties' respective pleadings, submissions and all the case law in support of their respective cases, this court has come to the conclusion that it would be fair, equitable and just for the Defendant to be accorded a fair and reasonable opportunity to ventilate its case and for this court to hear and determine this matter on merit.
- 28.However, the Defendant must bear the responsibility of causing delays to realisation of the Plaintiff's fruits of judgment, if any and be condemned to pay the Plaintiff's thrown away costs. The Defendant cannot be allowed to go scot free for the reason that that would be a great miscarriage of justice to the Plaintiff not to be compensated by an award of costs.

### **DISPOSITION**

- 29.For the foregoing reasons, the upshot of this court's ruling is that the Defendant's Notice of Motion application dated 4<sup>th</sup> April 2013 and filed on 11<sup>th</sup> April 2013 was merited and Prayer Nos (1) and (2) are hereby allowed in the following terms:-
- a. **The court hereby grants leave to the Defendant to file and serve its Defence within fourteen (14) days from the date of this ruling.**
  - b. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence to the Defendant's Defence within fourteen (14) days from the date of service.**
  - c. **The Defendant shall pay to the Plaintiff thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from the date of this ruling.**
  - d. **In the event the Defendant shall fail to comply with order 29 (c) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**
  - e. **Costs in the cause.**
- 30.It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of September 2014**

**J. KAMAU**

**JUDGE**