REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 395 of 2012

HENRY NJOROGE KAMAU ……..…….. PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD. ….....…….. DEFENDANT

R U L I N G

1. The principal prayer sought by the Notice of Motion filed by the Defendant on 22 August 2012 is that leave be granted by this court for the Defendant to file a Defence out of time and that service be dispensed with. The Application is brought under the provisions of **Orders 50 and 51** of the *Civil Procedure Rules, 2010*. The Application also asked that there should be a stay of proceedings pending the hearing and determination of the Application inter partes. The grounds upon which the Application are brought are that the Defendant/Respondent will not suffer any prejudice if a stay of proceedings is granted. I presume that this first ground contains the typographical error in that "Defendant/Respondent" should read "Plaintiff/Respondent". Further the Defendant details that it will be in the interests of justice that time be extended to file and serve a Defence in this matter.

2. The Application is supported by the Affidavit of the advocate appearing for the Defendant, **David Gikunda Miriti**. The deponent details in his said Affidavit, that having been instructed by the Defendant, his office filed a Memorandum of Appearance but misfiled the Defence owing to confusion with other matters pertaining to the Defendant company herein. Such was an inadvertent mistake and Mr. Miriti deponed to the fact that he was unable to file a Defence in this suit as the time therefore had already lapsed. He attached to his said affidavit a draft of the proposed Defence.

3. The Application was opposed by the Replying Affidavit of the Plaintiff sworn on 8 October 2012. In that Affidavit the Plaintiff stated that he was aware that the law firm of Gikunda Miriti and Company, advocates, had entered Memorandum of Appearance in this matter on 2 July 2012 and served a copy thereof on the Plaintiff's advocates on 9 July 2012. As no Defence had been filed, the Plaintiff's advocates had duly applied for judgement on 2 August 2012. The Plaintiff took exception to the Affidavit in support of the Application in which the deponent had stated that the Defence had been wrongly filed in another suit. The Plaintiff maintained that if that was the case why had the deponent not attached to his said Affidavit, a copy of the Defence which had been wrongly filed? The Plaintiff was of the opinion that no extra time should be allowed to the Defendant to remedy the situation and file a defence at this stage. Indeed, the Plaintiff maintained that the draft Defence annexed to the Affidavit in support of the Application, comprised a mere denial and was a sham aimed at delaying the conclusion of this matter.

4. The Defendant's submissions in relation to the Application were filed herein on the 19 October 2012. Having set out the prayers of the Application, the Defendant referred the court to Order 50 rule 6 of the Civil Procedure Rules 2000 and which provides:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;"

The submissions continued by detailing that the supporting Affidavit explained the reason for the Defence not being filed on time. It maintained that the matter was inadvertent and requested the court to allow the Application so that the parties could be heard as to the merits of the case. The Defendant relied on the case of **Jackson Biegon versus Charles Too & 3 Ors (2005) eKLR**. The Defendant then detailed what it considered were the triable issues raised by the draft Defence. Such included the fact that the Plaintiff had interfered with the supply of electricity to the Plaintiff's premises where he had punctured cable and broken the seals placed by an employee of the Defendant company. Further, the Plaintiff had not paid his electricity bills which had accumulated and which copies thereof had been annexed to the Plaint. Finally, the Defendant wished to draw the attention of the court that there was another suit pending as between the parties before the Chief Magistrate's Court being *CMCC No. 7188 of 2010*. The Defendant referred the court to the case of **CMC Holdings Ltd versus Nzioka (2004) 1KLR** where the Court of Appeal had held that in an application for setting aside judgement, the Magistrate should disregard the judgement on record and consider the pleadings so that if only one triable issue is raised, the application should be allowed. The Court also held that when considering such an application, a court should look at the draft Defence irrespective of how weak the reasons given for non-appearance.

5. The Plaintiff's written submissions were filed herein on 19 December 2012. The Plaintiff maintained that the Defendant had not satisfied this court as to the reason why it should be allowed to file its Defence out of time. For the court to use its discretion, the Plaintiff maintained that the Defendant must prove that the Application is brought without delay and that the reasons advanced for the delay in filing the Defence are reasonable. Finally, the Defendant must show that the proposed Defence raises triable issues and whether the Defendant is able to compensate Plaintiff in costs. The Plaintiff submitted that neither in the Application herein nor in its submissions, had the Defendant indicated whether the same had been brought without delay or otherwise. The Plaintiff was of the opinion that the Defendant had deliberately delayed in making this Application. The advocates for the Defendant would have been aware that after the filing of the Memorandum of Appearance, the Defence would need to be filed within the stipulated time provided by the Rules. The Plaintiff noted that the Defendant had delayed in filing the Application until 27 August 2012, almost 2 months after the date when the Memorandum of Appearance had been filed on 2 July 2012. The Plaintiff indicated that where there is delay on the side of the Defendant, the court should not exercise its discretion in its favour. Thereafter, the Plaintiff also referred this court to the case of **Jackson Biegon** (supra). The Plaintiff further relied on the finding of **Hon. Justice Gicheru** (as he then was) in the case of **The Union Insurance Company of Kenya Ltd versus Ramzon Abdul Civil Appeal Nai No. 179 of 1996 (unreported)**. In that case the learned Judge had stated that every party has a right to be heard and where a party does not exercise that right, he may be heard on the reason as to why he did not do so. The Plaintiff continued with his submissions by stating that, in his opinion, the Defendant had not given reasonable grounds for not filing the Defence within the stipulated time. The Plaintiff's submissions dwelt upon the fact, as stated in the Replying Affidavit, that the deponent of the Affidavit in support had not provided to court a copy of the Defence which he had alleged had been filed in the wrong case file. The Plaintiff considered that the excuse put forward by the deponent of the said Affidavit should be treated by the court as an afterthought and a falsehood. Having said that, the Plaintiff then detailed that mistakes by counsel should not be visited on the client and that litigants must take keen interest in their matters in court so the Defendant, having instructed the advocates on record to represent them, ought to have ensured that the Memorandum of Appearance and the Defence had been filed. Finally, the Plaintiff submitted that the Defence was a sham and the court should not consider the same. He asked for the Application to be dismissed with costs.

6. Both parties hereto have relied upon the findings in the **Jackson Biegon** case (supra). That was a Ruling by my learned brother Kimaru J. delivered in December 2005. The learned Judge reviewed a number of authorities in relation to the principles relating to the discretion of the court in setting aside judgement in default of appearance or defence. This court is bound by the remarks of **Duffus P.** in the

Court of Appeal case of **Patel versus EA Cargo Handling Services Ltd (1974) EA 75** in which the learned Judge stated:

"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to upset the wide discretion given to it by the rules. I agree that where it is a regular judgement, as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect a defence on the 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."

Further, Kimaru J found pertinent the words of **Ainley J** adopted with approval by **Sheridan J** in the case of **Sebei District Administration versus Gasyali (1968) EA 300** as follows:

"The nature of the action should be considered, the defence that 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 a deny the subject to hearing should be the last resort of a court."

7. The Plaintiff also referred me to the case of **Nzau & Ors. versus Beta Engineering Company Ltd & Anor. ELC No. 246 of 2012**. That case involved an application for the *status quo* to be maintained pending determination of an appeal before the Court of Appeal. Regretfully, I found no relevance as far as that case was concerned with regard to the matter before me. However, the second case to which the Defendant referred me, being that of **CMC Holdings Ltd,** proved more useful. Therein the Court of Appeal quoted from the High Court decision in **Shah versus Mbogo & Anor. (1967) EA 116** as follows:

"Applying the principle that the Court's discretion to set aside an *ex-parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice, the motion should be refused."

The above was upheld by the Court of Appeal's decision in **Mbogo & Anor. versus Shah (1968) EA 93** and followed in the **CMC Holdings** authority by the court saying:

"Our view is that in law, the discretion that a court of law has, in deciding whether or not to set-aside *ex-parte* order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such inexcusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. In the case before us, it is our view that the learned Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it could not appear was true or not and if true, the effect of the same on the *ex parte* judgement that was entered as a result of the nonappearance of the appellant and on the entire suit. We do not think the answer to that weighty issue was to advise the appellant of the resource open to it, as the learned Magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty-handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

8. With the above guidelines in mind, I don't think that this court should be unduly concerned as to whether the Defendant's advocate erroneously filed the Defence herein on another court file. I do not think that the errors of the advocate should be vested upon the client even to the extent of the inadequacy of the explanation for the delay in the filing of the Defence herein. I have also noted from the court record that although the Plaintiff made a request for Judgement filed on the 2 August 2012 the same was never entered as against the Defendant which in fact filed its Defence on 22 August 2012. What I think is of greater import is the validity or otherwise of the Defence that the Defendant filed or proposes to file. I

have perused the Defence filed and the Draft Defence marked as exhibit "KPL 1" attached to the Affidavit in support of the Application. The major allegation in that document is that the Plaintiff herein interfered with the supply of electricity to his premises which led to the disconnection of the supply. There is also some doubt as to the position with regard to the other suit as between the parties being *CMCC No. 7188 of 2010*. Finally the Defendant in paragraph 10 of its intended Defence states that no one can impose a monthly unit on a consumption meter as the same is computed electronically. I am not sure what that technically means but no doubt such will be explained at the hearing of this suit in due course. I am satisfied that there are triable issues as between the Plaintiff and the Defendant herein. Accordingly, I allow the Defendant's Notice of Motion dated 22nd of August 2012. As regards the costs of the Application, I think that in all the circumstances, such should be borne by the Defendant.

DATED and delivered at Nairobi this 24th day of January 2013.

J. B.HAVELOCK
JUDGE