



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 172 of 2004

BAMBURI CEMENT LIMITED.....PLAINTIFF

VERSUS

FURNCON LIMITED.....DEFENDANT

RULING

1. This is an application by the Defendant under Order 10 Rule 11 of Civil Procedure Rules seeking the setting aside of judgment in default of appearance against the Defendant for Kshs. 5,272,795/- plus costs. It is supported by the affidavit of Solomon Njoroge Kiore Managing Director of the Defendant. He depones that he was served with summons on 6th April, 2010 and filed a Memo of appearance on 16th April, 2010 and Defence on 30th April, 2010. He claims that these were served on the Plaintiff's then counsel on record, Buyuka Obonyo & Company Advocates, on 30th April, 2010.

2. Mr. Kiore says that despite entering appearance and filing defence, and not being served with any other pleading or court process, judgment was improperly entered against the Defendant on 15th December, 2010, and decrees issued. Thus, he says, the principle *audi alteram partem* was offended yet he has raised triable issues in the defence.

3. The Defendant has exhibited the Memo of Appearance and defence stamped as filed in the High Court, and a letter on 30th April, 2010. They indicate the acknowledgment stamp of M/s Buyuka Obonyo & Company Advocates on 20th April, 2010, and 7th May, 2010 respectively. Together with these, the Defendant filed a letter (SNK 3'a') dated 14th April, 2010 addressed to the Registrar of the High Court, and stamped with the Registry stamp on 16th April, 2010. In the letter the Defendant's Managing Director says *inter alia*:

“We are in receipt of summons to enter appearance in the above case, however, our Mr. Munyuoki court process server presented our Memorandum of appearance for registration but the same could not be filed as the court file could not be traced. In the circumstances, the advocates on record were issued with the said summons during the month of March and we therefore by a copy of this letter request them to advise the Deputy Registrar, High Court Mombasa of the last position of the file to enable us file the said memorandum of Appearance...”

4. In their Replying Affidavit, sworn by Wambugu Gitonga, counsel for the Plaintiff, he says that they filed a Notice of Change of Advocates dated 4th December, 2008 and duly served this on the previous advocates. There is, however, no indication that it was served on the Defendant. On 4th March, 2010 they filed an application to extend the validity of the summons dated 5th August, 2004, which was heard on 5th September, 2010. Counsel also depones that the court stamp on the Defendant's documents does not look

authentic. He further depones as to how he served the notice of entry of judgment on 2nd March, 2012.

5. The application herein is made under Order 10 Rule 11, which provides as follows:

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The power granted to the court is entirely discretionary.

6. I have perused all the attached documents in support of and against the application. It appears to me that the Defendant did file the Memo of Appearance and Defence. I am also persuaded that the court file may have been missing as I see no record of activity on the file between 14th December, 2004 and 5th March, 2010. I also have not seen any evidence of service of the Plaintiff's Notice of Change of Advocate, on the Defendant.

7. The authorities are clear that a court will be less inclined to set aside judgment after full trial than one where there has been no trial at all (see **Credit Bank Ltd vs Barclays Bank of Kenya Ltd** Civil Appeal 178 of 1998;

Further, that where the Applicant was served with summons and a plaint he has to show that he had some plausible excuse for not filing his defence on time, and also to show that he had a defence which discloses triable issues (see **John Onoka vs Kenya Commercial Bank Ltd** Civil Appeal Number 3 of 1993.

8. I have seen an original copy of the court stamped defence. In paragraphs 4, 5, 6 it raises serious triable issues whilst at paragraph 7 it asserts the Plaintiff's negligence, and at paragraph 8 raises the defence of statutory limitation of time.

Having also seen an original court stamped copy of the Memorandum of appearance together with a filing receipt, I am persuaded to accept the Defendant's contentions in its application.

9. The court's policy being one that leans towards deciding cases on their merits, I hereby allow the Applicant's application with costs and set aside the judgment entered on 15th September, 2010.

Dated, and signed this day of, 2013

**R.M. MWONGO
JUDGE**

Delivered on 19/2/2013 by Hon. Justice M. Muya

Read in open court

JUDGE

Date

Coram:

Judge:

Court clerk:

In Presence of Parties/Representative as follows:

a).....

b).....

c).....
d).....