REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 40 OF 2013

SAMEER AFRICA LIMITED ……..…… PLAINTIFF

VERSUS

AGGARWAL & SONS LIMITED …… DEFENDANT

R U L I N G

1. Before this Court is the Defendant's Notice of Motion dated 22nd May 2013 seeking the Principal Order that this Court do set-aside the ex-parte Judgement entered herein on 19th April 2013. The Application was brought under Certificate of Urgency and on 23rd May 2013, this Court granted a stay of execution of the said ex-parte Judgement. The Application is brought under the provisions of **Order 10 rules 1 and 2** of the *Civil Procedure Rules, 2010* as well as under **sections 3 and 63 (e)** of the *Civil Procedure Act*. The Application was predicated on the grounds *inter alia* that the firm of advocates instructed by the Defendant, although filing Appearance, failed to file a Defence within the stipulated period, hence the entering of the Judgement as against the Defendant. The Defendant had been under the mistaken belief that all pleadings had been filed and served as required under the Rules. The mistake in not filing the Defence in time was not intentional but inadvertence on the part of the Defendant's advocates. The Defendant maintained that it had a good defence with triable issues and should be given an opportunity to defend the suit.
2. The Defendant's said Application was supported by the Affidavit of one of its directors – **Atin Kumar Aggarwal** sworn on 22nd May 2013. The deponent recounted the entering of Appearance herein by the firm of Ken Omollo & Co. Advocates of Kisumu but that he had been informed by Mr. Omollo that the latter had prepared a statement of Defence in time but owing to pressure of work, had failed to file the same within the stipulated period. The failure to file the Defence was not the Defendant's mistake or that it was a deliberate omission on the part of its advocates on record which should not be visited on the Defendant. The deponent went on to note that a Decree had been extracted herein and the Defendant's property had been proclaimed for sale. He maintained that the proclamation and the entire execution process was premature as the Defendant

had not been served with a notice of entry of Judgement by the Plaintiff as required by law. Mr. Aggarwal attached to his said Affidavit, a Special Resolution of the Defendant Company authorising him to swear affidavits, sign documents and act on behalf of the Defendant in all court matters involving the company. He also attached a copy of the affidavit sworn by the said Mr. Omollo detailing the advocates' inadvertence in not filing the Defence herein. Finally, he attached a copy of a Statement of Defence which had been filed in this Court on 23rd May 2013.

3. The Plaintiff filed Grounds of Opposition on 28th May 2013. Such detailed as follows:

"1. That the motion as taken out drawn and filed is a non-starter incurably defective and unsustainable.

2. The jurisdiction of this court has not been properly invoked or at all.

3. the Applicant's misrepresentation of material facts and lack of candour is clearly manifest in the pleadings which renders it undeserving of this court's discretion.

4. The Applicant has not demonstrated sufficient cause or at all to warrant a grant of the orders sought.

5. Save for the partial admission of the claim in the defence, the rest of the defence is a sham and is frivolous only meant to delay the fair determination of this suit.

6. This court's discretion is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice such as the Applicant.

7. Whereas the judgment herein is lawful and regular, the applicant has miserably failed to demonstrate that it has a defence on merit to warrant setting aside the regular judgment".

4. The Defendant's said Notice of Motion dated 22nd May 2013 came for hearing before this Court on 4th June 2013. There was no appearance before Court on the part of the Defendant and, as a result, this Court struck out the said Application with costs to the Plaintiff. In the afternoon of the 4th June 2013, the said Mr. Omollo came before the Court with a fresh Application apologising for not appearing in the morning as he had been stuck in traffic coming in from the Airport on his arrival in Nairobi from Kisumu. As a result, I reinstated the Defendant's said Notice of Motion dated 22nd May 2013 duly cautioning Mr. Omollo for his lateness which could have been avoided had he travelled to Nairobi the day before. The next time the matter came before Court on 17th June 2013, there was no appearance for the Plaintiff! As a consequence a fresh date was taken with both parties making oral submissions.
5. Mr. Omollo for the Defendant detailed that when his firm came to learn that the default Judgement had been entered, he filed the Defendant's Application straightaway. He maintained that the failure to file a Defence was a mistake of the advocate and the client should not be penalised therefore. He stated that the Defendant had a good case. The Plaintiff was seeking the amount of Shs. 6.2 million from the Defendant of which at paragraphs 6 and 7 of the Defence, it admitted the amount of Shs. 2,052,587.60. The Plaintiff would not be prejudiced in any way by the Application being allowed by Court, as it could be compensated for in costs. The Plaintiff had commenced execution against the Defendant prematurely as the Proclamation made on 22nd May 2013 had been done without the Plaintiff complying with the Rules by serving of a Notice of Judgement as provided for under Order 22 rule 6 of the Civil Procedure Rules.
6. In his turn, Mr. Thangei for the Plaintiff made 3 points in reply. The first was that the Application before Court was defective as it failed to detail the proper procedure. In this regard, counsel referred the Court to the case of **Njagi Kanyunguti & 4 Ors v David Njogu (1997) eKLR**. The second point made by counsel was that the default Judgement entered herein was regular. The Defendant had tried to show that it had a good Defence but counsel referred to its letter to the Plaintiff dated 25th July 2012 in which the Defendant admitted in the amount owed of Shs. 6,244,036/95, the same sum as claimed in the Plaint. On that basis alone, counsel submitted that

setting aside the Judgement would be a waste of this Court's time. Mr. Thangei's third point was that where there is no Defence there is no point in setting aside the default Judgement. He referred the Court to **Shanzu Investments Ltd v the Commissioner of Lands Civil Appeal No. 100 1993** as well as **National Bank of Kenya Ltd v Ndzai Katana Jonathan HCCC No. 775 of 2002**. As regards the procedural point made by counsel for the Defendant, Mr. Thangei submitted that the Plaintiff's failure to issue a Notice of Judgement was no ground for setting aside the same, only a reason for setting aside execution, which the Court had already ordered. He noted that the goods sold to the Defendant by the Plaintiff were delivered on credit and that the Defendant had onward sold them and retained its profit for the last 3 years.

7. In his reply, Mr. Omollo, as regards the Plaintiff's submission that the Application before Court was defective, pointed to the provisions of **order 51 rule 10 (1) and (2)** of the *Civil Procedure Rules* as well as **sections 1A and 18** of the *Civil Procedure Act*. The Defendant was not contesting service of the Court process upon it, merely that it had neglected to file a Defence through the fault of its advocates. Counsel then submitted that the letter dated 26th July 2012 to which Mr. Thangei had referred was addressed to Sameer Africa not to the Plaintiff herein which was Sameer Africa Ltd. These were two different entities and this was one of the issues raised in the Defence. The Judgement entered was not on admission on the strength of the said letter dated 26th July 2012, it was entered in default of Defence. The Court could not set aside an execution without setting aside the Judgement. Finally, counsel submitted that the Orders that the Defendant were seeking would not prejudice the Plaintiff in any way for if it has a good case against the Defendant, it would still get its judgement. Mr. Omollo requested the Court to set aside the default Judgement and grant the Defendant/Applicant unconditional leave to defend.
8. Judgement in the **Njagi Kanyunguti** case (supra) to which the Plaintiff referred this Court, was delivered on 7th March 1997. In the course of its Judgement, the Court of Appeal detailed as follows:

"The appellants' application which bore the date 5th December, 1989, was EXPRESSED TO BE BROUGHT UNDER o. ix a RULE 10 AND o. xxi RULE 25 OF THE Civil Procedure Rules. We however, wish to observe at the outset that neither provision empowers a court to set aside a judgment entered as above. The power to set aside a judgment entered pursuant to an exparte hearing of a suit is donated by O. IX rule 8 of the Civil Procedure Rules. It is therefore, obvious that the application was brought under an incorrect provision of the law. Although the principles upon which the court acts in an application under O. IX A rule 10 and O. IX B rule 8 of the Civil Procedure Rules, respectively, are the same we do not consider that the both provisions are inter-changeable. If the Rules Committee had so intended there would have been no necessity for having the both provisions; and, it would have expressly said so. We, therefore, are of the view and so hold that the application was incurably defective".

That Judgement was delivered over 13 years ago and matters in relation to civil procedure before Courts have advanced considerably in that time. Quite apart from the Constitutional provision in Article 159 (2) (e) that:

"justice shall be administered without undue regard to procedural technicalities;"

as pointed out by counsel for the Defendant, the *Civil Procedure Rules* have been revised in line with the said *Article 159(2)(e)*. **Order 51 rule 10** now reads:

"51. 10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not effect the substance of the application".

In view of the above, it is my finding that the fact that the Defendant has brought its Application under **Order 10 rules 1 and 2** rather than under rule 11 is not fatal to the same.

9. The Plaintiff also referred this Court to the authoritative case of **Mbogo v Shah (1968) EA 93** and the Judgement of the Court of Appeal in the **Shanzu Investments** case (supra). This latter case was more along the lines of the Application before this Court and I note that the Court of Appeal found therein as follows:

"Now, in this instance, the judgement was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there must be a "triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication (see Patel's case Ibid). Mr. Oyalo, for the respondent, had submitted in the Superior Court as well as in this court that the respondent did not deny liability for the principal sum and that the only issue in contention was with regard to the rate of interest applicable.

In our view, no useful purpose could be served by setting aside the judgement as there was no possible defence to the action. We agree with Mr. Kariuki that the learned Judge acted in error in setting aside the said Judgement."

It is quite clear from this finding that in all the circumstances in this Application, the Court must necessarily view the Statement of Defence dated 14th April 2013 but only filed herein on 23rd May 2013. The same is annexed to the Supporting Affidavit of the Application and is marked as Exhibit "AKA 2". As pointed out by counsel for the Defendant paragraphs 6 and 7 of the Statement of Defence are what the Defendant considers are the triable issues in relation to this case. I would tend to agree in that the remainder of the Statement of Defence consists mainly of straightforward denials of various paragraphs of the Plaint. For example, in paragraph 5 of the said Statement of Defence there is a general denial that the Plaintiff sold to the Defendant tyres worth Shs. 6,234,036.95. In the next paragraph, the Defendant states that it only ordered two pieces of (presumably the Plaintiff's products) Yana Daima 825 R16 tyre tube together with 32 (18-4.30) Yana Kilimo tyres valued at Shs. 2,052,587.60.

10. In answer to these paragraphs, the Plaintiff points to a letter written by the Defendant to Sameer Africa dated 25th July 2012. That letter reads as follows:

"Dear Accounts Manager

We have received your statement for 6,244,036.95 Ksh which is overdue. We believe you have been an important supplier to us, and we'd like to establish a long-term friendship with you.

We are experiencing a cash crunch due to over importation of goods and hence forth we would wish to propose to pay your outstanding amount as per below

1. **Ksh 2,000,000 - Date 20-Aug-2012**
2. **Ksh 2,000,000 - Date 05-Sep-2012**
3. **Ksh 2,244,037 - Date 20-Sep-2012**

Your corporation will be highly appreciated.

Thanks & Regards

Yours sincerely,"

The Plaintiff Counsel's submission was that this letter was a clear admission by the Defendant that the full amount of the sum claimed in the Plaint of Shs. 6,244,036.95 was owed by it. I do not doubt such submission. Plaintiff's counsel went on to submit that setting the default Judgement aside based on the above admission only, would be a waste of this Court's time. The response from the Defendant's counsel is that Judgement herein was entered in default of Defence not upon admission and, as a result, the Defendant should be granted leave to defend. There is no doubt that this Court has discretion in the matter but how to exercise such?

11. The well-established principles of setting aside interlocutory judgements were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P.** who detailed:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter 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 defence on 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."

In this regard, I received some assistance from the decision of **Sir Clement De Lestang, V-P** as expressed in the **Mbogo v Shah** case (supra) as relied upon by the Plaintiff. At page 94 of the authority, he had this to say:

"when the respondent sought to enforce the judgment against the company it applied to the High Court under O.9 ru.10 of the Civil Procedure (Revised) Rules 1948 to set it aside and to grant it leave to defend in the name of the appellants. The learned judge who heard the application was the same judge who had entered judgment. He did not doubt the right of the company as an interested party to bring the application nor did he doubt his power to grant it if he chose to do so. He refused it, however, on the ground, as I understand his judgment, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case. Order 9, r. 10 gives the High Court an unfettered discretion to set aside or vary an ex parte judgment (*Evans v. Bartlam*, [1937] 2 All E.R. 646) and it was in the exercise of his discretion that the learned judge refused the application".

12. Although I have every sympathy with the Defendant which has been caught out by no mistake of its own but of its advocates in not filing its Statement of Defence in time, I do not consider that the same raises any triable issues worthy of the name. I agree with learned counsel for the Plaintiff that the aforementioned letter dated 25th July 2012 clearly admits the liability of the Defendant in the total amount as claimed in the Plaint herein of Shs. 6,234,036.95. I do not consider that the submission of the Defendant's counsel that the letter is addressed not to the Plaintiff herein but another entity holds any water as regards the clear admission therein. The Invoices contained in the Plaintiff's Bundle of Documents although headed "Sameerafrica" quite clearly detailed at the bottom of each, the name of the Plaintiff – "Sameer Africa Ltd". As a result, I refuse to exercise my discretion to set aside the default Judgement entered herein on 18th April 2013. I dismiss the Defendant's Notice of Motion dated 22nd May 2013 with costs to the Plaintiff.

DATED and delivered at Nairobi this 10th day of December, 2013.

J. B. HAVELOCK

JUDGE