



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 416 of 2010

**TECHNICAL EQUIPMENT INTERNATIONAL
LIMITED..... PLAINTIFF**

VS

**NATIONAL WATER CONSERVATION &
PIPELINE CORPORATION
DEFENDANT**

RULING

1. Before me is a Notice of Motion application dated 18th April 2012 brought by the Defendant under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. The Applicant seeks orders for enlargement of time within which to comply with the provisions of the Civil Procedure Rules, 2010 and for corresponding leave to be extended to the Plaintiff/Respondent. The Applicant further seeks enlargement of time within which to pay into court the decretal sum amount of Kshs. 7,460,582/- as ordered by the court.
2. The application is based on grounds set out on the face of the application and is further supported by the affidavit of Engineer Petronilla Ogut, the Managing Director of the Defendant sworn on 7th March 2012.
3. The background to the present application is that the suit in this matter was instituted on 15th June 2010. Judgment in default of appearance and or defence was entered in favour of the Plaintiff on 1st March 2011 in the sum of Kshs. 7,174,000/- together with interest and costs. On 16th December 2011, Mugo J set aside the default judgment on condition that the Defendant was to deposit the decretal sum within 14 days from the date of the ruling. The Defendant was also ordered to file and serve its Defence within 14 days from the said date.
4. The Applicant's instant application for extension of time is based on the claim that it was unable to comply with Mugo J's orders and directions aforesaid because the court file was missing and no deposit of the decretal sum was possible in the absence of the file. Similarly the Applicant argues that it could not file defence as directed due to the missing file. Nevertheless, the Applicant confirmed to court that it had now managed to deposit the decretal sum in court as ordered albeit out of time. The Applicant had therefore partially complied with the court orders aforesaid. Counsel for the Applicant therefore urged the court to allow the application so that full compliance in terms of filing of the defence could be achieved.

No prejudice would be occasioned to the Plaintiff by grant of the orders. However, the Defendant would greatly suffer if the orders sought are not granted.

5. Counsel for the Plaintiff further urged the court to strike out the replying affidavit as it was sworn by an advocate and that it was trite law that an advocate cannot depone an affidavit on disputed facts.

6. The application is opposed by the Plaintiff through a replying affidavit sworn on 26th April 2012 by Patrick Kimathi Muchena, counsel for the Plaintiff. In the affidavit, it is averred that the Defendant was in blatant violation of the orders of Mugo J issued on 16th November 2011. The excuse that the court file was missing does not suffice as the Defendant should have at least exhibited a defence stamped by the court registry within time even if the court file was missing. In any event, the Defendant had failed to mitigate its breach even after receipt of communication from court on 10th February 2012 when the court confirmed availability of the court file. The Defendant could have further mitigated itself on the question of deposit of the decretal sum by seeking to open a joint account in the name of the two law firms representing the parties.

7. It is further averred for the Plaintiff that a second default judgment having been entered on 9th March 2012, the court was now functus officio in relation to the application for enlargement of time. The only avenue available to the Defendant was to apply formally for the setting aside of the default judgment.

8. Counsel for the Plaintiff Mr. Wanjau in his submissions told the court that there was a profound trail of disobedience of court orders on the part of the Defendant and the present application by the Defendant was geared at delaying execution of the decree dated 9th March 2012. He submitted that the decree presently being executed was entirely unchallenged. With regard to the Defendant's contention that the replying affidavit should be struck out, Mr. Wanjau submitted that the matters deponed upon were matters of law which an advocate was entitled to depone to and which could indeed be argued without an affidavit. He therefore urged the court to dismiss the application as the Defendant's conduct amounted to disobedience and impunity.

9. I have carefully evaluated the application on the basis of the affidavit evidence tendered and the rival submissions made by counsel for the parties.

10. On the preliminary issue of admissibility of the replying affidavit, my perusal of the affidavit by counsel for the Plaintiff reveals that the affidavit does not contain facts that transcend matters that the advocate became seized of in the course of representation of the Plaintiff in this matter. I do not therefore think that the affidavit should be expunged as urged by counsel for the Defendant.

11. On the merits of the substantive application, it is common ground that the orders of Mugo J of 16th December 2011 were never complied with by the Defendant within the stipulated timespans. That is indeed the very reason why the Defendant filed the present application before this court. It is further confirmed that the deposit of the decretal sum in this matter was made recently and the pending aspect of compliance relates to the filing of defence. I am however made aware that following the orders of Mugo J of 16th December 2011, the Plaintiff brought a fresh application for judgment in default of appearance and Defence and that a second default judgment entered on 9th March 2012. In all this chronology of events, it does clearly emerge that the Defendant has never been keen to defend the suit in this matter and has indeed abused the magnanimity extended to it by the court. The excuse of a missing court file while valid does not appear to have been mitigated by any action by the Defendant attempting to achieve some level of compliance with the court orders aforesaid.

12. This court has discretion to accommodate the Defendant in the interest of justice, particularly in view of the severity of an *ex parte* judgment. However, in the light of the second default judgment entered on 9th March 2012, and given that the Defendant has not taken appropriate steps to set aside the said judgment, the court finds itself unable to come to the assistance of the Defendant and grant the orders sought in the present application. This is because the orders sought in the present application for enlargement of time are premised on an effort to comply with the earlier orders of the court which have

since been overhauled and precluded by the entry of the second default judgment. In the premises it would be futile to enlarge time for filing a defence in a suit where judgment has already been entered and when such judgment has not been set aside.

13. For these reasons, the Defendant's Notice of Motion dated 18th April 2012 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 24th day of May 2012.

J. M. MUTAVA

JUDGE