



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 28 of 2010

AL-KARIN BADRUDIN SUDERJI.....1ST PLAINTIFF

JITENDRA LAKHAMSHI DEDHIA.....2ND PLAINTIFF

VERSUS

CAPITAL CONSTRUCTION CO. LTD

(also known as Capital Construction Ltd.....1ST DEFENDANT

VENKATA CHAINULU GANTI.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

By this application, the Defendant/Applicants pray for orders that the default judgment issued against them on 22nd February, 2010 be set aside, and that the Defendant's defences filed on 11th March, 2010 be deemed as duly filed. The application is brought by a Chamber Summons dated 27th September, 2010 and taken out under **Order 1XA Rule 8** of the **Civil Procedure Rules**, and **Sections 1A, 3A** and **63** of the **Civil Procedure Act**.

The Application is supported by the annexed affidavit of Venkata Chainulu Ganti and is based on the ground that the default judgment is in respect of a demand which is not liquidated; that the applicants have a merited defence to the Respondent's claim; and that the belated filing of the Applicant's defences was inadvertent.

At the hearing of the application Mr. Wandabwa appeared for the Applicant while the Respondents were represented by Mr. Owuor. After considering the pleadings and the submissions of the respective counsel, I find that this application hinges on setting aside an *ex parte* judgment. The law and procedure for doing so is that the court has an unfettered discretion to set aside such a judgment but like or other discretionary powers, that discretion must be exercised judicially. Where there is no proper service of summons to enter appearance to the suit, the resorting default judgment is an irregular one which a court must set aside *ex debito justitiae*. Where the default judgment is a regular one, however, the court still wields an unfettered discretion to set aside such judgment upon such terms as are just as ordained by **Order 1XA** of the **Civil Procedure Rules**. This applies especially to those cases where the defendant has a defence on merit. Such a defence does not mean a defence which must succeed, but one which discloses

bona fide triable issues for adjudication at the trial.

It is noteworthy that the subject matter of this dispute is a colossal sum of money amounting to KShs. 215 Million. This is not a small amount of money by any standards. The 1st Defendant's proposed defence denies that there ever existed any contract(s) between itself and the Plaintiffs regarding the said sum of KShs 215 Million. It also denied that it requested for and was advanced the said sum of KShs. 215 Million as alleged in the Plaint.

Similarly, the 2nd Defendant pleads that the sum claimed against it is the same as that in **Winding Up Cause No. 4 of 2009** in which the claim against the 2nd defendant was settled and wholly compromised. Consequently, the 2nd Defendant pleads that the present suit is *Res Judicata*. Secondly, the 2nd Defendant further denies that there was an agreement for the 1st Defendant to pay the sum of KShs. 215 Million.

Against the above background, it is my considered view that these defences raise *bona fide* triable issues and that they should be given an opportunity for ventilation at a trial. For these reasons, I allow the application and make the following orders-

- (a) The default judgment entered on 22nd February, 2010 against the 1st and 2nd Defendants be and is hereby set aside.**
- (b) The 1st and 2nd Applicants defences dated 9th March, and filed on 11th March, 2010 be and are hereby deemed as duly filed.**
- (c) Although the belated filing of the above defences was inadvertent on the part of the Defendants, it was still their fault and I therefore direct that the Defendants will meet the costs of this application.**

L. NJAGI
JUDGE

DATED and DELIVERED ant NAIROBI this 15th day of November, 2012

OGOLA
JUDGE