



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 39 of 2012**

**WOOLWORTHS LIMITED ..... PLAINTIFF**

**VERSUS**

**NAKUMATT HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE KENYA POWER & LIGHTING CO. LTD. .... 2<sup>ND</sup> DEFENDANT**

**ATULKUMAR MAGANLAL SHAH ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is an Application brought under **Order 51** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act* praying this Court to set aside the Judgment entered and the subsequent Decree issued as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein. The grounds in support of the Application detail that an interlocutory judgement was entered herein on 25 May 2012, this despite the fact that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had entered Appearance on 28<sup>th</sup> February 2012 and filed a Defence on 14 March 2012. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants insisted that they had an arguable case and a strong, valid and good defence and that the Plaintiff would not be prejudiced by the granting of this Application.

2. The Application is supported by the Affidavit of **ATULKUMAR MAGANLAL SHAH** who is the 3<sup>rd</sup> Defendant herein and had been authorized by the 1<sup>st</sup> Defendant to swear the Affidavit on its (and his own presumably) behalf. He annexed to his said Affidavit a photocopy of the Appearance that he said was duly filed on 28 February 2012. That photocopy does bear the image of this Court's rubber stamp bearing the date 28 February 2012 as well as the image of the receipt stamp of the Plaintiff's advocates Messrs. Desai, Sarvia & Pallan bearing the date 2 March 2012. The bone of contention between the Plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants concerns the photocopy of the Defence of the latter which again bears the rubber stamp of this Court showing the date as received as 14 March 2012. However, there is no corresponding image of the Plaintiff's advocates rubber stamp acknowledging service of the Defence.

3. The said Affidavit in support of the Application contains averments similar to those detailed in the grounds to the Application. The deponent repeats that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have a good, strong and arguable Defence and goes on to say that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have not been accorded (as a result of the interlocutory judgement being entered) an opportunity to be heard in line with the principles and rules of natural justice. In contrast to this, the Replying Affidavit sworn by **CHANDARAKANT JASHBHAI PATEL** on 13 September 2012 while acknowledging receipt of a copy of the Memorandum of Appearance herein, details that within 14 days of the date of Appearance (28 February 2012), the 2 Defendants under the *Civil Procedure Rules* were required to file their Defence, list of witnesses, witness

statements and copies of documents, which they failed to do. The Replying Affidavit then related that, in default, the Plaintiff had filed a Request for Judgement on 23 April 2012 after their advocates' clerk had ascertained from the Registry that no Defence and accompanying documents had been filed. The deponent then recorded that the Deputy Registrar had checked the Court file to ascertain the position (although the deponent does not say how such action on the part of the Deputy Registrar was within his knowledge) and entered interlocutory Judgement herein on 25 May 2012.

4. Mr. Patel then continued in his Replying Affidavit by saying that he had been advised by the Plaintiff's advocates that even if the Court found that the Defence of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had been filed on 14 March 2012, it had been filed out of time as it should have been filed by 13<sup>th</sup> March 2012. The 1<sup>st</sup> and 3<sup>rd</sup> Defendant were in further default as they had failed to file alongside the Defence, the ancillary documents above referred to, contrary to the mandatory provisions of **Order 7 Rule 5** of the *Civil Procedure Rules, 2010* and such were not served on the Plaintiff's advocates contrary to **Order 7 Rule 1** of the said Rules. It was therefore the view of the Plaintiff's advocates, as expressed by Mr. Patel in his said Affidavit, that the Defence is invalid, incompetent, incurably defective, null and void and of no legal effect. In which case, the deponent believed that the interlocutory judgement entered against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in this matter was valid, regular and proper.

5. Mr. Mwanzia for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that he relied upon the Supporting Affidavit of Mr. Shah dated 18 June 2012. He maintained that there was an error in relation to the Memorandum of Appearance dated 28 February 2012 which the Deputy Registrar did not seem to have taken into account. He noted that the sums as claimed in the Pliant were fairly substantial. He also submitted that a default judgment is not a judgement on the merits and from the Defence filed on 14/3/2012 as well as the 3<sup>rd</sup> Defendant's witness statement filed on 20 June 2012, there were substantial issues raised that ought to be considered by this Court. Counsel observed that if the Deputy Registrar had been aware that the Applicant's Defence had been filed, she would have never entered interlocutory judgement on 25 April 2012. Counsel noted that the Defence of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had been filed on 14 March 2012. Finally, Counsel referred this Court to the authorities being **Kabiro Ndaiga & Co. Advocates vs. Kenya Tea Development Agency Ltd.** HCCC No. 223 of 2002 (unreported) and **Afrofreight Forwarders Ltd. vs. Pinnacle Consultants Ltd. & Another** – HCCC No. 220 of 2002 Mombasa – (unreported).

6. In turn, Mr. Sarvia for the Plaintiff stated that he relied upon Mr. Patel's Replying Affidavit dated 13 September 2012. He stated that he would not normally oppose an Application as per the one before Court but he had not been satisfied that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had actually filed their Defence quite apart from the same being filed in time. His firm had never been served with the Defence, although it had been served with the Memorandum of Appearance. He maintained that the only evidence put before Court, through the Affidavit in support of the Application, was the photocopy of the Defence which showed the Court's date stamp. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants had not even attached a copy of the Court's receipt showing that filing fees had been paid, upon the filing of the said Defence.

7. Further, the Affidavit in support of the Application gave no reason why the Defence had not been served on the Plaintiff's advocates. Mr. Sarvia submitted that looking at all the surrounding circumstances, they reveal that no Defence was actually filed and, in his view, the interlocutory judgement entered herein was properly so entered. He further submitted that the interlocutory judgement was not one that could be set aside as of right but only at the Court's discretion. Even if the Plaintiff or the Court was to accept that the Defence had been filed on 14 March 2012, it was filed out of time and without the supporting documents as prescribed by **Order 7 Rule 10** *Civil Procedure Rules*. As regards the authorities preferred to Court by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, Mr. Sarvia noted that they were authorities in which the Rulings therein were delivered under the old *Civil Procedure Rules*. However, Mr. Sarvia wished to rely on the case of **Kabiro Ndaiga & Co.** more particularly page 4 thereof in which Hayanga J (as he then was) had adopted the finding in **Shah vs. Mbogo** 1967 EA 116.

8. In completing his submissions, Mr. Sarvia requested the Court, if it was mindful to grant the

Application, to only do so on condition. Secondly, the court should consider setting out strict guidelines for the hearing and determination of the suit, along with consideration for costs, more particularly as regards the Application. In a brief reply, Mr. Mwanzia submitted that **Order 7 Rule 5 Civil Procedure Rules 2010** was not expressed in absolute terms as to the filing of documents and witness statements. He submitted that a Defence was filed and he held a copy of the receipt for the filing fees. He asked the Court to allow the Application saying that an order for costs should be sufficient to allay the Plaintiff's worries.

9. I agree with Mr. Sarvia's observations that it is unusual for a party to file a pleading and not serve the same on the other side. I have perused the Court file and found a duplicate receipt No. 4617410 for Shs.75/= to cover filing fees, dated 14 March 2012. Obviously some document was filed on that date as the said duplicate receipt bears this case's number. There is, however, no trace on the Court file of the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's Defence. However, such occurrences would seem to be commonplace within the confines of the Court Registry which is most regrettable.

10. I have considered the 2 authorities submitted for the Court's consideration by Mr. Mwanzia. The case of **Afrofright Forwarders** did not give the Court much assistance in reaching its decision in this matter. However, the case of **Kabiro Ndaiga** was more useful in a couple of ways. Firstly, it lent guidance as to how the Court should treat a late filed Defence. Secondly, it propounded upon the interpretation of a default judgement. I would adopt the findings of Hayanga J as follows:

**"First, where there is late defence already entered the court may not properly just ignore it because the party against whom it was filed late may still accept it and waive any rejection of it. If the party complains or wants to enter judgment he ought to make a twin application to strike out the late defence and ask for entry of judgment simultaneously.**

The commentary in the Supreme Court practice 1995 on a relevant (order 19 r 7 RSC) says:

**"A defence served after expiration of the prescribed time but before judgment has been given cannot be disregarded and will generally prevent the plaintiff from entering judgment, even though it is not served until after the plaintiff has served his summons ..... for judgment under this rule ..... but the defendant may be ordered to pay costs".**

In relation to the meaning of a default judgement Hayanga J had this to say:

**"The principle obviously is that unless and until the court has pronounced judgment upon the merit or by consent it is to have the power to revoke the expression of its coercive power when that has only been obtained by a failure to follow any of the rules of procedure.**

**However the application to set aside must be made promptly. I have looked at the copy of late defence filed herein and I see it raises triable issues of law and fact and was filed without too much delay".**

Finally, under this heading, Mr. Sarvia expressed his agreement to the principles as outlined by Harris J in the well known case of **Shah vs. Mbogo** (supra) which is always worthy of repetition as follows:

**"The principles governing the exercise of the courts discretion to set aside judgment obtained ex-parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".**

11. Taking into consideration all these matters, firstly I find that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Defence was filed on 14 March 2012, albeit one day late. I also find that the same sets up a number of triable issues. Further, I consider this to be a proper case in which to exercise my discretion so as to allow the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's Application dated 18<sup>th</sup> June 2012. I set aside the default Judgement entered herein as against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and dated the 25<sup>th</sup> May 2012. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants should pay

for the costs of the judgement and of the Application, to the Plaintiff.

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> day of November 2012.**

**J. B. HAVELOCK  
JUDGE**