REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

1. FABRIZIO GRIGOLETTI

2. COA ADA …….....……..PLAINTIFFS

VERSUS

1. KENYA POWER & LIGHTING CO. LTD

2. ISAACK THOYA…..…….....……DEFENDANTS

RULING

The Chamber summons application dated 14/07/10 is made pursuant to the provisions of Order XIA Rule 10, Order XXI Rule 22 and section 1A and 3A Civil Procedure Rule seeking for setting aside of the default judgment and that the defendant be granted leave to file a statement of defence. It is premised on grounds that;-

(1) Defendant was not served with the summons and only became aware of the matter upon being served with the Plaintiff`s application dated 10th march 2010.

(2) The Defendant has a good defence which raises triable issues and should be determined on merit.

(3) The Plaintiff stands to suffer no prejudice that cannot be redressed by way of costs, in the event that the orders sought are granted

(4) Given the nature of the Plaintiff`s claim and the circumstance of the alleged cause of action, setting aside the default judgement would give the parties a fair chance to ventilate their issues

The application is supported by the affidavit sworn by A.OWITI legal officer of the applicant) who gives a background to this application that is defendant was never served with any summons or pleadings, and he only became aware of the suit on 17th March 2010 when he received a letter from Respondent`s counsel indicating his desire to have a different advocate act for him in the matter. He does not dispute that this matter was filed in court on 14th September 2008 but says applicant has a meritious defence which raises serious triable issues which ought to be ventilated at an interpartes full hearing. A copy of the proposed defence is annexed. It is pointed out that Plaintiff`s claim is premised upon alleged destruction of his property by a fire which is attributed to Plaintiff`s negligence, the defendant/respondent denies this completely.

The application is opposed, and respondents counsel has filed the following grounds of opposition;-

(1) The firm of Muisyo & Co. Advocates are irregularly on record
(2) The application is being brought after inordinate delay
(3) The application is an abuse of the court process

At the hearing of this application, **MR MATHEKA** who held brief for **MR WAMEYO** for the applicant submitted that judgement was entered in default of filing defence and was on liquated sum, yet no formal proof has been conducted and the Deputy Registrar only entered judgement on the amount stated, yet this is a claim for material damage and this was in contradiction to the provisions of Order 10 Rule 6, so the judgement was irregular and void. He further argues that Plaintiff did not prove any relationship or nexus between the parties, so the Deputy Registrar`s action was ultra vires.

MR MATHEKA points out that the defence is good and raises triable issues and this court ought to consider Article 50 of the Constitution which provides for a fair hearing, and that the overriding objective is to do justice to the parties. It is his further contention that no prejudice will be suffered by the Respondent as it has not taken any steps towards execution since the year 2005 when Judgment was entered and respondent remained dormant up until the time the present application was filed, and in any case, the judgement entered was not a final judgement.

The application is opposed, and **MR KILONZO**, for the Respondent, submits that, the firm of **MUSINGA** and Co. Advocate is irregularly on record because from the record held by this Court the firm of **J.J.CHESARO** entered appearance on behalf of the defendant son 21st September 2005, and there being an interlocutory judgement, it was incumbent upon the firm of **MUSINGA** to seek time to come on record – he refers to Order 9 Rule 9 of the Civil Procedure Rule and points out that the provisions are mandatory. He further argues that even assuming that the firm of **MUISYO** was to come on record for the defendants, then they should have filed notice of change of advocate under Order 9 Rule 5, and not a notice of appointment. It is his contention that since such change has not been made, the **J.J. CHESARO** is deemed to be the advocate on record.

MR MATHEKA`S response to this is….;-

(a) That Respondents should be estopped by their own conduct, from raising the issue since on 29/04/10, the Respondent`s counsel elected to serve the firm of MUSINGA and no prejudice will be suffered because they are defacto on record for applicant

(b) The overriding principles in section 1A and 1B of the Civil Procedure Act demands that Justice be upheld, over mere techinicalities
MR KILONZO thinks otherwise and argues that Article 50, 159 (d) of the Constitution and the **OXYGEN PRINCIPLE** is not a device for parties to ignore rules of procedure set to be followed in civil litigation otherwise it will make a mockery of the existence of the rules of procedure.

I note that **MR MATHEKA** is not saying they are properly on record – reasoning that even if they are not, that should not matter because they were served with an earlier application, by non other than the Respondent.

Once a default judgement had been entered when the firm of **CHESARO** was on record, then how would the firm of **MUSINGA** come into the matter? The truth of the matter is that the firm of **MUSINGA** is not formally on record, and from a legal position **CHESARO** remains on record. Would this then defeat the entire application? I think this is where the overriding objective applies as contemplated by section 1A (1) of the Civil Procedure Act, which is that rules are made to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed by the Civil Procedure Act. If the court were to declare the entire application a non starter because of the failure by the firm of **MUSINGA** to properly place itself on record, then what would happen is that the application will be dismissed at this point without considering the merits of the other arguments raised. The applicant would then seek to come back to court after its counsel has regularized its position – this will only result in delaying the matter and incurring extra costs

by the applicant.

This however does not mean that the provisions of order 9 are being ignored – indeed order 9 rule 5 provides as follows;-

"A party suing or defending by an advocate, shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filled in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former advocate shall, subject to rules 12 and 13, be considered the advocate of the party until the final conclusion of the cause……..."

I think in order to achieve the requirements of Order 9 rule 5 and still maintain the Spirit and Letter of the oxygen principle under section 1A (1), I will deem the firm of MUSINGA to be properly on record **ON CONDITION** that a formal notice of change is filed and served within three (3) days from today, Failure to do this will then render the entire process a nullity and these proceedings shall be deemed not to have taken place.

Secondly is the issue of time – that this application is being made after inordinate delay – judgement having been entered on 30th November 2005, six years after the defendant had entered appearance but failed to file defence and thus should be a bar to the applicant obtaining any equitable relief – I think this argument is pegged to the equitable maxim that **DELAY DEFEATS EQUITY**. **MR KILONZO** urges this court to ignore the applicant`s claim about just being irregular, saying Order 10 rule 5 is very clear that where the claim is for unliquidated damages then the Deputy Registrar is mandated to enter judgement upon failure to file defence. The prayer in the plaint was for damages in the sum of 43,660,000/- which was a total figure of different losses which Respondent outlined in different paragraph of the Plaint. This was thus a liquidated claim as contemplated by order 10 Rule 4 which states;-

"where the plaint makes a liquidated demand……..and defendant……fails to appear, the court……..shall enter judgement against the defendant for the claim not exceeding the liquidated demand together with interest……"

There was therefore nothing irregular or void in the action taken by the Deputy Registrar and that argument by **MR MATHEKA** does not hold. **MR KILONZO** further urges this court to find that the delay is inordinate and the present application is an abuse of the court process because the defendants were served with pleadings – which is why they entered appearance, but failed to file defence and that since the claim was based on liquidated damage, then there is no requirement for the same to be set down for formal proof as this is not what is contemplated by Order 10 Rule 6.

Judgement was indeed entered in default of filing defence, on 14th November 2005. I note that by 21st September 2005, the firm of **CHESARO** had entered appearance for the Defendant – how did that firm get to know that Defendants had been sued by Plaintiff in HCCC NO. 91 of 2005 involving the same parties, if summons and pleadings were not served? I am afraid the applicant is being less than candid here. It would be more believable if there wasn`t any document filed by the applicant to demonstrate a total lack of awaremess that this suit existed, yet as it is Respondent has demonstrated that applicant was aware of the existence of this suit and filed a memo of appearance in 2005 through the firm of **CHESARO ADVOCATE**. It is significant that applicant do not deny having instructed the firm of **CHESARO** to act for them in this matter, before switching on to the firm of **MUSINGA**. I therefore find that the delay has been inordinately long and applicant is not being candid, and is therefore abusing the court process. Any prejudice which the applicants will suffer is directly authored by themselves. The upshot is that I find no reason whatsoever to warrant setting aside of the default judgement entered on 30/11/05 and this application is dismissed with costs to Respondent.

Delivered and dated this 23rd day of May 2011 at Malindi

H A OMONDI
JUDGE