REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 4 OF 2011

PARADISE SAFARI PARK LIMITED ……..….PLAINTIFF/RESPONDENT

VERSUS

THE ATTORNEY GENERAL ……..……..1ST DEFENDANT/RESPONDENT
SINOHYDRO CORPORATION LIMITED ……..2ND DEFENDANT/APPLICANT

RULING

The 2nd Defendant has filed a Notice of Motion dated 24th March, 2011 which is premised under Order 10 Rule 11 and Order 51 Rule 1 of Civil Procedure Rule 2010 and Sections 1A, 1B & 3A of the Civil Procedure Act. It seeks the prayers that the interlocutory judgment entered against the 2nd Defendant on 15th March, 2011, be set aside and that the 2nd Defendant be granted unconditional leave to file Defence out of time.

The said application is supported by the grounds set forth on face of the application, supporting affidavit sworn by Wen Jiamning, the Project Manager, on 24th March, 2011 as well as a further affidavit of Chen Wuqing, the Deputy Regional Manager, sworn on 26th May, 2011. Both the said affidavits are filed by the Managers of 2nd Defendant who aver in their respective affidavits that they are duly authorised by the 2nd Defendant. The said authority from the 2nd Defendant, which is a company incorporated in "China", has not been produced before the court. The two deponents would be presumed to be employees of the company being Project Manager and Deputy Regional Manager respectively. The certificate of compliance from the said Company as stipulated in Sec. 366 of the Companies Act (Cap 486) has been issued by the Registrar of Companies on 21st May, 2007. (Annexure 'CW').

These are the observations from the court and not from the Plaintiff. I shall thus not consider the issue raised, in respect of the competence of the application and the affidavits.

The application is opposed on the grounds of opposition dated 14th April, 2011.

The written submissions from both parties were filed and were thereafter highlighted.

It is common ground from both sides that the interlocutory judgment was regularly and validly entered.

The 2nd Defendant contends that on service of summons in the matter, a firm of M/s E. K. Mutua & Co. Advocates was instructed, who filed Memorandum of Appearance on 2nd February, 2010 which was

within time. The 2nd Defendant then reported the claim as well as sent the summons of this matter to its insurance broker M/s Curly Best Insurance Agency which in turn forwarded the same to its Insurance Company, namely M/s First Assurance Company Limited. This was done on 28th February, 2011. It is admitted by Ms. Michuki, the learned counsel for the 2nd Defendant, that by that date, the time to file defence in the matter had lapsed. The insurance company thereafter instructed the firm of Advocates presently on record. I may note that the supporting affidavit has failed to state the dates on which the above happenings occurred. In paragraph 9 thereof, it is simply averred that when the said firm went to file their Notice of Change on 17th March, 2011, they found out that the Judgment had been entered. The details of events between 2nd February, 2011 to 17th March, 2011 are not specified.

In support of the application, it is contended that it was an error or a mistake for the insurance company to presume that the earlier Advocate would have filed the defence Ms. Michuki stressed that the said mistake or inadvertence was not intentional and was due to inadvertence, which should be excused by this court in the interest of justice. How the alleged mistake or inadvertence happened is not shown to the court.

She emphasized the fact that the 2nd Defendant had to change the advocates as the suit is now subrogated by the insurance company.

She cited several authorities and I have considered them all very studiously. I shall only cite a passage from Madan J.A. (as then he was) in the case of ***Muror –vs- Wainaina (No.4) 1982 KLR 38***. This passage was adopted with approval in the case of ***John Terer and 2 Others –vs- John Mbaraka & 2 Others [2010] eKLR***. The said passage observed:-

"a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior council though in the case a junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made … the court may forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

I may simply add here that it has by now become a trite law that the court shall not shut the door of justice on a litigant if, considering all the facts and circumstances of the case, the court finds it equitable to do so considering the interest of justice for both the parties.

The discretion to set aside an interlocutory ex-parte judgment is wide and unfettered but the court of law has to exercise that discretion judiciously. I shall hesitate to frame an exhaustive list of the circumstances under which the said discretion should be applied. It is for the court to weigh the circumstances of each case. Suffice it shall be to state that the mistake or delay should be excusable and reasonable that the defence sought to be filed should raise triable issues and that the other party could be adequately compensated or secured in the event the Judgment is sought to be set aside.

The application has annexed a draft defence *san* the documents, list of witnesses and their statements, which is a stipulated requirement under Civil Procedure Rules, 2010. Ms. Michuki put forth vehemently that the draft defence, though defective, has raised triable issue disclosing a good defence.

I must agree that the annexed draft defence, is not an ideal one. Mostly, it contains simple denials of the averments made in the plaint. However, it has raised a defence of *'Force Majeure'* and has also in the alternative raised counter-claims of negligence on the part of the Plaintiff.

Considering carefully the draft defence as well as the amount claimed in the plaint, I do consider that shutting the 2nd Defendant from the proceedings at this stage may not be equitable and just, despite my reservations against the manner in which the 2nd Defendant has tried to put forth its case. It could have been better in all respect, except of course, I must say, the tenacity and vehemence with which Ms. Michuki presented the matter!!!
Moreover, the 2nd Defendant had acted promptly on receipt of the summons and filed the Memorandum

of Appearance, that is the reason I shall have to consider the application favourably.

Now what about the interest of the Plaintiff which I shall have to equally consider and protect?

The 2nd Defendant is a foreign company. This court has not been made privy of its original incorporation in "China". Similar is the position as regards divulging appropriately the terms and conditions of the insurance policy which the 2nd Defendant has procured.

The insurance covers the contract price of Kshs.9,994,153,764/= including construction equipments etc. However, the indemnity is limited to US$200,000/= per occurrence. (exchange rate having been fixed at Kshs.78 to the dollar).

The applicant has not disclosed any other assets or any other factors which could give the Plaintiff a comfort zone.

The application is brought under Order 10 Rule 11 of Civil Procedure Rule 2010 which stipulates:-

"Where judgment has been entered under this order the court may set aside or vary such judgment and consequential decree or order upon such terms as are just" *(emphasis mine)*

The Plaintiff having on hand a regular judgment and the 2nd Defendant has failed to show or divulge appropriately its capacity to pay the claimed sum, or any other sum, if granted by the court. I also note that the Plaintiff has sued the government and the 2nd Defendant jointly and severally and that the 1st Defendant is the employer of the contract for construction of Thika Road and the 2nd Defendant its contractor.

Considering all the aforesaid, I do order:-

(1) The judgment entered on 15th March, 2011 against the 2nd Defendant in favour of the Plaintiff be set aside.

(2) The 2nd Defendant shall pay costs of the application to the Plaintiff as well as the consequential costs to be incurred by the Plaintiff on setting aside the judgment.

(3) The 2nd Defendant shall give security in favour of the Plaintiff in the sum of Kshs.20,000,000/= within 30 days hereof.

Orders accordingly.

Dated, signed and **delivered** at Nairobi this 22nd day of **June, 2011**

K. H. RAWAL
JUDGE
22.06.2011