REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Commercial Civil Case 48 of 2009

MATHILDE FRANZI STAMMEL……..…….PLAINTIFF

VERSUS

AAR HEALTH SERVICES LTD……....DEFENDANT

RULING

The defendant, **AAR Health Services Limited,** seeks by its application dated 30th March 2010, two main orders of the court namely that the execution commenced herein be declared unlawful and the judgment entered herein in favour of the plaintiff be set aside and it be granted leave to defend the suit. The application is made on the primary grounds that no notice of entry of judgment was served and that the failure to enter appearance and file a defence was as a result of an innocent inadvertent error. The defendant has further stated that it has a valid defence which raises substantial triable issues. The application is expressed to have been brought under Orders IXA Rule 10 and XXI rule 22 (2) of the civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act.

The application is supported by an affidavit sworn by one **Ruth Warutere**, the defendant's Human Resources Manager. In the affidavit, it is deponed, *inter alia*, that when the defendant was served with summons to Enter Appearance, it forwarded the same to its advocates by e-mail but the advocates did not receive the summons because a wrong e-mail address was used; that as the advocates did not receive the said summons to Enter Appearance, they did not enter appearance or file defence with the result that the suit proceeded ex-parte and judgment was entered against the defendant; that no notice of entry of judgment was served; that the defendant has a good defence which raises triable issues and that it is fair and just that the judgment decree/warrants/proclamation be set aside and the defendant be granted unconditional leave to defend the suit. Annexed to the affidavit are several exhibits including copies of the said e-mail and the proposed defence.

The application is opposed and there is an affidavit in opposition sworn by the plaintiff. In the affidavit, it is deponed, *inter alia*, as follows: - that there is no proper and justifiable explanation for the defendant's failure to enter appearance and file defence; that the defendants conduct is lacking in candour; that the draft defence raises no triable issues and that no basis has been laid for the exercise of discretion to set aside the default judgment. To the said affidavit are annexed several documents including correspondence exchanged, terms of the applicable policy and a letter notifying the defendant of the entry of judgment against it.

When the application came up for hearing before me on 10th May, 2010, counsel agreed to file written summons which they highlighted on 15th July, 2010. Counsel restated the positions taken by their clients in their respective affidavits.

I have perused the application, the affidavits on record and the submissions of counsel. I have further given due consideration to the authorities cited to me by counsel. Having done so, I take the following view of this matter. The defendant admits having been served with summons to Enter Appearance in this suit. The default judgment is therefore a regular one. Such a judgment may be set aside by the court in exercise of its discretion (see IXA Rule 10 of the Civil Procedure Rules). In exercising its discretion, the main concern of the court is to do justice to the parties (see **Patel – v- E.A. Cargo Handling Services Limited [1975] E.A. 75**). The discretion is further intended 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 (see **Shah – v – Mbogo [1967] EA 116** and **Pithon Maina – v – Mugira [1982-88] 1KAR 171**).

It should also be noted that in exercising its discretion the court should consider, inter alia, the facts and circumstances both prior and subsequent and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs of any delay that may be occasioned by the setting aside of the judgment should be considered and it

should be remembered that to deny a party a hearing should be the last resort of the court (see **Sebei District Administration – v – Gasyali [1968] EA 300**).

The above are the settled principles upon which a default judgment regularly obtained may be set aside. The defendant was served on 17th November, 2009 and sought to instruct counsel on 26th November, 2009. If its advocates had received the summons to enter appearance on that date they had about six (6) days to enter appearance and another fifteen (15) days to deliver a defence. That was not to be because the defendant had used an incorrect e-mail address. The use of the wrong e-mail address was by the defendant. The blame cannot be placed at the door of its counsel as the defendant seemed to suggest in counsel's submissions. It was squarely to blame for the use of the incorrect address. It should however have been notified of failure to deliver. The defendant has not exhibited any such notice or receipt to that effect. The plaintiff has further demonstrated by her advocate's letter of 15th December, 2009, that the defendant was notified of the entry of judgment. The notice warned the defendant that execution would be levied at the expiration of ten (10) days. The ten (10) days expired on 25th December, 2009. Notwithstanding that notice, the defendant did nothing until execution was actually levied in March, 2010. The execution triggered this application. The defendant has not explained the delay between 15th December, 2009, and March, 2010. The plaintiff's complaint that there has been inordinate delay in filing this application is therefore not altogether frivolous.

Notwithstanding that delay, I have perused the proposed defence annexed to the defendant's supporting affidavit. It has raised issues such as the plaintiff being non suited under the policy contract. The defendant has not annexed the relevant contract. The plaintiff on her part has, point by point, answered the various issues raised by the defendant in the said affidavit and draft defence. She had even annexed to her affidavit a document titled AAR Members copy serial number 33005 which, according to her, contains terms of the policy applicable and under which her claim is payable. That document however has no name or signature. It is also not dated. The terms of the contract do not therefore appear to be crystal clear. That is the only issue that remotely resembles a bona fide issue. I say remotely, because the defendant did not file a further or supplementary affidavit to rebut those terms. At this stage however, I am not required to make a definitive finding as to whether the defendant will succeed in establishing the issue that the terms of contract were breached. But the issue, prima facie however is arguable.

I have in the circumstances, come to the conclusion that the default judgment be set aside on terms that the entire decretal amount be deposited in an interest earning account with a reputable bank in the joint names of the parties' advocates. The deposit be made within the next fifteen (15) days from the date hereof failing which this application shall stand dismissed with costs.

Before concluding this ruling, I should point out that the defendants challenge against execution was based on the fact that no notice of entry of judgment had been served. The challenge dissipated when the plaintiff deponed in the replying affidavit that a notice of entry of judgment was indeed served and evidence therefore exhibited. As already stated above, the defendant did not controvert the same by a further or other subsequent affidavit. I therefore find and hold that the execution was valid.

The defendant shall pay to the plaintiff thrown away costs if it complies with the order of deposit within the time appointed in this ruling otherwise as already stated, the same will stand dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF SEPTEMBER 2010

F. AZANGALALA
JUDGE

Read in the presence of:-
Mr. Mulwa holding brief for Mr. Muri Mwaniki for the Defendant/Applicant and Mr. Simiyu for the Plaintiff/Respondent.

F. AZANGALALA
JUDGE
15TH SEPTEMBER 2010