REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 91 of 2007

CRYSTAL MOTORS (K) LIMITED……..…..PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE COMPANY LIMITED…..…..DEFENDANT

RULING

Before me is the application under Order IXA Rules 10 and 11 of the Civil Procedure Rules seeking that the judgement entered herein in default of appearance and defence be set aside together with all consequential orders and the defendant be granted leave to file its defence herein.

The contention of the applicant is that summons and plaint were duly served on 4th March, 2007 but the plaintiff contends service was done on 26th February, 2007. The defendant then wrote a letter dated 5th March, 20076 to the plaintiff's advocates and the letter in paragraph 2 states:-

"**We are amenable to an amicable settlement and would like to know whether you are also willing to settle the matter out of court. If in the affirmative kindly give us your undertaking in writing not to proceed with the matter when negotiations are ongoing and that you shall give us 10 days notice to put in a defence if the negotiations breakdown".**

The Plaintiff's Advocate replied through a letter dated 15th March, 2007, which states in part;

"**As agreed we give our undertaking not to proceed with the matter within the next four (4) weeks of the date herein as we try to negotiate out of court".**

It appears the negotiations did not materialize in a settlement as expected by the parties. The Plaintiff's Advocates then applied for judgement in default of appearance and defence on 18th April, 2007 and judgement entered on 25th April, 2007. The defendant then filed an appearance dated 24th April, 2007 but which was received on 2nd May, 2007 by the court.

Mr. Kopere Advocate for the defendant submitted that summons were served and upon service, the parties held a meeting on 15th March, 2007. It was agreed pending their negotiations no action would be taken by the plaintiff's Advocates. The plaintiff's Advocates gave 4 weeks which was to end on 15th April, 2007. Unfortunately in the understanding of the legal officer of the defendant, if negotiations fail the plaintiff would give the defendant a further 10 days, within which to file its appearance and defence.

Mr. Kopere Advocate also contended that the defendant has a good defence which should be a given

chance to go for trial. And in his view the delay was not deliberate and inordinate, therefore he urged me to exercise my discretion in favour of the defendant.

The respondent filed a replying affidavit through **Mr. Eric Mwenda Kanyuru**, who is a director of the plaintiff's company. He states that the defendant was given 4 weeks from 15th March, 2007 to sort out their record and settle the matter. No action was taken by the defendant during the period 4 weeks which constituted the undertaking given by the Advocates for the plaintiff. He also avers that the applicants claim that its records could not be traced is spurious as demand notice puts the defendant on notice of the pending suit and gave ample time to prepare its defence.

It is also the contention of the plaintiff that the defendant having had notice of the suit on 26th February, 2007, it ought to have filed a holding defence and its failure to do so is negligent hence the defendant is guilty of laches. On the question of defence, the plaintiff contend that the annexed defence does not disclose any bonafide triable issue for adjudication at the trial in that the said draft defence seeks to join a party in which the applicant already holds a decree, hence the counterclaim is untenable. That position was supported by **Mr. Wagara** Advocate for the plaintiff/respondent who submitted that the defence introduces a new issue to the dispute before court. The other company was sued and there is a valid decree and as far as the defendant intends to incorporate that earlier judgement, which was determined then the defence discloses no issue for trial.

According to **Mr. Wagara** Advocate, there is no reason given for the inability to file a defence on time. And since the plaintiff gave 4 weeks, the defendant was obliged to file its defence after the expiry of the 4 weeks. In short he termed the judgement as regular which should not be disturbed as the defendant did not follow its case diligently.

Order IXA Rule 10 states;

"**Where judgement has been entered under this order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just".**

In my understanding Order IXA deals with consequence of non-appearance and default of defence. The default judgement was entered on the strength that the defendant had failed to enter appearance and/or file defence within the prescribed period. And a party faced with such a situation is required to file its application under Order IXA in order to request the court to set aside the default or exparte judgement. The court entered judgement on the basis of the request for judgement made under Order IXA rule 9 of the Civil Procedure Rules because the defendant had failed to enter appearance and/or file defence within the stipulated period. The said request for judgement is dated 18th April, 2007 and was filed in court on 23rd April, 2007, therefore I am satisfied that the present application is properly before court. I refuse to be guided by the submissions of **Mr. Wagara** Advocate that it is incompetent. I make a finding that the application is not incompetent in so far as it is brought under Order IXA Rule 1 of the Civil Procedure Rules.

The present application seeks the exercise of my discretion and I appreciate that I have to excuse my discretion judicially and in consonant with the facts of the case. The conspectus of the facts is that the plaintiff gave 4 weeks to enable the parties to undertake an amicable settlement. No settlement was reached within the agreed period and the defendant says it took some time to locate the material necessary for its defence. It is the contention of the defendant that it could not obtain the necessary material for preparing its defence because the people behind the throne had left employment of the defendant company. It is stated that the legal officer and General Manager who left employment were crucial in the preparation and location of material for the defence of the applicant.

It is also contended by the applicant that the plaintiff was required to alert them or give a warning notice that it would apply for default judgement upon failure of negotiations. In my understanding the plaintiff was obliged to sound a warning to the defendant that it would apply for default judgement since the negotiations had broken down. In this case no notice or warning was given after negotiations had broken down and in my view such a notice was necessary after the negotiations had broken down.

It is quite clear that this court has adequate and ample discretion but the court is required to take into consideration all the relevant factors in the case. All the facts and circumstances both prior and subsequent and of the respective merits of the case of the parties are matters which should guide the court as to whether to exercise its discretion or not. One must not forget that a court of justice looks at both sides of the roads before it attempts to cross. I think the delay has been explained to the satisfaction of this court. In any case the delay of 10 days after the 4 weeks is not inordinate to shut out the defendant from defending the case.

Having considered the history of the parties, the circumstances in which the debt had arisen and the nature of the delay, I think it would be just and reasonable to set aside the default judgement obtained by the plaintiff. I agree with **Mr. Wagara** Advocate that the judgement is regular but the court has a discretion to even disturb and/or interfere with a regular judgement in order to achieve justice between the parties.

In my honourable opinion the defendant has brought itself within the province which would justify this court to set aside the exparte judgement entered against it. The circumstances to be borne in mind were correctly and sufficiently fulfilled by the defendant to make it benefit from my discretion.

I am satisfied that the draft defence discloses some serious and triable issues which must be allowed to go to full hearing. I am also satisfied that the defendant has given satisfactory explanation for its failure to enter appearance and file defence within the required time. I make a finding that the defendant has offered a good explanation for the reasons of the delay. The delay has been properly and sufficiently explained to the expectation of this court. And I think this case merits the exercise of my discretion so as to give parties an opportunity to contest the rival position through a hearing when the defence is available for consideration. Any prejudice suffered by the plaintiff can be compensated by an award of costs.

I therefore, allow the application dated 3rd May, 2007, the consequence being that the default judgement entered on 25th April, 2007 is hereby set aside. The defendant is hereby given 10 days within which to file a defence. The plaintiff shall have costs of Kshs.5,000/= be paid within the next 10 days.

Dated and delivered at Nairobi this 6th day of June, 2007.

M. A. WARSAME

JUDGE