



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

Civil Case 690 of 2006

LACHLAN KENYA LTDPLAINTIFF

V E R S U S

KENYA FARMERS ASSOCIATION LTDDEFENDANT

R U L I N G

This is an application by chamber summons dated 5th February, 2007 brought by the Defendant seeking the main order that the interlocutory judgment entered against it on 31st January, 2007 in default of defence be set aside. The application is brought under Order 9A, rule 10 of the Civil Procedure Rules (the Rules). It is premised upon the grounds that the Defendant was late by only a day in filing defence; that the said delay was inadvertent; that the Defendant has an arguable defence; and that the Plaintiff will be fairly compensated by an award of costs. There is a supporting affidavit sworn by one TOM C. NDIWA, the company secretary of the Defendant. To it is annexed a draft statement of defence.

The Plaintiff has opposed the application upon the following grounds (grounds of opposition dated 19th February, 2007):-

1. That the application has been brought under the wrong provisions of the law.
2. That the Defendant's defence does not disclose any triable issues and falls short of the requirements of Order 6, rules 4 and 9 (1) and (3) of the Rules.
3. That there has been inordinate delay in bringing the application.
4. That no evidence has been adduced by the Defendant to entitle it to defend.

There is no replying affidavit filed.

The principles to guide the court in applications of this nature are now well-settled. The main concern of the court is to justice to the parties before it. Its unfettered discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, it will not be exercised in order to assist an indolent litigant, or one who has deliberately sought, by commission or omission, to obstruct or delay the course of justice. See the well-known case of **SHAH – VS- MBOGO**, [1967] E.A. 116.

Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after the judgment sought to be set aside. It will also consider if the defendant has an arguable defence to the claim. But, to deny the defendant the right to a trial should be the last resort of the court.

I have considered the submissions of the learned counsels appearing, including the cases cited. The objection that the application has been brought under the wrong provision of the law is not well taken. Under rule 10 of Order 9A, where judgment has been entered under that Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. Under rule 9 of the same order the provisions of rules 3 to 8 of the Order (inclusive) shall apply with any necessary modification where any defendant has failed to file a defence. Those rules provide for entry of interlocutory judgment in various instances in default of appearance. Clearly, therefore, the Defendant has correctly and properly invoked rule 10 of Order 9A.

I will next deal with the issue of delay. It is common ground that the Defendant duly entered appearance in time on 15th January, 2007. It should therefore have filed defence within 14 days of that date. I accept the explanations given in paragraphs 4, 5 and 6 of the supporting affidavit why defence was not filed on time. Regarding delay in filing the present application, the same was filed on 12th February, 2007, that was a delay of 14 days from the date when defence was due. Considering that the client's instructions had to be sought by the advocate, papers prepared and affidavit sworn, I do not consider a delay of 14 days to be inordinate in the circumstances of this case.

Interlocutory judgment was entered on 31st January 2007, two days after the time within which defence ought to have been filed. The judgment was therefore regularly entered. The Defendant must thus demonstrate that it has an arguable defence, that is, that its intended defence raises triable issues. The Plaintiff's claim is very detailed. At paragraph 6 of the plaint the various dates and places of delivery, the invoice numbers and amounts due for each delivery are given. How does the Defendant respond in the draft defence? At paragraph 4 it denies receiving invoices worth KShs. 3,167,035/60. It is not stated in the supporting affidavit which these invoices are. At paragraph 5 it is pleaded that goods worth KShs. 2,410,691/00 were returned and accepted back by the Plaintiff on the grounds that the same had expired or were slow moving. No particulars of these goods are given in the supporting affidavit. At paragraph 6 it is pleaded that the Plaintiff failed to supply fully goods ordered and charged for amounting to KShs. 37,926/80. Again no particulars are given in the supporting affidavit. At paragraph 7 it is pleaded that the Plaintiff charged the Defendant the sum of KShs. 62,990/00 over and above the amount quoted in its own price list which was the basis of the Defendants orders. Necessary particulars are not given in the supporting affidavit.

Finally, at paragraph 8 it is pleaded that between the years 2003 and December 2006 the Defendant paid to the Plaintiff the sum of KShs. 7,366,497/20 for the goods actually supplied to it and that the Plaintiff's claim in this suit has absolutely no basis. The Defendant

has not tendered in the supporting affidavit any evidence of the payments it alleges in paragraph 8 of the draft defence. It could have easily done so. It is not stated which of the various invoices pleaded in paragraph 6 are disputed; nor is it stated which goods were returned or overcharged.

Where a Defendant is faced with a detailed claim, such as the Plaintiff's, he is duty bound to answer it in detail. The Defendant has failed to do this. Its draft defence amounts to a mere denial. It should not be permitted to stand in the way of the Plaintiff's claim. I find that the draft defence raises no triable issues and is a sham.

In the event, I will refuse the present application. It is hereby dismissed with costs to the Plaintiff. There will be orders accordingly.

DATED AT NAIROBI THIS 22ND DAY OF AUGUST, 2007

H. P. G. WAWERU

JUDGE

DELIVERED THIS 24th DAY OF AUGUST, 2007