



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 288 of 2006

MORRIS & COMPANY (2004) LTDPLAINTIFF

V E R S U S

1. VICTORIA MINERALS AND CHEMICES LTD

2. HARENKUMAR DAMJI MANDAVIA

.....DEFENDANTS

R U L I N G

I have before me an application by chamber summons dated 26th September, 2006. By it the Defendants seek the main orders that the interlocutory judgment entered on 14th July, 2006 and all consequential orders be set aside and that they be granted leave to defend the suit. The application is made under Order 9A, rule 10 of the Civil Procedure Rules (the Rules). Under that rule, where interlocutory judgment has been entered, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. The court has an unfettered discretion. But it is a judicial discretion that must be exercised judicially upon settled principles.

The application is brought upon the following grounds (as they appear on the face thereof):-

1. That the memorandum of appearance was erroneously filed in the Chief Magistrate's court at Milimani.
2. That the Defendants have reasonable and/or arguable defences.
3. That failure to file defence was not due to any fault on the part of the Defendant.
4. That the Plaintiff does not stand to suffer any prejudice.
5. That the application has been made without delay.
6. That it is in the interests of justice that the orders sought be granted.

There is a supporting affidavit sworn by the 2nd Defendant. She depones that she is a director of the 1st Defendant. To the supporting affidavit is annexed, *inter alia*, an affidavit by one ENOCK ALOO NYAGOL, the Defendants learned counsel. In it he explains the delay in filing defence. A draft defence is also annexed.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 30th October 2006. It is sworn by one RAM AGARWAL who describes himself as the financial controller of the Plaintiff. The grounds of opposition emerging therefrom are:-

1. That the Defendants were duly served with summons to enter appearance, and the interlocutory judgment entered against them is regular.
2. That no explanation has been offered why no defence was filed.
3. That the Defendants have not come to court with clean hands.
4. That the Defendants have admitted their indebtedness to the Plaintiff and therefore have no defence to the claim.
5. That the 1st Defendant issued cheques to the Plaintiff in part-payment which were dishonoured by its bankers.
6. That the 2nd Defendant was a guarantor of the 1st Defendant and is liable as such.
7. That the application otherwise lacks merit and is an abuse of the process of the court.

There are various documents annexed to the replying affidavit.

The Defendants filed a supplementary affidavit on 9th November, 2006 with leave of the court in response to the replying affidavit. A number of documents are annexed thereto. In its turn the Plaintiff also filed a supplementary affidavit on 17th November, 2006, with leave of the court, in response to the Defendants' supplementary affidavit. Yet more documents are annexed to the same.

I have considered the submissions of the learned counsels appearing, including the authorities cited. The principles to guide the court in applications of this nature are now well settled. The main concern of the court is to do justice to the parties before it. Its 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. To deny the Defendant the right to a trial should be the last resort of the court.

I have considered all the material placed before the court. The Defendants were served with summons to enter appearance on 20th June, 2006. They had 15 days within which to enter appearance; they were required to enter appearance on or before 5th July, 2006. They entered appearance on 10th July, 2006, 5 days late, albeit in the wrong registry (the Chief Magistrate's registry instead of the High Court registry). This is an excusable error considering that both registries are in the same building but on different floors at Milimani Commercial Courts. But is there explanation for this five day delay? I find no explanation in the supporting affidavit. I also find no explanation for the delay in the supplementary affidavit filed on 9th November, 2006.

The Defendants, even after belatedly entering appearance, never filed defence. Interlocutory judgment was entered against them on 14th July, 2006. The present application was filed on 26th September, 2006. Is there any explanation for this delay which spans nearly three months?

The 2nd Defendant has deponed in the supporting affidavit that she instructed her counsels on 22nd June, 2006 to enter appearance and file defence. This was only two days after summons to enter appearance

had been served. So there was no delay on the part of the Defendants themselves to take action. The delay was caused by their advocates. Mr. Nyagol's affidavit which has already been mentioned does not explain the delay in entering appearance. Regarding the delay in filing defence and the present application, Mr. Nyagol simply states at paragraph 5 of his affidavit that after filing memorandum of appearance on 10th July, 2006 he was subsequently taken ill and was not able to attend to his professional duties for about one month, during which time this matter escaped his mind. That means that about mid-August, 2006 Mr. Nyagol was back on duty. So, why did he wait until 26th September, 2006 to file the present application? There is no explanation for that delay.

Although the court has unfettered discretion, a party seeking exercise of it in his favour is duty-bound to explain any inordinate delay in taking action. There has been inordinate delay here which had not been explained.

I have perused the draft defence annexed to the supporting affidavit. I have also looked at all the other documents annexed to the various affidavits. In effect, the Plaintiff seeks in the plaint judgement against the Defendants for the sum of KShs. 3,320,632/80 for goods sold and delivered. The 2nd Defendant was the 1st Defendant's guarantor for payment. The Plaintiff has pleaded that the 1st Defendant has admitted the claim. I cannot find any clear admission. Annexed to the replying affidavit are various delivery notes and invoices. It appears that the Plaintiff supplied goods to the 1st Defendant on a running account. At some point the 1st Defendant also supplied to the Plaintiff certain goods which were supposed to off-set in part against the 1st Defendant's indebtedness to the Plaintiff.

The materials placed before the court at this stage do not disclose a clear statement of account between the parties. It is not possible now to know if indeed the 1st Defendant owes the sum claimed by the Plaintiff or a part thereof, or whether the same has been off-set by the goods supplied by the 1st Defendant to the Plaintiff. A trial will be necessary so that the relevant documents can be examined and explained by witnesses. It is in the interests of justice that this be done so that justice can be done to the parties. For this reason alone I am inclined to allow the application.

In the event, I will set aside the interlocutory judgment entered against the Defendants on 14th July, 2006 and all subsequent orders. The Defendants may file defence within 10 days of delivery of this ruling. The Plaintiff will have the costs of this application. It will also have all the thrown-away costs occasioned by the interlocutory judgment now set aside. Those will be the orders of the court.

DATED AT NAIROBI THIS 22ND DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 24th DAY OF AUGUST, 2007