



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

**Civil Suit 2071 of 2000**

**M-LINK COMMUNICATIONS COMPANLIMITEDLIMITED.....PLAINTIFF**

**VERSUS**

**COMMUNICATIONS COMMISSION OF KENYA.....1<sup>ST</sup> DEFENDANT**

**TELKOM KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

By a Chamber Summons dated 18<sup>th</sup> June 2007 filed on 19<sup>th</sup> June 2007 the 1<sup>st</sup> Defendant seeks orders as follows: -

1. That the application herein be certified urgent and be heard at the earliest possible date.
2. That there be a stay of execution and/or any further proceedings consequent upon the “exparte judgment/interlocutory judgment” entered against the 1<sup>st</sup> Defendant pursuant to the Plaintiff’s letter dated 27<sup>th</sup> March 2007 pending the ‘inter partes’ hearing and determination of this application.
3. That the said “exparte judgment/interlocutory judgment” entered against the 1<sup>st</sup> Defendant be set aside unconditionally.
4. That the 1<sup>st</sup> Defendant be awarded the costs of this application to be paid promptly upon assessment or agreement.
5. That the Honourable Court be pleased to grant any other or further orders as it may deem fit in the interest of justice.

Prayers number (1) and (2) have already been spent and this court is now dealing with prayers (3), (4), and (5).

The background to this application as is evident from the court record is as follows: -

The suit was initiated by the Plaintiff M. Link Communications Limited who filed a plaint on 22<sup>nd</sup> November 2000. The 2<sup>nd</sup> Defendant entered appearance through Kiplagat & Manyarkiy Advocates on 20<sup>th</sup> December 2000. The advocate subsequently filed a defence on behalf of the 2<sup>nd</sup> Defendant on 22<sup>nd</sup> January 2001. The 1<sup>st</sup> Defendant on the other hand entered appearance through Kiplagat & Associates on 2<sup>nd</sup> January 2001.

On 30<sup>th</sup> January 2001 the 1<sup>st</sup> Defendant brought an application under Section 6 (1) of the Arbitration Act 1995, and Rule 2 of the Arbitration Rules, 1997, seeking to have the suit and all proceedings in relation thereto stayed, as the subject matter of the suit was subject to an arbitration agreement. The 1<sup>st</sup> Defendant also sought to have the dispute referred to arbitration. The parties counsels appeared before Mbaluto J. on 28<sup>th</sup> February 2001, when a consent was recorded granting the orders sought by the 1<sup>st</sup> Defendant. Between 27<sup>th</sup> April 2001 and 22<sup>nd</sup> October 2001, the parties appeared before the court severally, but nothing significant took place.

On the 1<sup>st</sup> November 2001 a consent letter duly signed by all the parties advocates was filed in court seeking to have a consent recorded in the following terms: -

It is hereby ordered by consent: -

- 1. That notwithstanding the fact that the 2<sup>nd</sup> Defendant has filed a defence, all parties have agreed that there be a stay of proceedings in the above suit and the dispute between the Plaintiff and the Defendants be referred to arbitration.**
- 2. That an arbitration panel be appointed by the parties with the plaintiff appointing one arbitrator and the Defendants jointly appointing one arbitrator.**
- 3. That this consent supersedes any other consent entered into by any of the parties in this matter.**
- 4. That the result of the arbitration be final and binding on all the parties.**

Consequently, the consent was recorded and adopted by the court on 8<sup>th</sup> November 2001.

On the 29<sup>th</sup> November 2001, the parties confirmed having appointed arbitrators and the court gave directions for the arbitral proceedings to be concluded within 90 days and award filed before the expiry of that period. This period was extended by consent on the 5<sup>th</sup> March 2002, for a further 90 days.

On the 27<sup>th</sup> March, 2002, the 1<sup>st</sup> Defendant filed a defence to the Plaintiff's claim.

On the 10<sup>th</sup> April 2002, the parties' advocate filed a consent letter duly signed by counsels which read as follows: -

***"We should be grateful if you would record the following consent: -***

- 1. There having been a reference to Arbitration under Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, the order for stay of proceedings made on the 8<sup>th</sup> November 2001 be vacated.**
- 2. That Mr. Dinesh Kapila be appointed on Umpire and in the event that he is required to make an award he delivers his award within 30 days of the matter be referred to him by the Arbitrator.**
- 3. The time for the conduct of the Arbitration and filing of Arbitrator's Award be extended to the 30<sup>th</sup> September 2002."**

For some inexplicable reasons this consent does not appear to have been recorded by the court. However, on the same day i.e. 10<sup>th</sup> April 2002, the Plaintiff filed an amended plaint. On the 17<sup>th</sup> April 2002, the Plaintiff filed a reply to the 1<sup>st</sup> Defendant's defence, and a reply to the 2<sup>nd</sup> Defendant's defence. The 1<sup>st</sup> Defendant filed an amended defence on the 18<sup>th</sup> April 2002 whilst the 2<sup>nd</sup> Defendant filed an amended defence on the 24<sup>th</sup> April 2002.

On the 7<sup>th</sup> October 2002, the parties again filed a consent later dated 1<sup>st</sup> October 2002, in which they

agreed to have the time for conduct of arbitration and filing of the arbitrators award extended for a further 76 days until 15<sup>th</sup> December 2002. This consent was recorded by the court on the 8<sup>th</sup> October 2002.

This remained the position until 3<sup>rd</sup> October 2005, when the Plaintiff filed a Notice of Motion brought under Order XLV rule 5 (1) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, or orders that the Defendant do appoint an arbitrator within 7 days, failing which, the court to appoint an arbitrator on behalf of the Defendant.

That application was dismissed by Ochieng J. on the 23/11/05 on the grounds that the period for the arbitration proceedings had lapsed on 15<sup>th</sup> December 2002, and in the absence of any further consent or court order extending the period, an order for appointment of an arbitrator would be an exercise in futility.

On the 17<sup>th</sup> January 2006, the Plaintiff appointed the firm of Odera Obar & Company Advocates to replace Murage & Mwangi Advocates. On the same day the Plaintiff's new advocates brought an application under certificate of urgency by way of Chamber Summons under Order XLV Rule 4 and 8 (2) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeking *inter alia* to have the court extend time for the arbitration proceedings and the making of the arbitral award. The application was heard inter-parties by Ochieng J. who delivered a ruling on the 25<sup>th</sup> September 2006, in which He dismissed the application on the grounds that He had no authority either under Order 45 Rule 4 or Order 45 Rule 8 (2) of the Civil Procedure Rules to extend time for the commencement of arbitration proceeding.

On the 27<sup>th</sup> March 2007, the Plaintiff's advocate filed a letter dated 27/2/07 addressed to the Deputy Registrar in the following terms:-

***“We refer to the above mentioned matter. Kindly enter interlocutory judgment against the 1<sup>st</sup> Defendant Communication Commissions of Kenya who has entered appearance but has failed to file a defence within the prescribed period.***

***We undertake to pay your charges.”***

On the 25<sup>th</sup> April 2007, the Deputy Registrar recorded the following interlocutory judgment in the file: -

***“The Defendant, Communication Commission of Kenya herein having been duly served with summons to enter appearance within the prescribed period and having failed to file appearance/defence within prescribed period and on application by the Advocate for the Plaintiff. I enter interlocutory judgment against the said Defendant as prayed in the plaint. The award of costs shall await judgment upon the remainder of the claim when the suit will be set down for formal proof.”***

On 21<sup>st</sup> May 2007, the 1<sup>st</sup> Defendant, through its Company Secretary, was served with a notice of entry of judgment in default of defence. The 1<sup>st</sup> Defendant consulted their advocates, who wrote a letter dated May 21<sup>st</sup> 2007 addressed to the Deputy Registrar as follows: -

***“Our client, the 1<sup>st</sup> Defendant herein has today the 21<sup>st</sup> May 2007 been served with a Notice of Entry of Judgment “in default of defence”. This has really shocked our client and us since: -***

***(1) The initial defence of the 1<sup>st</sup> Defendant was filed on the 27<sup>th</sup> March 2002 and served upon the Plaintiffs Advocates the following day.***

***(2) The Plaintiffs themselves filed a reply to that defence on the 17<sup>th</sup> April 2002 and served us on the same day.***

***(3) In response to the amended plaint filed on 10<sup>th</sup> April 2000, we filed the 1<sup>st</sup> Defendant's***

*amended defence on 18<sup>th</sup> April 2002 and served the Plaintiff's advocates the same day.*

*Since all the above documents were filed in court before service, we cannot understand on what basis the default judgment was applied for, but most of all, how the court could have granted the same. Kindly let us have a response to determine the corrective steps that can be taken, for otherwise, we have to move the court to set aside the highly irregular judgment.*

*Please favour us with your prompt reply as our clients are extremely disturbed by these strange developments.”*

That letter elicited a response from the Deputy Registrar in a letter dated 28<sup>th</sup> May 2007 as follows: -

*“Your letter Rf.23.03.17.008 dated 21<sup>st</sup> May, 2007 refers.*

*Your concerns have been duly noted. Upon perusal of the said court file it is noted that indeed your clients did file a defence in the matter. It is apparent that the entry “judgment in default of defence” entered on 25/4/2007 was done in error by the court. We do apologize for any inconvenience to yourselves or your clients. We do suggest that the file be mentioned before the Ag. Chief Magistrate on 30/5/2007 for further direction”*

When the counsels appeared before the Deputy Registrar, who also doubles up as Ag. Chief Magistrate, she directed the parties to appear before the Presiding Judge, who upon hearing the parties, directed that any party aggrieved by the entry of the interlocutory judgment dated 25<sup>th</sup> April 2007 should move the court by way of appropriate application. The result is the Chamber Summons dated 18<sup>th</sup> June 2007, filed by the 1<sup>st</sup> Defendant.

It is the 1<sup>st</sup> Defendant's contention that on the 26<sup>th</sup> March 2002, the parties agreed before the arbitrators that the stay of proceedings which had been agreed by consent before Mbaluto J. be vacated; that the 2<sup>nd</sup> Defendant's defence be admitted; and that the 1<sup>st</sup> Defendant files a defence to facilitate formulation of issues before the arbitrators. The Defendant further maintained that it was pursuant to this understanding that it filed its defence on 27<sup>th</sup> March 2002, leading to further deliberations and the filing of amended plaint and amended defence.

In a replying affidavit sworn by John Kimani Chege a director of the Plaintiff's Company. It is contended that the 1<sup>st</sup> Defendant could not have filed his defence at a time when the proceedings were stayed. It was maintained that it was consequent to the failure to file a defence after the arbitration proceedings collapsed on 25<sup>th</sup> September 2006, that the default judgment was obtained.

Mr. Oriema who argued this application for the Plaintiff/Applicant submitted that the default judgment was irregular, as there was a defence on record. He maintained that the request for judgment was explicit that it was seeking interlocutory judgment on the grounds that no defence had been filed, and that this was the ground upon which the interlocutory judgment was granted. Mr. Oriema contended that the issue of the defence on record being improperly before the court was never raised as no application was made to strike out the defence. He maintained that the Deputy Registrar could not have had any jurisdiction to grant the interlocutory judgment if it was being alleged that the pleadings were improper.

Relying on the Court of Appeal C.A. Nai. 140 of 1995 **Uhuru Highway Development Limited vs Control Bank of Kenya & Others**, Mr. Oriema submitted that the Plaintiff could not apply for an ex-parte judgment in default of defence and then come back to defend that judgment on a total different basis i.e. that there was actually a defence on record which was irregular.

M/s Mburu who appeared for the 2<sup>nd</sup> Defendant also concurred with Mr. Oriema. She submitted that the Plaintiff waived its right to question the so called irregular defence when it filed a reply to the defence.

Mr. Odera who appeared for the Plaintiff maintained that the default judgment was entered because the 1<sup>st</sup> Defendant failed to file a defence after the collapse of the arbitration proceedings. He maintained that the defence filed during the arbitration proceedings, when the court proceedings were stayed, was a nullity and the court cannot take cognizance of it. Mr. Odera relied on the case of **Mcfoy v United Africa Company Limited (1961) ALL E.R. 1169**, wherein it was held that if an act is void, then it is in law a nullity and there is no order of the court required to set it aside as it is automatically null and void. Mr. Odera maintained that the Plaintiff did not need to apply to strike out a defence which was a nullity. As regards the Plaintiff's filing of a reply to the defence. Mr. Odera maintained that the court had no jurisdiction to entertain the defence or the reply to the defence as both were a nullity, and that the jurisdiction of the court could not be conferred by consent of the parties where none existed. In this regard Mr. Odera cited the case of **Carmella Wathuru Karigaca vs Mary Nyokabi** Civil Appeal Number 30 of 1995. Mr. Odera also relied on Civil Appeal Number 157 of 1998, **Samuel Githitu & Another vs Duncan Nyaga Kariuki** to reinforce his argument that no defence could be filed while the arbitration proceedings were on, as the court proceedings remained in suspended animation. He found further support in **Niazsons (K) Limited vs China Road & Bridge Corporation (K) [2001] 2 E A 302** wherein it was held by majority decision that Section 6 (2) of the Arbitration Act of 1995, does not permit parallel proceedings to be handled simultaneously and that it was not therefore open to a Defendant to take out an application for stay of proceedings and at the same time file a statement of defence.

It is apparent that in his letter dated 27<sup>th</sup> February 2007 reproduced above, the Plaintiff's advocate applied for interlocutory judgment against the 1<sup>st</sup> Defendant in default of a defence having been filed within the prescribed period. Although there was a defence filed on 27<sup>th</sup> March 2002, counsel for the Plaintiff took the view that this defence was a nullity as it was filed during the pendency of the arbitration proceedings, and that a defence was only due after the collapse of the arbitration proceedings.

In my considered opinion counsel for the Plaintiff did not depart from the initial reasons for obtaining the interlocutory judgment it was merely a matter of interpretation as to whether there was a proper defence on record or whether there was no defence, as the one filed on 27<sup>th</sup> March 2002 was a nullity. Counsel took the latter view, hence his application. The question is whether counsel was right in his interpretation. The issue therefore, is whether the defence filed by the 1<sup>st</sup> Defendant on 27<sup>th</sup> March 2007, was null and void, and whether the interlocutory judgment entered in favour of the Plaintiff on the 25<sup>th</sup> April 2007 was proper.

It is clear that at the time the 1<sup>st</sup> Defendant filed his defence on 27<sup>th</sup> March 2002, the suit had already been referred to arbitration and proceedings stayed vide orders dated 28<sup>th</sup> February 2001 and 8<sup>th</sup> December 2001. I concur with the view taken by Omolo J. in **Niazsons (K) Limited vs China Road and Bridge Corporation (K)** that it was not open for the 1<sup>st</sup> Defendant "to take out an application for stay of proceedings and at the same time file a written statement of defence". The 1<sup>st</sup> Defendant has however explained that his defence was filed after the parties reached an agreement before the arbitrators on 26<sup>th</sup> March 2002 that the stay of proceedings order be vacated and 1<sup>st</sup> Defendant files a defence to facilitate the formulation of issues before the Arbitrators. The Plaintiff has not directly denied this allegation but is contending (on the advice of his counsel), that any purported consents conferring two parallel jurisdiction is in law unlawful, null and void.

I am inclined to believe and accept the 1<sup>st</sup> Defendant's explanation that there was an agreement that the order for stay of proceedings be lifted. This would explain why 1<sup>st</sup> Defendant filed its defence and why the Plaintiff subsequently filed an amended plaint and a reply to the 1<sup>st</sup> Defendant's defence. Although it looks as if the parties were in effect consenting to parallel jurisdiction by lifting the order for stay of proceedings, in my view that was not so. The parties did not open up the proceedings to continue in the court at the same time as the Arbitration but the stay was lifted only for the limited purpose of filing pleadings in the court to enable the arbitrators to be able to formulate the issues. It is evident that apart from filing the pleadings the parties did not revert back to the court until after the arbitration proceedings aborted. That being so, and the Plaintiff having participated in the filing of the pleadings, during the pendency of the arbitration, He cannot turn round and seek to benefit by claiming that the actions agreed

upon are null and void.

The jurisdiction of the court was only suspended by parties' consent when they submitted to arbitration. Thus it was not illegal for the parties to lift that suspension for a specific purpose. At worst, the filing of the pleadings during the pendency of the arbitration can only be termed as an irregularity which could be waived. By filing the reply to the 1<sup>st</sup> Defendant's defence and even filing an amended plaint during the pendency of the arbitration proceedings, the Plaintiff clearly waived any right to challenge the 1<sup>st</sup> Defendant's defence. He cannot therefore purport to ignore these pleadings by claiming that they are a nullity.

I would echo the words of Bosire J.A. in the case of *Niazsons (K) Limited vs China Road & Bridge Corporation (K)* (supra) as follows: -

***“Besides, default of defence as provided under Order 9A rule 3 of the Civil Procedure Rules does not envisage a situation as exists in the present case. It envisages a case where a Defendant is indolent. To deny a litigant as the Respondent in the present appeal a chance to put forward a defence whether before the court or before a private tribunal as the Appellant seeks to do, more so in a case where the claim is enormous will be tantamount to offending the audi alteram partem principle.”***

In the circumstances, I find that the interlocutory judgment entered against the 1<sup>st</sup> Defendant on the 25<sup>th</sup> April 2007 was not proper. It is only fair and just that the same be set aside. It is so ordered. I further order that costs shall be in the cause.

**Dated, signed and delivered this 24<sup>th</sup> day of October 2007.**

**H. M. OKWENGU**

**JUDGE**