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

Civil Case 128 of 2006

CHARLES MUNYEKI WACHIRA…..…….....……..PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED……..... DEFENDANT

R U L I N G

This is an application to set aside an ex parte interlocutory judgment entered on 11.5.2006 in favour of the plaintiff. The application is essentially brought under the provisions of Order IXA Rule 10 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and any other enabling provisions of the law and procedure.

The substance of the grounds for the application is that the applicant has a good defence and should not be condemned unheard. The application is supported by an affidavit sworn by one Ann Mwangi an Advocate in the firm of M/s Mohammed & Kinyanjui the Advocates for the defendant. She has deponed that the defendant was served on 24.4.2006 and instructed her firm the next day i.e. 25.4.2006. The advocates then sought instructions to enable them file defence which instructions were only received on 9.5.2006. The advocates then prepared the defence drew a Memorandum of Appearance and when the same were presented for filing, it was discovered that a default judgment had been entered on 11.5.2006. It is further deponed that the interlocutory judgment is void as the statutory period of 15 days had not expired when the same was entered. There is also a deposition that the defendant's defence raises triable issues and unless the default judgment is set aside the defendant will suffer irreparable harm, loss and damage but the plaintiff will suffer no prejudice if the judgment is set aside.

There is a supplementary affidavit sworn by the same Ann Mwangi in which she depones that the failure to enter appearance and file defence on time was occasioned by delay on the part of the defendant's advocates which delay should not be visited upon the defendant.

The application is opposed on the primary grounds that the reasons provided for failure to file the Memorandum of Appearance and Defence do not justify the grant of the order sought and that there is no plausible defence other than the same being obstructive and geared at delaying the cause of justice.

The application was canvassed before me on 5.7.2006 by Ms Macharia Learned counsel for the defendant/applicant and Mr. Monari Learned counsel for the plaintiff. Counsel for the defendant in her submissions abandoned the ground that the default judgment is ***void abinitio*** and emphasized one ground that the failure to enter appearance and file defence in time was due to counsel's mistake which should not be visited upon the defendant. She also submitted that the defendant has a good defence which raises bonafide triable issues which should be ventilated and the suit heard on merits. Reliance was placed upon several cases to show that the court's discretion to set aside a default judgment is wide.

Counsel for the plaintiff on his part argued that the defendant was undeserving of the exercise of the court's discretion to set aside the default judgment. He contended that the defendant had not sought to have its defence allowed out of time and that in any event the proposed defence raises no bonafide triable issues. Counsel saw no reason why the plaintiff should suffer for the mistake of counsel for the defendant.

I have considered the application, the affidavit in support thereof, the Grounds of Opposition, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter.

As the default judgment is a regular judgment the defendant is seeking that the court's discretion be exercised in its favour to set aside the ex parte judgment. In my view the delay involved cannot be said to be inordinate and as counsel has freely admitted that the delay was due to counsel's mistake, I accept that as a good reason for the delay and will not visit the same upon the defendant.

I have perused the proposed defence. In my view the proposed defence is not a sham. It raises issues such as on what terms the defendant employed the plaintiff; whether or not the plaintiff was in breach of the terms; whether or not the termination was in accordance with the said terms; whether or not the procedure leading to the termination was flawed; whether or not the plaintiff admitted the complaints made against him by the defendant and whether or not any medical services were paid for by the defendant and were deductable from the plaintiff's dues.

The principles to be followed, in an application to set aside an ex parte judgment were set out in **Patel –vs – E.A. Cargo Handling Services Limited [1974] E.A. 75.** The same have been applied from time to time. The Court of Appeal restated them in **Muthaiga Road Trust Company Limited – vs – Five Continents Stationers Limited & 2 Others : CA. No.298 of 2001.** The Learned Judges said:

"**The main concern of the court is to do justice to the partes and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."**

AND in **CMC Holdings Limited – vs – Nzioki : [2004] 1 KLR 173** it was held inter alia that

"**3. In Law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake of error.**

4. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake inadvertence, accident or error."

In **Kenya Ports Authority –vs- Kustron (K) Limited C.A. No.142 of 1995** the Court of Appeal cited with approval the case of **Jamnadas Sodhia – vs – Gordandas Hemraj [1952] 7 ULR** – where it was held as follows:-

"**The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that, to deny a subject a hearing should be the last resort of a court."**

Applying the above principles to the application at hand I am of the view that the ex parte – judgment entered against the defendant should be set aside and the defendant be allowed to put forward its defence. The plaintiff has not demonstrated that he will suffer injury which cannot be compensated by an award of costs. I also do not consider it fatal that the defendant has not sought enlargement of time to put in its defence. That is a minor lapse which I will ignore.

In the end, the defendant's application dated 15.5.2006 is allowed in terms of prayer 4 thereof. The defendant is allowed time to file its defence within the next 10 days. The plaintiff's costs of this

application and all costs thrown away be paid by the defendant.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **27th** day of **July, 2006.**

F. AZANGALALA

JUDGE

27/7/2006

Read in the presence of:-