REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 594 of 2004

KENYA SHELL LIMITED …… PLAINTIFF

VERSUS

KILELESHWA SERVICE

STATION LIMITED …… DEFENDANT

RULING

The Notice of Motion dated 18.5.05 was brought under Order 49 Rule 5, Order 9A Rule 10 of the Civil Procedure Rules and under the inherent Power of the Court. It seeks the following primary prayers.

> **1. That the time for filing the undertaking to pay damages be extended to 12th May 2005.**
>
> **2. That upon granting prayer 1 above the Court do confirm the injunction granted by its order of 19.4.2005.**
>
> **3. Alternatively and without prejudice to the foregoing the Court do issue an injunction in terms of prayer 4 of the Plaintiff's Notice of Motion dated 29.4.2004 which prayer is sought out of abundant caution.**
>
> **4. That the interlocutory judgment entered herein on 10.5.2005 be set aside. The Plaintiff do have leave to file its reply to defence and defence to counterclaim.**

The grounds for the Application are in the application. They are that:

> ***(a) The Applicant had only one day's notice to comply with the Court order***
>
> ***(b) The undertaking to pay damages was inadvertently not filed in Court within the time ordered by the Court on 19.4.2005.***
>
> ***(c) No injustice will be suffered by the Defendant if the extension of time is granted.***
>
> ***(d) The Deputy Registrar had no jurisdiction to enter interlocutory judgment on the counterclaim.***
>
> ***(e) There is no provision for entry of judgment in regard to the reliefs sought by the Defendant in the Counterclaim.***

(f) The Applicant's advocate took a decision as to how the pleadings should be dealt with and it would be unjust for the Applicant to be penalized for this.

The Application is supported by an affidavit sworn by one Paul Magu the Plaintiff's Legal Officer. The application was opposed and there is a replying affidavit sworn by one Nizarali Husein a director of the Defendant.

The Application was canvassed before me on 30.5.2005 by Mr. Kiragu Learned Counsel for the Plaintiff and Mr. Arua, Learned Counsel for the Defendant. Counsel for the Plaintiff in substantiation of the grounds for the application submitted that the main prayers sought were extension of the time to lodge the undertaking and setting aside of the interlocutory judgment on the Counterclaim and if the extension sought is granted the order of injunction issued on 19.4.2005 be confirmed. Counsel for the Plaintiff further submitted that the delay in filing both the undertaking to pay damages and the defence to counterclaim was due to inadvertence and was not inordinate or inexcusable. The blame was placed at the door of the advocates for the Plaintiff in this matter and the Plaintiff's in house legal advisers who Counsel submitted were overwhelmed with work.

With regard to the prayer, for setting aside the interlocutory judgment on the Counterclaim. It was Counsel's argument that there was no jurisdiction to enter interlocutory judgment in the light of the pleadings on the record. Reliance was placed upon several authorities for this submission. I will refer to some of the authorities in this ruling. On the authorities it was Counsel's view that the interlocutory judgment entered on the counterclaim should be set aside debito justiatiae. It was also Counsel's view that the Defendant will not be occasioned prejudice if the orders sought are granted.

On his part Counsel for the Defendant submitted with regard to the prayer for extension of time to lodge the undertaking to pay damages that the extension would serve no purpose as the temporary injunction had lapsed when the undertaking was not given as ordered. Counsel further argued that sufficient reasons had not been given for the order sought.

With regard to the prayer seeking to confirm the temporary injunction, Counsel argued that the Court's jurisdiction had not been properly invoked and the Plaintiff could not resort to the Inherent Power of the Court.

With regard to the prayer for setting aside the interlocutory judgment on the counterclaim, Counsel submitted that there was jurisdiction to enter the interlocutory judgment as the Defendant had raised a pecuniary claim in the counterclaim.

Reliance was placed upon several authorities for the propositions made by the Defendant. I will keep the principles enunciated in the authorities in mind in considering this application. In the Defendant's view this application is without merit and should be dismissed with costs.

I have now considered the application, the affidavits, the annextures, Counsel's submissions' and the authorities cited. Having done so I take the following view of the matter.

With regard to the prayer for setting aside the interlocutory judgment entered on the counterclaim, I have found as follows: The Defendant by its counterclaim claims a declaratory order that the Plaintiff's termination letter dated 28.7.2004 is of no legal effect, a permanent prohibitory injunction and reimbursement of all losses that were occasioned by the Plaintiff's actions. Pursuant to these prayers, the Defendant by its letter dated 27.4.2005 requested for judgment in default of defence to the counterclaim.The Deputy Registrar obliged and accordingly entered judgment on 10th May 2005 on the counterclaim.

In my view the counterclaim as pleaded did not have a liquidated demand. The claim for reimbursement of all losses that were occasioned by the Plaintiff's actions in my view is not a pecuniary claim as envisaged by our Civil Procedure Rules. The Defendant while requesting for judgment did not state the order or rule under which judgment would be entered. This does not surprise me at all as there is

no rule in our Rule book for entry of judgment on such a request pursuant to a counterclaim.

Order 8 Rule 13 of the Civil Procedure Rule reads:-

> ***"13 Where in any suit a set off or counterclaim is established as a defence against he Plaintiff's claim the Court may, if the balance is in favour of the Defendant give judgment for the Defendant for such balance or may otherwise adjudge to the Defendant such relief as he may be entitled to upon the merits of the case."***

My understanding of this rule is that judgment on a counterclaim may only be given upon merits. I have found no other rule that would entitle the Defendant to judgment in default of a defence to a counterclaim. I am not alone in this view. Harris J. was of the same view in K**ahuru Bus Service –v- Praful Patel (1979) KLR 213** and so was Onyango Otieno J. as he then was in **Boc Kenya Ltd –v- Chemgas Ltd [1999] LLR 1400.**

In the result I hold that the Deputy Registrar had no jurisdiction to enter interlocutory judgment on the counterclaim.

Turning now to the prayer for extension of time to file the undertaking to pay damages I have found as follows:-

Under the provisions of Order 49 Rule 5 of the Civil Procedure Rules, the Court has power to enlarge time for the doing of any act or taking any proceedings under the rules where a limited time has been fixed or where the Court itself has specified the period. The primary consideration is to do justice as each case may require.

On 19th April, 2005, after being satisfied of the merits of the Plaintiff's application I granted an interim prohibitory injunction on condition that the Plaintiff was to file a written undertaking to pay damages if any to the Defendant in the event that it is found at the trial that the injunction ought not to have been issued. The undertaking was to be filed within 7 days of the said order. It was not filed as ordered. It was instead filed on 12.5.2005. The Plaintiff has laid blame on Counsel's mistake or error. There is no allegation that that was not the case. On my part I am satisfied with the explanation given by the Plaintiff for the delay.

In Githere –v- Kimungu [1984] KLR 387, Hancox J.A. as he then was quoted Madan J.A. as he then was in **Belinda Murai and Others –v- Amos Wainaina** as follows:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel …… A blunder on a point of Law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate…."

AND in the case of **Joseph Njuguna Muniu –v- Medicino Giovanni: Nairobi C.A.**

No.216 of 1997 (UR) the Court of Appeal allowed an appeal against an order refusing to set aside an ex-parte judgment where an advocate by mistake had not entered the hearing date in her diary. The Court said at page 267 of the judgment:-

> **"We know that administrative mistakes of this kind do occur in offices of busy practicing advocates … in our view the explanation given by Miss Jan Mohammed was good enough to show why she failed to attend at the hearing of the suit."**

In the result I am satisfied for reasons advanced by Counsel for the Plaintiff that there is reason shown to extend the time. And I cannot see that the Defendant would be prejudiced at all as the position of the parties cannot have drastically changed. I accordingly grant to the Plaintiff the extension of time sought

and order that the time for filing the undertaking to pay damages be and is hereby extended to 12.5.2005. For avoidance of doubt the injunction granted by my order of 19.4.2004 is hereby confirmed.

Having found that the Deputy Registrar had no jurisdiction to enter interlocutory judgment on the counterclaim I order that the interlocutory judgment entered on 10.5.2005 be and is hereby set aside. The plaintiff is granted leave to file and serve its reply and defence to counterclaim within Ten (10) days of the date hereof. The Plaintiff is condemned in the costs of this application in any event. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-