REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION – NAIROBI

CIVIL CASE 1237 OF 2002

FURSYS (K) LIMITED…………..………….PLAINTIFF

VERSUS

SYSTEMS INTERGRATED

LTD T/A SYMPHONY……………......…..DEFENDANT

RULING

This is an application to set aside an ex-parte interlocutory judgment entered on 16.6.2004 in favour of the Defendant in default of defence to counterclaim. The Application is expressed to be brought under Order 1XA Rules 10 and 11 of the Civil Procedure Rules, Section 3(A) of the Civil Procedure Act and all other enabling Provisions of the Law.

The substance of the grounds for the Application is that the Plaintiff was prevented by factors beyond its control from filing its defence to the set off and counterclaim and that it has a good defence to the set off and counterclaim. The Application is supported by an Affidavit sworn by one Kim Byung Tae, the Managing Director of the Plaintiff who deponed that the Plaintiff instructed Counsel to act in the matter but does not know why no Reply and Defence to counterclaim was filed. He also deponed that the delay in filing the Application was due to the fact that the Plaintiff became aware of the default judgment late when its current advocates filed the Notice of Change of Advocates. According to the Plaintiff the Defendant does not stand to suffer any prejudice should the ex-parte judgment be set aside.

The Application is opposed on the grounds that it is bad in-law unmeritorious frivolous and an abuse of the Court process and further that the Plaintiff has no defence to the Counterclaim and is guilty of inexcusable delay in bringing this Application.

The Application was canvassed before me on 25.10.2005 by Mr. Nyaga, Learned Counsel for the Plaintiff/Applicant and Mr. Ikera Learned Counsel for the Defendant/Respondent. Counsel for the Applicant took me through the supporting affidavit and submitted that the delay in filing this application had been satisfactorily explained and it was clear that the delay was inadvertent. Counsel emphasized that the Applicant has a good defence to the Respondent’s set off and counterclaim and in the interests of justice the default judgment should be set aside in view of the further fact that the Respondent will not suffer prejudice as no formal proof has been held.

Reliance was placed upon the case of SHAH –V- MBOGO & ANOTHER (1967) E.A. 116 for the proposition that the Court has unfettered discretion to set aside such judgment to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

Further reliance was placed upon the case of OMAERA PHARMACENTICAL LIMITED –V- DIANI PHARMACY: HCCC NO. 1352 OF 1996 (UR) for the proposition that in exercising its discretion to set aside a default judgment or not the main concern of the Court is to do justice between the parties.

Counsel for the Respondent on his part submitted that the Applicant was undeserving of the Court's discretion to set aside the default judgment. He contended that the Application offends Order Rule 15 (2) and was therefore, defective and should be struck out. He further contended that the proposed defence does not answer the Defendant's entire claim and there will be no purpose served in setting aside the default judgment. Finally Counsel argued that the application had not been made timeously as the default

judgment was entered on 16.6.2004 and the application to set aside the same was made on 30.8.2005 over one year afterwards without a proper explanation for the delay.

Counsel's alternative prayer was that if the Court's discretion is to be exercised in favour of the Applicant it should be on terms that the Applicant deposits the decretal sum in a joint account of the advocates appearing with thrown away costs being awarded to the Respondents.

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. I will first dispose of the Objection raised against the Application on the basis that it offends Order L Rule 15 (2). I reject the objection since despite failure of compliance the Respondent responded to the application by filing Grounds of Opposition and was ably represented by Counsel. I am of the view that it is not open to a Respondent who responds to an Application and attends at the hearing of the application to raise objection that Order L Rule 15 (2) has not been complied with.

Turning now to the merits of the application I have found as follows:-

That a Defendant who raises a counterclaim is not in the same position as a Plaintiff who makes a liquidated claim when there is default in delivering a defence.

Order VIII Rule 13 reads:-

> "*Where in any suit a set off or counterclaim is established as a defence against the 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 the case.*"

In my view this rule does not empower the Court to enter interlocutory judgment in favour of the Defendant in default of defence to counterclaim. I am not alone in this interpretation of the rule. In BOC KENYA LTD –V- CHEMGAS LTD: HCCC NO. 935 OF 1999 (UR), Otieno J. as he then was held that Order 8 Rule 13 of the Civil Procedure Rules does not entitle the Court to enter interlocutory ex parte judgment for the Defendant in default of defence to Counterclaim. This position was also taken by Harris J. in KABURU BUS SERVICES –V- PRAFUL PATEL (1979) KLR 213. The Learned Judge held:-

"***Neither Order VI nor Order 1XA of the Civil Procedure Rules gives the Court jurisdiction to give judgment on a Counterclaim in default of filing of a defence to the Counterclaim.***"

The Defendant/Respondent purported to request for judgment under Order IXA Rules 3,4,5 and 6 and the Deputy Registrar obliged. This was irregular as the Court could only enter judgment against the Plaintiff in favour of the Defendant on the Counterclaim on merits. The Judgment purportedly entered on 16.6.2004 is accordingly irregular and must be set aside.

Even if I were to consider the judgment entered against the Plaintiff on the Counter claim as a regular judgment, I would still set it aside, in exercise of the Court's unfettered discretion. This is because the Plaintiff/Applicant is not guilty of deliberately seeking to obstruct or delay the course of justice. The Plaintiff instructed Counsel to handle its case. Counsel failed to act on the Plaintiff's instructions. I

would not visit Counsel's mistake upon the Plaintiff/Applicant. I have also perused the proposed defence to the set off and counterclaim. In my view the proposed defence is not a sham defence. It raises issues such as variation of the original contract, failure of payment of sums due under the contract and whether or not there was breach of contract and who is to blame for the breach.

With respect to delay in bringing this application, I am satisfied that the Applicant has satisfactorily explained the same and the explanation has not been rebutted by the Defendant. In Pithon Waweru Maina –v- Thuku Mugiria (l982-88) 1 KAR 171, the Court of Appeal citing with approval the case of JAMNADAS –V- SODHIA –V- GORDANDAS HEMRAJ (1952) 7 UR 7 held *inter alia that:*

> "*5. 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 it should be remembered that to deny the subject a hearing should be the last resort of a Court*."

In the result the Plaintiff's application dated 29.8.2005 is allowed in terms of prayers 1 and 2 thereof.

The Plaintiff from the outset offered to pay thrown away costs to the Defendant. Costs are a matter of discretion and in view of the Plaintiff's offer I order that costs be borne by the Applicant/Plaintiff.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-