REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 220 OF 2002

AFROFREIGHT FORWARDERS LIMITED …… PLAINTIFF

VERSUS

PINNACLE CONSULTANTS LIMITED …… 1ST DEFENDANT

SOFTWARE TECHNOLOGIES LIMITED ……..……. 2ND DEFENDANT

RULING

The Plaintiff/Respondent filed a plaint dated 28th May 2002 on 28th May 2002. In that plaint the Plaintiff's prayers for judgment were as follows:

> *"REASONS WHEREFORE the Plaintiff prays for judgment against the defendants jointly and severally in the foll owing terms: -*
>
> *(a) Against First Defendant for the sum of US Dollars 28,000.00,*
>
> *(b) Against Second Defendant for the sum of US Dollars 42,895.00,*
>
> *(c) General damages for breach of contract against the defendants jointly and severally,*
>
> *(d) Costs of the suit,*
>
> *(e) Interest o n a, b, and c above at commercial rates from the date of payment to defendants until when the decretal sum is fully recovered."*

There is a mistake in prayer (e) but it is no consequence as one understands that the Plaintiff is praying for interest on (a), (b) and (c) from the date the Defendants were paid the money being claimed.

One thing is clear from the prayers in the plaint which I have reproduced herein above and that is that the prayers against the Applicant (2nd Defendant) were for refund of US Dollars 42,895.00 and for General damages for breach of contract and of course for costs as well and interest on the prayers for refund of money and for general damages. The summons and plaint were allegedly served upon the applicant on 21st August 2002 through its Managing Director who allegedly authorised the secretary to receive the same summons and plaint. The applicant took no action on the matter – it neither entered appearance nor filed Defence within the time required by law. On 1st November 2002 the respondent made a written request for Judgment and on 11th November 2002 interlocutory judgment was entered. Certificate of costs was then issued dated 2nd December 2002 after Decree had been clear and sealed on 26th

November 2002. Apparently Notice of the entry of judgment was dated 22nd November 2002. Execution proceedings were then commenced against the applicant/2nd Defendant. On 290th January 2003 auctioneers went to the Applicant's premises and allegedly informed the same applicant that judgment had been entered against the same applicant. That was the day the Applicant allege it knew about the entry of exparte judgment against it.

On 23rd January 2003, this application was filed by the applicant. It is seeking mainly two orders and these are shown in prayers 3 and 4 of the application. Prayer 3 is seeking an order to set aside and/or vary the interlocutory judgment entered on 11th November 2002, against it in default of appearance and defence and all consequential orders attendant thereto be set aside and/or be stayed. The fourth prayer is seeking that the annexed Memorandum of Appearance and Statement of Defence be deemed as properly filed and served upon payment of requisite fee. There is also a prayer for costs and a prayer that the court do impose further orders and directions as it would deem fit in the interests of the parties. The application is supported by two Affidavits. One being affidavit of the General Manager of the applicant company and another sworn by the Managing Director of the First Defendant. There are several annextures to the supporting affidavit.

The Respondent also opposed the Application filed and filed two affidavits both of them sworn by the Managing Director of the Respondent company.

I have considered the entire application, the law applicable and the submissions by the learned counsel. The law is now well settled on the principles the court need for guidance in an application of this nature.Broadly they are that the court has to first consider whether the interlocutory exparte judgment was a regular judgment or not. If the court finds that it was irregularly entered then the court has no discretion over whether or not to set it aside. The court must set it aside for no court can allow an illegal judgment to remain on record. Thus in case the court finds that the judgment was irregular then it must be set aside unconditionally for it is not a judgment in law. If however the court finds that the judgment entered was regular then the court has to look at the draft Defence if the same is filed together with the application and see if it raises bon fide triable issues and if it does then the court can set aside the interlocutory exparte order on conditions or unconditionally depending on the circumstances before the court. Thus in cases where the judgment is regular the court has wide discretion to interfere with the same but always putting in mind that that power is not given to the court to aid a party who deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.There are several authorities to the above principals including that of Shah vs. Mkogo & Another (1967) EA 116 and that of Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75. In the case of Abraham Kip tanui vs. Delphis Bank Ltd & another, HCCC No.1864 of 1999 , Ringera J. states as follows:

> *"As regards the first issue, it is settled law that if it is shown that a judgment in default of appearance or defence is irregularly obtained, the same will be set aside as a matter of right. In the language of the esoteric, such judgment is said to be set aside ex debito justitiae.*
>
> *In my view, a judgment would be held to have been irregularly obtained, where the same has, for example, been procured either without there having been any or any proper service of summons to enter appearance, or obviously of the existence on record of the memorandum of appearance or defence as the case may be, or when it ought not to have been procured due regard being had to the rules of procedure."*

And he goes on in the same ruling to state further on the powers of the court in a situation where judgment is irregularly obtained as follows:

> *"As this court cannot countenance an irregular judgment on its record, the same is for setting aside ex debito justitiae. In my view, it matters not that the defendant is guilty of inordinate delay in presenting the application for setting aside such a judgment or that he may not have a defence on the merits. Once it is established that a judgmen t on record is irregular it must be set aside as of right.*

There are no two ways about it. The same is not susceptible to any variation. It's only fate is vacation from the record. Such a judgment is not set aside as a matter of discretion but as a mat ter of judicial duty in order to uphold the integrity of the judicial process itself.

As I have stated above, I do fully share the above submissions and I do feel they set out the principles I have mentioned above with the required emphasis.

I will now consider, with the above in mind first whether the judgment that was obtained in this case was regular or not. That the summons was served, properly seems to me certain. The process server states clearly that he found the Managing Director of the company who referred him to her secretary and instructed the secretary to receive the summons and plaint on her behalf. The Secretary acted as instructed. I do not accept the Applicant's version as contained in paragraph 9 of the Affidavit that sometimes in November 2002 an individual apparently went to their offices and left court papers with their receptionist. Surely the applicant knew the alleged Receptionist and if its version is true the name of the same Receptionist would have been revealed and the date she was left with the papers would also have been revealed. In any case, on the Respondent stating that the managing Director was served, the same Managing Director would have sworn an affidavit to dispute the same or Applicant would have sought to cross-examine the process server. I do not accept Applicant's contention. Applicant was clearly and properly served.

However that is not the end of it all as concerns whether or not the judgment was regular. Having found as I have that the service was proper, another question is yet to be resolved and that is whether the judgment was properly procured with due regard to the rules of procedure and whether the judgment as it stands on the record is properly entered. This is what causes me concern notwithstanding all that was ably submitted before me by the learned counsels. For some unknown reasons they did not touch on this issue but as a court of law I cannot ignore it.

First is the Request for judgment dated 31st October 2002 and file on 1st November 2002. The request was apparently made under Orders 3, 4, 5 and 6 of the Civil Procedure Rules. This was clearly a mistake. Order 3 is dealing with Recognised Agents and Advocates. Order 4 is dealing with institution of suit and issue of summons. Order 5 is on service of summons and order 6 is on pleadings generally. None of these orders is relevant here.

Perhaps the Applicant meant Order 9A rules 3, 4, 5 and 6. It did not say so but even the, is this case, as far as I can see only Order 9A rules 3 and 4 were relevant.

Second is the judgment that was entered. The plaint in this case makes a liquidated demand together with some other claim. (I have reproduced the prayers hereinabove). It was against two defendants and one of them failed to appear. The correct position is to proceed under Order 9A rule 4 and 3. Order 9A rule 4 states as follows:

"4. Where the plaint makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fail s to appear, the court shall, or request in Form No.26 of Appendix C, enter judgment against any defendant failing to appear in accordance with rule 3, and execution may issue upon such judgment and decree without prejudice to the Plaintiff's right to proc eed with the action against such as have appeared."

As rule 4 only refers to rule 3 but does not specify which part of rule 3 to be applied, one has to look at rule 3 and see which one will apply and that depends on whether the Plaint makes liquidated demand with some other claim or without some other claim. If it makes liquidated demand without some other claim the rule 3(1) will apply and if it makes liquidated claim with some other claim then rule 3(2) will apply. Here the plaint made liquidated demand with some other claim and therefore Order 9A rule 3(2) would apply. That order states as follows:

"(2) Where the plaint makes a liquidated demand with one other claim, and defendant fails, or all the defendants fail to appear as aforesaid, the court s hall, on request in Form 26 of Appendix C,

enter judgment for the liquidated dem and and interest thereon as provided by sub-rule 1 but the award of costs shall await judgment upon such other claim " (underlining supplied.)

That, in my mind is what should have happened here if the learned Deputy Registrar decided to accept and act on a Request for judgment which as I have stated was not properly drawn and was not properly before him and should have been rejected. What did the Deputy Registrar do. He accepted the request which he should not have accepted in the first place and proceeded to enter the following judgment: "7.11.02.

The defendant herein Software Technologies Ltd (2nd) having been duly served and having failed to enter appearance or file defence within the time prescribed by the law and on the application for request for judgment dated 1 st November 2002 I hereby enter ex -parte judgment of US Dollars 42,895 plus costs and interest as prayed in the plaint."

This was wrong. The Deputy Registrar should not have awarded costs. The award of costs should have awaited judgment upon the demand for general damages.

The sum total of it all is that the judgment entered was not regular as the correct procedure was not followed and judgment awarded with included costs was not legal. As I have demonstrated herein above, the court, in such a situation has no discretion and must as a duty set aside such a judgment. I do so. The Applicant is to file Defence within ten days of the date hereof.

As the service was proper, and the mistake is not totally on the Respondent except for an improper request for judgment, I will order no costs to either party. Each party to bear its own costs. Orders accordingly.

Dated and delivered this 28th Day of February 2003.

J.W. ONYANG OTIENO

JUDGE