REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1675 OF 2002

NELLIWA BUILDERS & CIVIL ENGINEERS ……PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL …… DEFENDANT

R U L I N G

On the 10th December, 2002, the plaintiff applied for judgment against the defendant who had entered an appearance but failed to file a defence within the prescribed time, and it got that judgment, which was dated the 13th December, 2002. The defendant now comes with the present application asking the court to set aside that judgment on the grounds

> (a) that the parties had discussed the matter and the plaintiff was on the site proceeding with the works, and that being the case, the application for a default judgment was confounding, surreptitious and in bad faith; and
>
> (b) a defence had been filed on 11th December 2002 while the judgment was entered on the 13th December 2002; and
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> (c) that the defendant has a good defence to the claim.

These grounds are set out in the application itself and sworn to in the affidavit of Kibagendi Assa M Nyakundi, an advocate, sworn on December 18, 2002 to support the application.

In reply, Mr. Njuguna Paul Chuchu, an advocate on record for the plaintiff, swore an affidavit on January 10, 2003. In it, he stated, that truly an out of court settlement of the matter was under negotiation; indeed, since before the suit was filed, but with no undertaking by the plaintiff that it would not request for judgment or waive its right to do so during the negotiations; that the judgment was requested for and was entered at the time when there was no valid defence on record, and none was on record even at the time of swearing the replying affidavit, and therefore the judgment was regularly entered; and that as the contract certificate was issued there would really be no contest in a defence as the defendant has already made part payment of shs 10 million on that certificate. So, according to the plaintiff, no useful purpose would be served by setting aside the interlocutory judgment.

In their oral arguments before me, in support of their respective clients' cases, the advocates more or less repeated what was contained in the affidavits on either side. The advocate for the defendant further said that the payment by the defendant to the plaintiff of the shs 10 million followed the negotiations, to enable the defendant to call back the plaintiff to complete the work: it was a payment "to mobilize the

plaintiff to come back to the site", and not an admission that the contract certificate was payable. The plaintiff is in fact back on site continuing with the work to complete it. It was said that the defendant went into the negotiations in good faith, but the plaintiff is now attempting to stab the defendant in the back. The plaintiff's advocate maintained that the judgment is alright, and at any rate there is no triable issue when one looks at the voucher accompanying the payment cheque.

The first issue for this court to decide is whether as at the date and time when the interlocutory judgment was entered, there was a defence filed. This is a matter of historical fact. I have combed this file, turning each sheet of paper on it, in search for any defence filed. I have not seen any at all. I have also thoroughly gone through this file in search for a copy of an official or any receipt showing that any money was paid as court fees on filing any defence, as is normally the case, filing fees being a normal requirement. I have not come across any such copy. I have carefully read the record on this file, but I have not seen any minuted note on the file (as is the normal practice) showing that a defence had been received and filed at the registry on any date.

What I have seen is a documents said in an affidavit by Kibagendi Assa M Nyakundi, to be an annexed copy of the defence. Apart from a court date stamp for the date of December 11, 2002, on it, there is nothing else to show that a defence was filed. Filing would have attracted a payment of the requisite court fees, upon which an official court receipt would have been issued. Indeed if there had been such payment, Kibagendi Assa M Nyakundi would have said so in his said affidavit; but not a word is said about payment and issuance of an official payment receipt by the court. Such a receipt would have also borne a serial number, the case number, the date of payment, at least the signature of the cashier who received the payment, and other particulars. No such receipt was exhibited or alluded to in the affidavit supporting the application, or in the course of the oral presentations before me.

In the absence of all these things, coupled with the fact that no minute on the file reflects the alleged filing, I have no good reason to believe that defence has ever been filed in this case, or that it was filed as at the material time. Nothing has been put before me to show that the deputy registrar, when entering judgment ignored or overlooked any defence on the file. He must have checked the file, found no filed defence, and then accordingly entered the judgment. I therefore answer the question by saying that as at the date and time of entering the interlocutory judgment in default of defence, no defence had been filed; and, I add, none has been filed up to this day.

It was not said or argued that the date when the judgment was entered was before the expiry of the time for filing the defence. The application for the judgment was made after the time for filing a defence had expired. Entry of judgment followed the said expiry.

Clearly, therefore, the defendant was in default of filing its defence as at the time the judgment was entered on that ground. That being the factual position I have found on record, I am satisfied that the interlocutory judgment was regularly entered in accordance with the rules of procedure.

Upon this finding of fact, the second issue then is this: is this a proper case in which the court may set aside the judgment which was regularly entered? This is a question to be answered by consideration and application of general principles to the facts of the case.

Where a judgment in default of a defence was regularly entered and it is sought to have it set aside, it is a matter for the judicial discretion of the court to set it aside when such a course is desired by the defendant in the face of opposition from the holder of the judgment. It is today trite law and practice, that where a defendant enters an appearance but fails to file a statement of defence, and upon a default judgment entered he seeks to have it set aside, he is wholly at the discretion of the court as to whether the judgment against him should, in the circumstances prevailing both prior and subsequent to the default judgment, be set aside and the defendant be allowed to file a statement of defence.

The discretion of the court is a very wide discretion. There are no limits or restrictions on the court's discretion. There is no rule of thumb whereby a given case or application can be judged according to. Each case and each application must be judged by an intelligent weighing of all the facts and

circumstances given at the hearing of the application or case. And in a proper case, the judgment may be set aside upon such terms as are just. As it has been said, “the discretion of the court is perfectly free, and the only question is whether, upon the facts of any particular case it should be exercised”.: per Briggs, JA, in the Court of Appeal for Eastern Africa, in Shabir Din v Ram Parkash Anand , (1955), 22 EACA 48.

It is neither possible nor, as a matter of practical prudence, desirable, to indicate in detail the manner in which the discretion should be exercised. The matter must always be open and the court’s discretion be left unfettered by rule, so that the court is left to determine whether there are facts in the case which would make it unjust to allow the applicant to succeed or to deny him the relief sought. The discretion will not necessarily be exercised in every set of facts to excuse a party’s default or his advocate’s wrongdoing and grant the relief he seeks. Sometimes justice may require excusing a party’s fault and allowing him to pursue his position; but sometimes there may be facts in a case which would make it unjust to allow the application to succeed, and the applicant must be shut out. It is undesirable and almost impossible to lay down any rigid rule to bind or guide courts in the exercise of their discretion in such applications, because each case must be decided on its own merits: ibid.

The very wide and unfettered discretion of the court is not for nothing. It is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. While considering an application, and exercising the discretion, the concern of the court is to do justice to the parties, without imposing conditions on itself to fetter the wide discretion given it by the law: Sir William Duffus, P in Patel v E A Cargo Handling Services Ltd , [1974] EA 75, at p 76.

At all levels of courts, it has always been emphasized, that the discretion is in terms unconditional, or that it is a discretion untrammeled in terms; and that it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run. As it is well known, a discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. So, in matters of discretion no one case can be an authority for another. The court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion on which the law has put no limits or restrictions and has required it to be perfectly free: see the speeches of Lord Atkin and Lord Russell of Killowen, in the House of Lords of England in Evans v Barthlam , [1937] A C 473, a case which has been followed many times in East Africa, e.g. in Mbogo and another v Shah [1968] EA 93 (CA – K); Sebei District Administration v Gasyali and others , [1968] EA 300 (U); and Patel v E A Cargo Handling Services, Ltd , [1974] EA 75 (CA – K).

Since the discretion is possessed only for the purposes of doing justice to the parties and to avoid injustice or hardship resulting as aforesaid, it means necessarily, that wide though that discretion is, it is a judicial discretion and it must be exercised judicially, or in another phraseology, in a selective and discriminatory manner, on fixed sound principles, and not arbitrarily or idiosyncratically according to private opinion, sympathy or benevolence, for otherwise the parties would become dependent on judicial whim, contrary to our notion of justice under the Rule of Law: see Pickering, CJ, in Mulji Jetha v Partab Singh, (1931), 13 KLR 1, at p 2; and Kneller, JA, in Pithon Waweru Maina v Thuka Mugiria (1982 – 1988) 1 KAR 171, at p 178. Accordingly, it is often convenient in practice to lay down, not rules of law, but some general principles and indications, to help the court in exercising the untrammeled discretion; and the courts have, case by case, laid down for themselves broad principles to guide them in the normal exercise of their discretion, always remembering that the discretion may be exercised on any proper material: Evans v Barthlam , [1937] A C 43. A few of the broad principles for guidance are set out in a number of decisions.

One obvious principle is that unless and until the court has pronounced a judgment upon the merits or by the consent of the parties, it is to have the power to revocate the expression of its coercive power where the judgment has only been obtained by a failure to follow any of the rules of procedure. “The court goes by the principle that….. an ex parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the court’s power of revocation at its discretion”. Chesoni, J (as he then was), in Municipal Council of Eldoret v James Nyakeno, Eldore t HCC Appeal No 14 of 1980; and Chesoni, Ag JA (as he then was), in Pithon Waweru Maina v Thuka Mugiria , (1982 – 1988), 1

KAR 171, at 180.

Indeed, in this connection, a plaintiff who, finding that the defendant has entered an appearance but has failed to file a defence within time or at all, elects to proceed to obtain a judgment in default of defence does so at the risk involved in the possibility of the court subsequently setting aside or varying such judgment. It goes without saying it, that if he has no reason to suppose that the defendant will seek to have the judgment set aside or varied, or if he knows that the defendant has no valid defence to the suit the risk is minimal; but where the plaintiff in order to obtain his judgment on formal proof has first to defeat an application to the court by the defendant for liberty to file a defence out of time, the risk which he undertakes may be substantially increased: Harris, J, in Jesse Kimani v McConnel and another , [1966] EA 547, at p 555.

Recognizing that it is not easy, practicably possible or even desireable, to define with exactitude the several considerations to which the court may properly have regard in dealing with an application to set aside or vary a judgment entered in default of a pleading or appearance or attendance, yet the other important principle which must be borne in mind is that an attempt must firstly be made to comprehend the purpose of the power to set aside or vary such a judgment, and then adopt a reasonable approach to the exercise of that power in any particular case always avoiding mere technicalities for their own sake: ibid.

When the purpose of possessing the discretionary power to set aside or vary a judgment is recalled as one intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, it then becomes abundantly plain that the canverse truth is that the discretion of the court is not intended so to be exercised, nor is it designed, to assist a person who has deliberately declined to take heed of the intimation given him before filing suit to reach a settlement without resort to litigation, or to give proper attention to the matter in the face of warnings, or who has otherwise deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. So, a party who arranges his affairs in such a way that the normal process of the court fails to work in his respect can only have himself to blame if his own system works to his prejudice in a litigation unless he gives a good explanation for his arrangements: see Shah v Mbogo and another [1967] EA 116, particularly at p 123, per Harris, J, affirmed on appeal to the Court of Appeal for East Africa, in Mbogo and another v Shah [1968] EA 93, at p 94 (per Sir Clement de Lestang, V-P, and Sir Charles Newbold, P, at 96, as well as Law, JA, at p 97).

On a reasonable approach to the application of the rules which give the discretionary power to set aside or vary a judgment entered in default of appearance, pleading or attendance, the circumstances to be borne in mind by a judge on an application to set aside a judgment include the court asking itself whether any material factor appears to have entered into the passing of the ex parte or default judgment, which would not or might not have been present had the judgment not been ex parte or in default of an essential procedural step; see Harris, J, in Jesse Kimani v McConnell and another , [1966] EA 547, at p 555.

If satisfied that a material factor entered or may have entered into the passing of the judgment which would not or might not have been present had the judgment not been ex parte or been passed by default, then the court would determine whether, in the light of all the facts and circumstances both prior and subsequent, and in the light of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed by the court as a price for setting aside or variation of the judgment: ibid.

This proposition means that in these applications, what happened before the filing of the suit concerning the subject matter of the suit and the parties in the suit, and what has happened during the pendency of the suit or after the court has passed judgment, are relevant factors when the court exercised its discretion on the application to set aside a judgment or to vary it. Further, 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 it should always be remembered that to deny a person a hearing should be the last resort of a court; Ainely, J (as he then was), in Jamnadas V Sodha v

Gordhandas Hemraj (1952), 7 ULR7, at p 11, adopted by Sheridan, J (as he then was), in Sebei District Administration v Gasyali and others , [1968] EA 300, at p 302, and approved and adopted by Kneller, JA, in Pithon Waweru Maina v Thuka Mugiria , (1982 – 1988), 1 KAR 171, at p 178.

It goes without saying, that delay and its possible adverse effect in relation to witnesses are, of course, factors to be borne in mind in determining whether, looked at as a whole, the justice of the case requires that the case be re-opened so as to try it on its merits. Delay may be adverse to the discharging by the plaintiff of the onus of proof resting on him as such plaintiff. Sometimes it happens that if the application to set aside a judgment is granted, leading to a reopening of the litigation, the filing of pleadings, the court diary and the judicial calendar may already be so clogged with other cases, that the fresh hearing would almost certainly not take place for some more considerable time; and there could be no certainty that the plaintiff's witnesses would necessarily be available or if available, would be as clear in their recollection of the material events as at the time of an earlier hearing. In that eventuality, the plaintiff may suffer undeserved prejudice for a wrong brought about by the defendant's default. The court will not allow such a prejudice to work against the plaintiff as an innocent party: see Sir Charles Mewbold, P, in Mbogo and another v Shah [1968] EA 93, at p 96.

The discretion of the court is so free, that in a proper case, a judgment may still be set aside even if the defendant (applicant) has approbated the judgment in default. Even if by some act (e.g. a letter acknowledging the judgment and asking for time in which to pay the decretal sum) the defendant has done something amounting to approbating the judgment, the court still has a discretion to set aside the judgment if there are circumstances to justify such a course: Sheridan, J, in Sebei District Administration v Gasyali an d others , [1968] EA 300, at p 302.

The strength or poverty of the defendant – applicant's excuse for letting a default judgment to be passed against him, is an important factor to be considered; but it would be wrong for a judge to concentrate solely upon that factor. Thus, the poverty of the applicant's excuse is not the sole matter which must be considered in cases of this kind: Jamnadas V Sodha v Gordhandas Hemray , (1952), 7 ULR 7; and Pithon Waweru Maina v Thuka Mugiria , supra.

Applying these general principles to the present application, I note that it must have come as no surprise to the defendant, that the suit was filed after attempts to settle the matter amicably out of court collapsed. After the suit was filed the summons to enter an appearance was served upon the defendant. The defendant entered an appearance. So, it was clearly aware and had knowledge of the filing of the action, and of the nature of the plaintiff's claim, but either refused or otherwise failed to file a defence.

Instead of candidly admitting that it failed to file, its defence either in time or at all and then seek to explain the lateness or default, the defendant has defiantly, in the face of contrary evidence on the file and lack of a filing fees receipt, insisted that it had timeously filed its defence before judgment was entered. The defendant did not attempt to explain the absence of a receipt which should have been issued on filing a defence. I find that this kind of conduct of the defendant was an attempt to pull a fast one on the court by presenting to the court a document purporting to bear a rubber stamp which may or may not be a court stamp, but with no accompanying receipt to show payment on filing. To attempt a trick on the court is something that the court will not countenance. It is a serious matter which I have borne in mind against the applicant.

Similar contractual obligations between the parties have been honoured wholly or in part, and as a matter of fact, the plaintiff is still on the construction site under the contract. There is nothing brought to my attention, constituting any fundamental or serious dispute, and prima facie the plaintiff is entitled to further payments in accordance with the contract. I have not found any material factor which appears to have entered into the passing of the judgment which would not or might not have been present had the judgment not been in default of defence.

I have considered the nature of the action. It is founded on a breach of a building contract, and the plaintiff claims a sum of Shs.78,315,914.55, among declarations. The sum of money claimed includes a sum under an unpaid architect's certificate, No 30 certifying payment due to the plaintiff, in accordance

with clause 30 of the building contract between the parties. There is no reasonable answer and defence to the claim.

With the ebbs and swings of the currency strength and value, it is unlikely that the plaintiff can reasonably be compensated by costs for any delay occasioned. Moreover, given the shortage of judges and the avalanche of civil litigation in these courts, to re-open this case would lead to an intolerable waiting for it to be cause listed for hearing, and the dangers of delay to which I have already adumbrated, will prejudice the plaintiff's case.

The defendant is not being denied a hearing. The defendant itself was accorded a fair opportunity to be heard, but refused or failed to seize that opportunity and then resorted to cheating the court that it had properly filed a defence when, in truth, it had not done so. This is not a party to be trusted in this matter.

Taking everything together, the justice of the case is that it will not be right to grant this application. In the circumstances of this case, it appears that the defendant has deliberately sought to obstruct or delay the course of justice.

Accordingly, this application is dismissed with costs. It is so dismissed.

Signed and dated by me this 27th day of March, 2003, at Nairobi.

R. KULOBA

JUDGE

27.3.2003

Coram : R. Kuloba, J

Miss Ogwora, holding brief for Mr. Nyakundi for the applicant, present

Mr. Njuguna for the respondent, present

Court Clerk in attendance, Anne

COURT

This Ruling is read out and delivered by me this 27th day of March, 2003, at Nairobi in the presence of the advocates for the parties.

R. KULOBA

JUDGE

27.3.2003