



Adco Group Companies Ltd v Ranford Holdings Co Ltd & another (Civil Case E508 of 2022) [2024] KEHC 1004 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E508 OF 2022
A MABEYA, J
FEBRUARY 9, 2024**

BETWEEN

ADCO GROUP COMPANIES LTD PLAINTIFF

AND

RANFORD HOLDINGS CO LTD 1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY 2ND DEFENDANT

RULING

1. Before Court is the application dated 1/8/2023. It is brought under Article 159 2(d) of the Constitution of Kenya 2010, section 1A, 1B, 3A and 95 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 10 rule 11, Order 50 rule 6, Order 51 rule 1 of the Civil Procedure Rules.
2. The application seeks the setting aside of the interlocutory judgment obtained by the plaintiff against the 1st defendant on 28/7/2023 and the enlargement of time for filing the memorandum of appearance filed on 20/7/2023.
3. The application is premised on the grounds on the face of it and on the affidavit of Noor Haji Ali sworn on 1/8/2023. The applicant averred pleaded that it was served with the summons to enter appearance on 17/2/2023 and its advocates orally entered appearance and the matter was fixed for case management.
4. The applicant's contention was that its advocates had tried at numerous times to be mapped into the system and the process took longer than expected. That on 20/7/2023, its advocates were mapped and on the same day regularized its affairs by filing a memorandum of appearance.
5. That the respondent had already filed a request for judgment and on 28/7/2023 the deputy registrar entered judgment against the 1st defendant on prayer one of the plaint and the rest of the matters were



- set down for formal proof. It is the applicant's averment that the judgment is of a substantial amount of Kshs 145,071,090.38 and it would be highly prejudiced if it is condemned unheard. That failure to enter appearance could not be blamed on the applicant.
6. The plaintiff filed a replying affidavit in opposition to the application sworn by Eugene Otieno dated 14/9/2023. It questioned the letters relied upon by the applicant stating that they did not contain official stamps and the same were not copied to it. That there was no proof with respect to the correspondences.
 7. With respect to the memorandum of appearance, the plaintiff contended that the applicant had 15 days to file a memorandum of appearance and defence from the date of service however it took 5 months. That the deputy registrar was within her rights to enter judgment as prayed as the applicant did not enter appearance nor did it file a defence.
 8. The application was canvassed by way of written submissions which I have carefully considered.
 9. The applicant submitted that it had not filed a defence since its application dated 20/7/2023 challenged the jurisdiction of the Court due to the existence of an arbitral clause. That no prejudice would be suffered by the plaintiff if the application was allowed since the applicant would be allowed to prosecute its case. That the failure to enter appearance in 15 days was due to the technical issues it encountered in the judiciary e filing portal with respect to being mapped out.
 10. The plaintiff submitted that the 1st defendant was duly served with the summons to enter appearance and entered appearance orally. That on 23/3/2023, the applicant's advocates stated that they would file and serve the memorandum of appearance and defence before close of business of that day. That there was no valid defence on record and that the applicant was just employing delaying tactics.
9. I have considered the rival averments, the submissions by counsels and the authorities cited. The main issue for determination is whether the interlocutory judgment against the applicant should be set aside.
 10. Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules*, 2010 provides as follows: -
 - (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
 - (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."
11. There is no dispute that the summons to enter appearance were properly served upon the applicant on 17/2/2023. It is also not in dispute that the applicant did not enter appearance within the stipulated timelines and judgment was entered in default of appearance for Kshs 145,071,090. The alleged reason for failure enter appearance was that the applicant was unable to file the documents on the online filing platform since it had not been mapped out in the system and the said process took some time.



12. In *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, it was held that: -

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

13. Further, in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another*, [2015] eKLR, the Court of Appeal stated: -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. EA. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986/ KLR 492* and *CMC Holdings v. Nzioki [2004/ 1 KLR 173]*.”

14. From the foregoing, what is to be considered in an application for setting aside an interlocutory judgment is; the reason for failure to enter appearance, time that has lapsed, the prejudice to be suffered by the parties and whether the defence raises triable issues.

15. On the reason for the delay, the applicant produced several correspondences. The Court notes that the applicant’s advocates in the letters dated 22/02/2023, 27/03/2023 and 8/06/2023 brought to the attention of the deputy registrar that they had not been mapped out and they needed to enter appearance. The Court believes that there was effort on the part of the applicant’s advocates and there is nothing on record to make the Court doubt the said correspondence. The reason for the delay is therefore plausible.

16. On whether the defence raises triable issues, the applicant did not file any defence. But it filed an application dated 20/7/2023 which challenges the jurisdiction of the Court pursuant to section 6 of the *Arbitration Act*. In the circumstances, the applicant was not obligated to file a defence since doing so would have denied it its right to challenge the Court’s jurisdiction over the matter. I find that the challenge on jurisdiction is a weighty matter that need to be investigated and therefore a triable issue.

17. On the delay, I find that the delay of five months was inordinate but an order for costs would be able to atone the plaintiff.



18. In the circumstances, I find merit in the application and set aside the interlocutory judgment entered on 28/7/2023. The memorandum of appearance filed on 20/7/2023 is deemed as duly filed. The application dated 20/7/2023 is to be set down for hearing. However, for the delay, I will award the plaintiff thrown away costs of Kshs.20,000/-.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

