Tim Holdings PTY Limited & another v Dragonfly Aviation Limited (Commercial Case E114 of 2023) [2024] KEHC 2681 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E114 OF 2023

A MABEYA, J

MARCH 15, 2024

BETWEEN

TIM HOLDINGS PTY LIMITED ..... 1ST PLAINTIFF

JET EXPRESS HOLDINGS LIMITED ..... 2ND PLAINTIFF

AND

DRAGONFLY AVIATION LIMITED ..... DEFENDANT

RULING

1. The application before Court is dated 2/6/2023. It is brought under Order 51 rules 1and 4, Order 5, Order 10 rule 11 of the *Civil Procedure Rules 2010*, section 57 of the *Interpretation and General Provisions Act*, section 1A, rule 1B and 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya.

2. The application seeks the setting aside of the interlocutory judgment entered on 26/5/2023. That the Memorandum of Appearance dated 14/4/2023 be deemed to be properly on record and the defendant be granted leave to defend the suit.

3. The application is based on the grounds on the face of it and supported by the affidavit sworn by Patricia Njoki Matu on 2/6/2023. The applicant's case is that, the plaintiff instituted the suit against the defendants for alleged breach of the Lease Purchase Agreement dated 19/7/2022.

4. That the terms of the lease agreement were that any dispute arising from the agreement would be heard and determined in South Africa or the British Virgin Island. That the defendant had started initiating proceedings in South Africa and they instructed their advocates to act on their behalf and file a memorandum of appearance.

5. However, the defendant's advocates could not access the system since there was an error on the system as other advocates had been mapped as acting for the defendants. That once the issue was resolved the

defendant's advocates entered appearance and filed a preliminary objection challenging the suit. It was the applicant's contention that the defence raised triable issues and should not be condemned unheard.

6. The application was opposed by the respondent/plaintiff vide a replying affidavit sworn by Davies Mulani. He averred that the defendant did not dispute receiving the summons which were served on 31/3/2023. That the defendant ought to have entered appearance on or before the 14/4/2023 but failed to do so prompting the court to enter judgment in default of appearance. That the suit in South Africa had nothing to do with the case before Court and the annexed statement of defence was a sham and did not raise triable issues.

7. The application was canvassed by way of written submissions which I have considered. It was the applicant's submission that the Court had the discretion to set aside the interlocutory judgment. That the applicant had raised triable issues in the statement of defence and explained the delay in entering appearance. That the respondent would not be prejudiced and it would be in the interest of justice to allow the application.

8. The respondent submitted that the applicant did not prove that service was not effected therefore the summons were valid and proper. That the judgment was regular for default of appearance. With respect to the defence, it was submitted that the applicant's denial that the plaintiff was not entitled to the sums was not enough. That the applicant should have filed the application for leave to defend the suit before judgment was entered. That the applicant had failed to give a plausible explanation for the delay.

9. I have considered the pleadings, the rival submissions and the authorities quoted by Learned Counsel.

10. Order10 rule 4(1) and (2) of the *Civil Procedure Rules* provides that the Court can enter judgment with respect to a liquidated claim where a defendant fails to appear. On the other hand, Order 10 rule 11 gives discretion to set aside such judgment.

11. In the application, the applicant stated its advocates had been instructed to enter appearance but that they encountered difficulties in doing so since there was another firm on record that had been mapped as acting for the applicant. That as at the time the mistake was rectified, the time had already lapsed for entering appearance. The question is whether this is a proper case for exercising discretion to set aside the judgment.

12. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR, the Court of Appeal held that: -

> " The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani -v- MC Conmell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

13. Further, in *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, it was held: -

> " 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 count 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."

14. Similarly, in *Thorn PLC v Macdonald* [1999] CPLR 660, the following guiding principles were set out on how to exercise the discretion to set aside a default judgment: -

> " i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
>
> ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
>
> iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
>
> iv) prejudice (or the absence of it) to the claimant also has to be taken into account."

15. In the present case, it was not disputed that the applicant was served the plaint and summons to enter appearance. The applicant did not also dispute that it did not enter appearance or file a defence within the stipulated time. The summons to enter appearance had been served upon the applicant on 31/3/2023 therefore the applicant ought to have entered appearance on or before 14/4/2023. However, the applicant entered appearance on 17/4/2023. That was a delay of three days which I find not to be inordinate.

16. I have considered the reason advanced by the applicant for the delay. The evidence shows that indeed another firm had been mapped as appearing for the applicant and therefore it posed a challenge to comply. I have perused the preliminary objection challenging the jurisdiction of the Court and the defence filed thereon. My finding is that the defence raises triable issues.

17. I am persuaded that the applicant has made out a case for grant of the discretionary orders to set aside the interlocutory judgment. Any prejudice to be suffered by the respondent can be compensated by an award of costs.

18. Accordingly, the application is hereby allowed as prayed. Costs to the respondent.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE