



Microbit Systems Limited v Mandera County Government (Civil Case 4 of 2021) [2024] KEHC 5515 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL CASE 4 OF 2021
JN ONYIEGO, J
MAY 9, 2024**

BETWEEN

MICROBIT SYSTEMS LIMITED PLAINTIFF

AND

MANDERA COUNTY GOVERNMENT DEFENDANT

RULING

1. By a plaint dated 17th March 2021, the plaintiff/respondent sought for judgment against the defendant for the sum of Kes. 42,028,000 together with interests and costs of the suit. It was averred that the said amount accrued out of the goods supplied to the defendant by the plaintiff upon executing a duly binding supply of goods contract which they honoured but the defendant/applicant reneged on their part.
2. Interlocutory judgment was entered for the sum of Kes. 42,028,000 on 18.10.2022 and subsequently a decree dated 19.10.2022 extracted as a consequence of non-appearance and default to file defence by the applicants/defendants.
3. Faced with the execution process, the defendant /applicant moved to this court vide the application dated 12.05.2023 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. Spent.



- v. That this Honourable Court be pleased to set aside the interlocutory judgment entered on 18.10.2022 and consequential decree issued on 19.10.2022 and the taxation proceedings of the party and party bill of costs dated 25.11.2022.
 - vi. That the defendant/applicant be granted leave to file and serve its statement of defence out of time.
 - vii. That the court be pleased to order the re-hearing of the suit.
 - viii. That the court be pleased to make such orders as it deems fit and just.
 - ix. That the costs of the application be provided for.
4. The application was supported by the affidavit of Billow Issack Hassan, the County Secretary of the County Government of Mandera sworn on 12.05.2023 who deposed that the plaintiff did not serve upon the defendant the requisite pleadings. That the defendant only came to learn of the proceedings herein when the bill of costs was served upon it hence the instant application. He deposed that he was aware that the plaintiff had previously made a fictitious claim stating that he had not been paid despite having supplied the defendant with goods.
 5. That having in mind that the amounts involved were immense and coupled with the fact that these are public funds, it was only mete that the interlocutory judgment dated 18.10.2022 be set aside and the defendant be given an opportunity to defend the suit.
 6. In opposing the said application, Ali Hassan, the director of the plaintiff company filed an affidavit sworn on 08.06.2023 in which he deposed that the claim by the plaintiff was based on an award for Tender No. MCG/469/2014 – 2015 and agreement dated 01.02.2015 wherein the plaintiff entered into an agreement for the supply, delivery of dry foodstuffs (rice, beans and cooking oil) with the defendant which goods were supplied and acknowledged by Mr. Issack Hassan. That pursuant to and in fulfilment of the said agreement dated 01.02.2015, the defendant issued the plaintiff a Local Purchase Order No. 2450902 dated 02.04.2015 for the supply of the already mentioned goods.
 7. It was his case that the defendant inspected all the goods and endorsed on its delivery notes that the goods were in good condition and further acknowledged by signing and stamping the said delivery notes. He contended that all the delivery notes bear the order number 2450902 which was obtained from the L.P.O. dated 04.04.2015 and therefore, Mr. Isaack is estopped from denying its legitimacy. That nonetheless, and in blatant disregard of the payment terms of the contract for sale, the defendant has failed, ignored and/or refused to pay the plaintiff an amount of Kes. 42,028,000/- thereby breaching their contract.
 8. It was urged that despite being served, the defendant failed to enter appearance or file defence within the prescribed period of time and consequently, an interlocutory judgment was entered. The deponent contended that the defendant was guilty of inordinate delay after having admitted to having been aware of these proceedings on 25.01.2023. That the impugned judgment was lawfully entered and issued the same having been sought and granted by way of notice of motion dated 01.12.2021. He decried the fact that this application has been filed with the sole intention to frustrate the plaintiff.
 9. In its rejoinder, the defendant filed a supplementary affidavit sworn by Mr. Billow Isaack Hassan, the County Secretary of Mandera County on 04.08.2023 thus deponing that it is not in dispute that the parties entered into a framework agreement dated 01,02,2015 and on the strength of the said agreement, the defendant had regularly issued the plaintiff L.P.O.'s for the supply of dry foodstuffs under the County Relief Programme. He urged that the defendant had paid for all the goods in which the L.P.O.s were issued and goods supplied to the county. That the L.P.O. Number 2450901



of Kes. 10,850,000/- was found to be a forgery by the defendant and the same was communicated to the Director General of the Public Procurement and Regulatory Authority. It was reiterated that the L.P.O. Number 2450902 which is the subject of this suit forms part of the L.P.O.'s in which the defendant had raised a complaint against.

10. It was his case that the pleadings, the summons, application and hearing notice were neither served upon the defendant and/ or through the email address info@mandera.go.ke. That he was aware that the same had been having low storage capacity and that the address had not been working from 2020 till recently in January when its storage was enhanced.
11. On inordinate delay, the deponent urged that he was appointed to the office of county secretary on 07.11.2022 and that he was new in the office when the service was effected upon him and so he required more time to inquire from his officers whether the said pleadings were served upon them and coupled with the fact that the County Attorney also was new in the office, the application herein was filed late.
12. That payment of goods and services in any public entity must be founded on budgetary allocation, procurement process and issuance of either Local Purchase Order or Local Service Order to a successful bidder which in this case, was not, notwithstanding the fact that the parties had previously entered into a framework agreement.
13. The court ordered that the hearing of the application be canvassed by way of written submissions. The applicant filed its submissions on 5th September 2023 basically reiterating the content of the averments contained in the affidavit in support of the application. It was contended that the judgment entered by the court was irregular for failure to comply with strict and mandatory provisions of order 10 rule 8 of the Civil Procedure Rules which requires leave of the court before entry of judgment against Government. Reliance to support that position was placed on the case of Maggy Agulo Construction Co. Ltd v Ministry of Public Health & 4 Others (2020) eKLR where it was held that

it follows that the failure to adhere to Order 10 Rule 8 of the Civil Procedure Rules made the default judgment irregular. The said judgment cannot stand and the same is amenable to setting aside.
14. That the interlocutory judgment against the defendant was obtained irregularly as the plaintiff did not formally seek leave for entry of an interlocutory judgment or file the required document, form 13 as provided for in appendix A of the Civil Procedure Rules. To that end, support was placed on the case of Gulf Fabricators v County Government of Siaya (2020) eKLR where it was held that an irregular judgment is amenable for setting aside in limine.
15. Further, counsel opined that Local Purchase Order Number 2450902 which is subject to the case herein was not issued by the County Government of Mandera and that the amount of money claimed under that LPO cannot be honoured as it did not emanate from Mandera County Government
16. Further, that the plaintiff had previously made fictitious complaint to the Public Procurement and Regulatory Authority to the effect that the defendant did not pay for goods supplied under Local Purchase Orders Number 2262566, 2262599 and 2450901 all amounting to Kes. 52,508,150.
17. That the defendant being a public entity that uses public funds to run its activities and also ensures prudent public financial management, public policy demands that due to the plaintiff's previous fictitious complaints, it was only mete that the defendant be given an opportunity to defend the suit. The defendant relied on the case of Mohamed & Another v Shoka (1990) KLR which was cited with approval in the case of David Kiptanui Yego & 134 Others v Benjamin Rono & 3 Others (2021) eKLR where the court set out the tenets to be considered in entering interlocutory judgment to wit:



whether there is a regular judgment, whether there is a defence on merit, whether there is a reasonable explanation for any delay and whether there would be any prejudice.

18. In regards to the above tenets, the defendant urged that at the time of moving this court, the file herein was with the Tax Master and as such, it was not possible to peruse the file to determine the contents therein. That all it had was the party to party bill of costs which was scheduled for hearing on 16.05.2023. That in the absence of the draft defence as a result of the circumstances herein, the nature of the defence to be filed by the defendant in the event this application is allowed is already clear to the court as the same relates to the forged L.P.O.
19. On whether there is a reasonable prospect for the delay, it was submitted that the County Secretary was appointed to the office on 07.11.2022 and that he was new to the office when he was served and the same took time before the suit was forwarded to the County Attorney who was equally new in the office hence the delay in filing the application herein.
20. On whether there was any prejudice to be suffered by the plaintiffs, it was submitted that given the seriousness of the issues of forgeries raised herein, the plaintiff stands to unjustly enrich itself at the expense of the public. This court was therefore urged to allow the orders as prayed.
21. The plaintiff/respondent did not file their submissions.
22. I have considered the application herein and the submissions by the defendant. I find that the matter for this court's determination is whether the defendant has met the criteria for setting aside the impugned interlocutory judgment.
23. From the pleadings, it is clear from the application herein that, the defendant/applicant is seeking to set aside the interlocutory judgment entered on 18.10.2022 and thereafter be allowed to file its defence out of time on the basis that; the plaintiff/respondent did not obtain leave to enter judgment against them as required under Order 10 Rule 8 of the [Civil Procedure Rules](#); the copy of the plaint and subsequent pleadings was/were not served upon the defendant/applicant; the decretal sum is not a genuine claim hence the applicant has a good defence which raises good triable issues.
24. With regard to setting aside of judgments entered in default generally, the court, in [James Kanyita Nderitu v Maries Philotas Ghika & Another](#) [2016] eKLR had this to say;

“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 this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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 appearances 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 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 [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).



In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. [See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456]...."

25. From the above guidelines, it is clear that this court has power to set aside a default judgment obtained irregularly. The defendants' principal complaint is that Order 10 Rule 8 of the *Civil Procedure Rules* was not complied with. The said provision states as follows:

“No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return date.”

26. In the case of *Gulf Fabricators v County Government of Siaya* [*supra*] , the court considered similar circumstances and held that:

“31. I note that the application dated 11/7/2017 filed on 12/7/2017 sought for leave of court to be granted to the plaintiff for judgment to be entered against the defendant in default of entering appearance and filing a defence. I further note that the applicant never sought any prayer to the effect that interlocutory judgment be entered against the defendant, which judgment would then have given room for formal proof hearing followed by a final judgment.

32. In other words, albeit leave of the court was granted, such leave was not and did not operate as interlocutory judgment. The plaintiff was expected to use the leave granted to request for judgment in default of appearance and defence, which was not done in the present case.

[Also See *Maua Methodist Hospital Sacco v Commissioner Kenya Revenue Authority* [2011] eKLR].

27. In the instant case, the plaintiff/respondent via a notice of motion dated 01.12.2021 sought the orders that:

- i. This Honourable Court be pleased to enter judgment for the plaintiff in the sum of Kes. 42,028,000/- against the defendant who has failed to enter appearance or file defence having been served with summons to enter appearance, plead, verify affidavit and plaintiff's supporting affidavit.
- ii. The defendant pay for the costs of this application.

28. That being the case, it was expected that as the suit was against the County Government and not just any other ordinary person or company, the Plaintiff should have sought leave of court for judgment



- to be entered against the defendant being a government entity in default of entering appearance and filing a defence and thereafter seek for an interlocutory judgment against the said defendant.
29. As already noted from the prayers sought by the plaintiff/respondent leading to the granting of the orders made on 18.10.2022, it follows that the same was irregular as leave was not sought to enter an interlocutory judgment against the defendant/applicant. It therefore follows that the impugned judgment is amenable for setting aside.
 30. On the question whether there was proper service upon the defendant, the affidavit of service filed by the process server is clear. Service was acknowledged hence nothing to question on the regularity of service. The claim that the defendant's e-mail at the material time had no sufficient storage capacity, is a mere statement not supported by any evidence.
 31. Regarding the question whether the defence raises trial issues, no draft copy was attached to ascertain whether it indeed raises trial issues. In any event, the applicant is admitting the claim save for one LPO worth about 10million which was allegedly fraudulently acquired and the subject of investigation.
 32. Whether there is any prejudice likely to be suffered by the respondent in case the orders were to be granted, that will depend on the nature of the claim at stake. Obviously, a party is entitled to enjoy the fruits of his judgment hence any unjustified delay in execution would automatically be prejudicial. See *Machira T/A Machira and co. Advocates v East Africa Standard (no.2)*(2002) KLR 63. In this case, the execution process has been pending for far too long thus occasioning unnecessary costs in servicing even loans for funds incurred in purchasing the supplied goods.
 33. Having analyzed the application herein and the affidavit in support, it is apparent that the only ground that is persuasive is that leave to enter interlocutory judgment against government was not procedurally acquired. This being a mandatory requirement, this court has no choice but to allow the application.
 34. From the foregoing, the order that is commendable to me is that of setting aside the interlocutory judgment entered on 18.10.2022 on the following conditions:
 - i. That the defendant/applicant to deposit Kes. 15,000,000/- within thirty days (30) days of delivery of this ruling in an interest bearing bank account to be jointly held by both counsel representing parties.
 - ii. That the defendant/applicant to file its defence within fourteen days of the delivery of this ruling.
 - iii. That failure to comply with any of the two orders above, the original orders shall be reinstated.
 - iv. That the suit herein be settled down for hearing on a priority basis.
 - v. That the respondent shall be entitled to throw away costs of 50,000 payable within 30 days.
 - vi. Costs of the application shall be borne by the defendant/applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MAY 2024

J. N. ONYIEGO

JUDGE

