Murai v Oile (Commercial Case E927 of 2021)
[2024] KEHC 8564 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8564 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E927 OF 2021

MN MWANGI, J

JULY 11, 2024

BETWEEN

EVA CECILIA BJERBORN MURAI ..... PLAINTIFF

AND

EUNICE BELLA AKINI OILE ..... DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 6th November, 2023 pursuant to the provisions of Article 159 of *the Constitution* of Kenya, 2010, Order 10 Rule 11, Order 45 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and all other enabling provisions of law seeking the following orders –

    i. Spent;

    ii. Spent;

    iii. That the Honourable Court be pleased to review, vary and/or set aside the ruling delivered on 13th October, 2023 pending the hearing and determination of the suit;

    iv. That the Honorable Court be pleased to stay and/or arrest the intended execution by the plaintiff to the decree dated 28th November, 2022 pending the hearing and determination of this application and suit;

    v. That the Honorable Court be and is hereby pleased to vary or set aside the interlocutory judgment entered on 23rd February, 2022 pending the hearing and determination of this application and suit;

vi. That the Honorable Court be pleased to grant the defendant/applicant leave to file her statement of defence, counter-claim, list of documents, list of witnesses, witness statement for purposes of fair hearing;

vii. That the Honorable Court be pleased to deem the annexed statement of defence and Counter-claim, list of documents, list of witnesses and witness statement as duly filed;

viii. That the Honorable Court be pleased to set down this matter for hearing to enable both parties be accorded a fair trial; and

ix. That the Honorable Court do make any such order or further orders as it may deem fair and just in the interest of justice.

2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Eunice Bella Akini Oile, the defendant herein. In opposition thereto, the plaintiff filed grounds of opposition dated 15th January, 2024 raising the following grounds–

i. The application is incompetent, misconceived, bad in law, incurably defective and devoid of any merit in view of its contents together with the supporting affidavit;

ii. The defendant/applicant has not produced before Court any proper reason as to inform the grant of the orders sought and therefore cannot establish a prima facie case with a probability of success or that she will suffer an irreparable harm (sic);

iii. That the application as framed does not disclose a reasonable cause of action against the plaintiff/respondent herein and is an abuse of the process of this Honourable Court;

iv. As held by the Court of Appeal in *Nabro Properties v Sky Structures* [2002] KLR 299 no one is allowed to base his claim on his own wrong. The application is based on the defendant/applicant's own wrongs taking the form of failing to file a defence in time despite having knowledge of the suit, attending Court sessions several times and still failing to file the defence out of time when leave was granted, and further filing and insisting on a wrong application for 'enlargement of time' when interlocutory judgment had already been entered;

v. The defendant/applicant is guilty of non-disclosure of material facts- namely that she was aware of the fact of filing of the instant suit, participated in the proceedings before judgment was entered and had previously sought and was granted leave to file a defence out of time but still failed to do so and it is when the leave expired that the judgment was entered;

vi. This application being made after evidence has been led in the defendant's applications dated 30th March, 2022 and 1st December, 2022 respectively, which were analogous to the instant one and were both dismissed on 14th November, 2022 and 13th October, 2023, respectively, are inherently barred for attempting to appeal against the Court's own decision in the same Court and greatly prejudicial to the plaintiff/respondent's right of access to justice (sic);

vii. The said application is aimed at putting the clock back and reopening matters which ought to have been canvassed in the defendant/applicant's application dated 30th March, 2022 and 1st December, 2023 which were heard and dismissed by this Honourable Court on 14th November, 2022 and 13th October, 2023, respectively;

viii. That the orders sought under the application are untenable and the orders sought thereunder are based on a grave misconception and distortion of law and facts;

ix. As was held in the case of *R.J. Varsani Enterprises Limited v Chelsea Holdings Limited & 4 others* [2019] eKLR and affirmed in the case of *Neeta Gohil v Fideliy Commercial Bank Limited* [2019] eKLR, it is not in every case that a mistake committed by an Advocate as being propagated by the defendant/applicant herein would be a ground for setting aside orders of the Court and further if it was true that the failure to file the defence was out of the mistake of the defendant/applicant's Counsel herein, then the Counsel being an Officer of the Court ought to have sworn an affidavit explaining the said mistake. To which end they have not filed any thus rendering the defendant/applicant's application an abuse of the Court process.

x. That the instant application is just one of the tools employed by the defendant/applicant to delay justice to the plaintiff/respondent owing to their frivolous filings as demonstrated in the Court file and the various rulings of the Court;

xi. The instant application is time barred as it is intended to set aside a judgment which was entered two years ago without any proper explanation for the glaring delay and the same should be dismissed and the plaintiff/respondent allowed to enjoy the fruits of the judgment; and

xii. That the application is tantamount to trifling with the Court and is an abuse of the process of this Honourable Court.

3. The instant application was canvassed by way of written submissions. The defendant's submissions were filed on 19th February, 2024 by the law firm of Musyoki, Mogaka & Company Advocates, whereas the plaintiff's submissions were filed by the law firm of Aguko, Osman & Company Advocates on 11th March, 2024.

4. Mr. Omari, learned Counsel for the defendant referred to the provisions of Order 10 Rule 11 of the *Civil Procedure Rules* 2010, the decisions *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 and submitted that the discretion of a Court to set aside or vary ex-parte judgment entered in default of appearance or defense is not only free but is also intended to be exercised to avoid injustice or hardship, but the said discretion is not meant to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. Counsel relied on the case of *Thorn PLC v Macdonald* [1999] CPLR 660, where the Court of Appeal highlighted the guiding principles in applications of this nature.

5. Mr. Omari cited the case of *Sebei District Administration v Gasyali & others* [1968] EA 300 and *Tree Shade Motor Limited v DT Dobie Co Ltd* CA 38/98 and further submitted that the delay in filing a defence & counter-claim by the defendant was occasioned by an oversight and miscommunication between the defendant's Advocate on record and this Court. He contended that the said delay was not inordinate, as it was a delay of 2 months from the date when the Court directed the defendant to enter their defence, and when the default judgment was entered. In addition, the defendant's defence dated 28th March, 2022 also raises triable issues that require this Court's assessment and determination.

6. Mr. Aguko, learned Counsel for the plaintiff cited the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 and submitted that the defendant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record to warrant a review of the ruling delivered on 13th October, 2023 by this Court. He relied on the Court of Appeal decisions in *Abdalla Mohamed & another v Mbaraka Shoka* [1990] eKLR and *Mwala v Kenya Bureau of Standards EA LR* [2001] 1 EA 148 and submitted that the interlocutory judgment entered on 23rd February, 2022 is a regular judgment as was held by this Court (differently constituted) in a judgment that was delivered on 14th November, 2022. He contended that in order for the said judgment to be set aside, the defendant must satisfy all the 3 limbs set by the law and judicial precedents.

7. Mr. Aguko contended that the defendant's draft defence is a general document consisting of mere denials, hence it does not raise any triable issues that warrant this Court's consideration. He stated that the defendant has not offered any reasonable explanation for the delay in filing a statement of defence to the plaintiff's claim despite the fact that she was duly served with all the pleadings in this case. He further stated that on 10th December, 2021 the defendant through her Counsel sought and was granted leave to file a statement of defence to the plaintiff's claim, but the defendant failed to comply with the Court's directions. Counsel cited the case of *R. J. Varsani Enterprises Limited v Chelsea Holdings Limited & 4 others* [2019] eKLR and asserted that if at all the failure to file a statement of defence was out of the mistake of the defendant's Counsel, then the said Counsel ought to have sworn an affidavit explaining the said mistake, which has not been done in this case.

8. He submitted it cannot be an excusable mistake for Counsel to deliberately file an application that is unknown to law despite knowing the position of the matter having been informed by the Court. To buttress the aforesaid submissions, Counsel relied on the case of *Neeta Gohil v Fideliy Commercial Bank Limite*d [2019] eKLR. Mr. Aguko argued that this being the third application in a span of approximately two years seeking to set aside the interlocutory judgment entered in favour of the plaintiff on 23rd February 2022, it is manifest that the defendant's actions have only been strategic to buy time. He referred to the case of *Charles Omwata Omwoyo v African Highlands & Produce Co. Ltd* [2002] eKLR and submitted that the defendant had not explained the delay in filing the instant application since 23rd February, 2022, when interlocutory judgment was entered against her. Further, any attempt to claim that the said delay was occasioned by the defendant having filed a wrong application should not be accepted.

9. He asserted that if the ex parte judgement entered on 23rd February, 2022 is set aside, the plaintiff will suffer great prejudice in view of the fact that the suit herein was filed in November 2021. He stated that setting aside the said judgment after more than two years and three months serves to delay justice, which is equivalent to justice being denied, and that in any event, the instant application was not filed promptly thus defeating the overriding objective of this Court to deliver justice expeditiously and timely.

10. Mr. Aguko submitted that the defendant's statement of defence is baseless, frivolous, vexatious and an afterthought and may prejudice, unnecessarily embarrass and/or delay a fair trial of the dispute between the parties herein. He further stated that if this Court is inclined to set aside the ex parte judgment entered on 23rd February, 2022, the defendant should be ordered to deposit in Court the entire decretal sum within seven (7) days of this ruling to act as security.

Analysis And Determination.

11. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff, as well as the written submissions filed by Counsel for the parties. The issues that arise for determination are –

    i. Whether this Court should review, vary, and/or set aside its ruling delivered on 13th October, 2023; and

    ii. If the instant application is merited.

12. In the affidavit filed by the defendant she deposed that her Advocates on record appeared in Court on 10th December, 2021 for mention to take directions, and the Court gave directions in the absence of Counsel for the plaintiff for case management on 24th February, 2022.

13. She averred that on 24th February, 2022, her Advocates on record had not filed a defence but they had filed and served a Notice of Preliminary Objection dated 23rd February, 2022. For the said reason, they sought for more time in the absence of the Counsel for the plaintiff to file the defendant's statement of defence, and that the Court granted them thirty (30) days to do so. The defendant further averred that on 28th March, 2022, her Advocates on record filed a statement of defence and counter-claim, together with accompanying documents.

14. It was stated by the defendant that this mater came up on 29th March, 2022 for another case management conference when the plaintiff's Counsel attended Court and indicated that default judgment had already been entered against the defendant on 23rd February, 2022. As a result, the Court granted the parties herein thirty (30) days to put their houses in order.

15. That in an attempt to comply with the Court orders issued on 29th March, 2022, the defendant filed an application dated 30th March, 2022 seeking an order for enlargement of time to file and serve her defence and counter-claim to the plaintiff's suit, but the said application was dismissed vide a ruling dated 14th November, 2022 on the ground that there was a default judgment on record that had not yet been varied and/or set aside.

16. The defendant contended that in regard to the application dated 30th March, 2022, Counsel holding brief for Mr. Omari misinterpreted and/or misunderstood the Court's sentiments to mean that the defendant should file an application for enlargement of time to file and serve the defence and counter-claim.

17. The defendant deposed that there are good and sufficient reasons to warrant her being granted the orders being sought in the instant application as the agreement heavily relied on by the plaintiff offends the provisions of Section 4(1)(a) of the *Limitation of Actions Act*. She further averred that she is willing to deposit security with this Court to secure the judgment, if so required by the Court.

18. It was stated by the defendant that on 13th October, 2023, this Court dismissed her application on grounds of inappropriate drafting. She deposed that there are good and sufficient reasons to warrant being granted the orders sought herein. She further deposed that the plaintiff does not stand to suffer any harm in the event the application herein is granted. In addition, that the prayers sought herein are meant to protect her right to a fair hearing.

Whether this Court should review, vary, and/or set aside its ruling delivered on 13th October, 2023.

19. This Court is clothed with the requisite jurisdiction to review its own decisions. However, the said jurisdiction does not operate in a vacuum, as it has to be exercised within the parameters of Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010 which provide as hereunder-

> " 80. Any person who considers himself aggrieved-
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
>
> Order 45 Rule 1
>
> (1) Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

20. The Court in the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR in dismissing an application similar to the instant one held that-

> "...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:
>
> a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
>
> b. On account of some mistake or error apparent on the face of the record, or
>
> c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

21. In this case, in as much as the defendant is seeking this Court to review, vary, and/or set aside its ruling delivered on 13th October, 2023, she has not pleaded, alleged, and/or demonstrated the existence of discovery of new and important evidence which was not within her knowledge even after the exercise of due diligence, at the time of filing the application dated 1st December, 2022 which was the subject of the ruling delivered on 13th October, 2023. The defendant has also not pleaded and/or demonstrated that there is a mistake or error apparent on the face of the record and/or any other sufficient reason to warrant this Court to exercise its discretion to review, vary, and/or set aside its ruling delivered on 13th October, 2023.

22. In the premise, this Court finds that the defendant has not made out a case for the Court to review, vary, and/or set aside its ruling delivered on 13th October, 2023.

If the instant application is merited.

23. The setting aside of interlocutory judgments is provided for under Order 10 Rule 11 of the Civil Procedure Rules, 2010 which states that -

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

24. The Court's discretion to set aside an ex parte judgment for default of appearance and/or filing of a defence should be exercised with extreme caution. In addition, the said discretion should only be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or

error, and not to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. That was the holding by the Court in the case of *Shah v Mbogo & Another* [1967] EA 116 at page 123.

25. On the issue of whether this Court should set aside the interlocutory judgment entered by the Court on 23rd February, 2022 in favour of the plaintiff, I am guided by the Court's holding in the case of *Patel v EA Cargo Handling Services Ltd* (*supra*), where it which held as hereunder -

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication." (Emphasis added).

26. This Court shall not belabour on the issue of whether the interlocutory judgment entered by the Court on 23rd February, 2022 in favour of the plaintiff was regular, since the Court in its judgment delivered on 14th November, 2022 addressed the said issue and held that the said judgment was regular, thus lawful and enforceable. I note that the said judgment has not been varied, reviewed and/or set aside by a Court of competent jurisdiction, and no appeal has been lodged against it. Therefore, the finding by the Court on 14th November, 2022 that the interlocutory judgment on record is regular still stands.

27. In view of the said finding, the defendant now has a duty to demonstrate that her defence against the plaintiff's claim raises triable issues, thus warranting the setting aside of the said interlocutory judgment, and thereby allowing her to file her statement defence. In doing so, I am guided by the principles laid down by the Court of Appeal in the case of Thorn PLC v Macdonald (*supra*), cited by the Court in *International Air Transport Association & another v Roskar Travel Limited & 3 others* (Civil Case E457 of 2020) [2022] KEHC 200 (KLR) that -

    (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."

28. The instant application was filed approximately twenty-one (21) months after the interlocutory judgment was entered in favour of the plaintiff by the Court. It is worthy of note that this is not the defendant's first attempt to move the Court for leave to file its statement of defence and its accompanying documents out of time. From the record, when this matter first came up before Hon. Tanui on 10th December, 2021, the slated it for case management conference on 24th February, 2022 in the presence of Counsel for the parties. On 23rd February, 2022, interlocutory judgment was however entered for the plaintiff. On 24th February, 2022 when this matter was mentioned for case management conference, there was no appearance for the plaintiff, but Counsel for the defendant prayed for thirty (30) days to comply. The Court then slated the matter for case management conference on 29th March, 2022 and directed the defendant to serve a notice for the said date on the plaintiff.

29. On the 29th March, 2022, Counsel for the plaintiff informed the Court that there was an interlocutory judgment on record and they were in the process of extracting a decree. Counsel for the defendant on the other hand indicated that they were not aware that there was an interlocutory judgment on record, but they would file an application seeking to set it aside since the defendant had filed a statement of defence and other documents. In view of the above position, the Court fixed the matter for mention on 26th April, 2022 and directed the parties to agree on the way forward. However, before the said date the defendant vide an application dated 30th March, 2022, which was filed approximately a month after the entry of the aforesaid interlocutory judgment, sought for the interlocutory judgment entered on 23rd February, 2022 to be set side. The said application was however struck out vide a judgment delivered by the Court on 14th November, 2022 on the ground that there was a regular interlocutory judgment on record, that had not been varied and/or set aside.

30. Approximately seventeen (17) days later, the defendant filed another application dated 1st December, 2022 seeking inter alia that the interlocutory judgment entered on 23rd February, 2022 against it be varied and/or set aside pending the hearing and determination of the application, and that the defendant be granted leave to file her Notice of Preliminary Objection, statement of defence & counter-claim and all its accompanying documents. This Court considered the said application and delivered a ruling on 13th October, 2023, wherein it struck out the application dated 1st December 2022 on the ground that the prayer seeking the setting aside of the interlocutory judgment was spent since it was sought "pending the hearing and determination of the said application", which meant that the interlocutory judgment on record was still legal, valid and enforceable, hence the issue of whether or not the defendant should be granted leave to defend this suit could not be determined. Approximately twenty-three (23) days later, the defendant filed the instant application.

31. It is apparent that there was a lapse of communication between the Advocates on record since the plaintiff's Counsel did not serve on the defendant's Counsel a notice of entry of judgment once interlocutory judgment was entered against the defendant on 23rd February, 2022. From the record, it appears that the defendant was operating on the premise that there was no judgment interlocutory or otherwise on record, until 29th March, 2022 when the plaintiff's Counsel informed the Court that interlocutory judgment had been entered against the defendant on 23rd February, 2022 and they were in the process of extracting a decree. Immediately thereafter, the defendant filed its first application dated 30th March, 2022 seeking to have the interlocutory judgment entered on 23rd February, 2022 set side.

32. This Court also notes that other than the lapse in communication, there has also been a mistake on the part of Counsel for the defendant in view of the fact that he has in the past filed two applications that were not properly drafted and/or were not seeking appropriate reliefs. It is also important to note that the defendant's applications dated 30th March 2022 and 1st December 2022 were struck out, which means that the defendant was not barred from seeking appropriate orders in a fresh application, as opposed to when an application is dismissed. I therefore find that the application herein is not equivalent to an appeal of this Court's decision since the issues raised have not been heard and determined by this Court on merits.

33. In the premise, this Court finds that it cannot be said that there has been a prolonged delay and/or that the delay in filing the instant application has not been sufficiently explained.

34. On whether the defendant's defence raises triable issues, I note that the plaintiff's claim against the defendant is for breach of agreement as contained in the instalment promissory note dated 6th September, 2013. The plaintiff contended that she has over the years advanced various friendly loans to the defendant and in an effort to give the plaintiff confidence that she will repay the said loans,

the defendant prepared a loan agreement in the form of an instalment promissory note dated 6th September, 2013 stating how she would repay the said loan amount to the plaintiff. She averred that sometime in July 2021, having noted that instead of the defendant making an effort to settle the amount she had advanced to her, she was making further efforts to fraudulently obtain more money from her, the plaintiff got into a verbal agreement with the defendant that the latter would pay her Kshs 20,000,000/=, as full settlement of the outstanding amount owed to the plaintiff which stood at Kshs 28,000,000/= at the time.

35. In the defendant's defence, she stated that the parties herein were business partners in real estate business under Bertene Enterprises since April 2011. That during the said time, the plaintiff was also working with the World Bank Group at the International Finance Corporation. That since the defendant was a relocation expert, she was engaged by the International Bank for Reconstruction and Development which was an integral part of the World Bank Group to assist in relocating incoming staff members posted to work in Nairobi at the time. The defendant averred in her statement of defence that since the International Bank for Reconstruction and Development required that one must declare if any staff member was a beneficiary of a company it was recruiting, she informed the plaintiff of this requirement and she expressed her fears of losing her job on account of conflict of interest, in the event the International Bank for Reconstruction and Development found out that she was a partner in Bertene Enterprises. Thus, the plaintiff and the defendant orally agreed that the plaintiff would be a silent partner in Bertene Enterprises.

36. The defendant stated that Bertene Enterprises got another offer from International Brookfield Global Relocation Services, which offer required them to invest some money which they did. She averred that the contract for International Brookfield Global Relocation Services got terminated in the year 2013 which is the same year that the plaintiff's contract with International Finance Corporation was not renewed, and also the same year the plaintiff opted out of business with the defendant and requested that she be refunded her investment. Subsequently, the plaintiff threatened to report the defendant to the Embassy, hence the defendant asked her for a breakdown of her investment in Bertene Enterprises and that is how the instalment promissory note came about.

37. On perusal of the defendant's counter-claim on the other hand, it is worth noting that the defendant attempts to break down each party's contribution to the business she did with the plaintiff. The defendant also states that the plaintiff is indebted to her as a result of debts she paid on her behalf, personal financial assistance she accorded her, commissions for work done, and salary for running Bertene Enterprises for two years. In the end, the defendant asserts that the plaintiff still owes her Kshs 7,036,313.00, which amount she prays to be set off against the plaintiff's claim, to the extent admitted by the defendant.

38. From the foregoing, I note that the defendant does not dispute being indebted to the plaintiff. Instead, she has opted to give her a background of how the instalment promissory note came to be. It is also worthy of note that the defendant does not challenge the authenticity of the instalment promissory note but avers that in as much as she is indebted to the plaintiff, the plaintiff also owes her Kshs 7,036,313.00.

39. A triable issue was defined by the Court in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, as hereunder -

> "...A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term "triable" as, subject or liable to judicial examination and trial". It therefore does not need

to be an issue that would succeed, but just one that warrants further intervention by the Court."

40. Guided by the above authority, it is my considered view that in as much as the defendant does not dispute being indebted to the plaintiff, the issue of whether or not the plaintiff is also indebted to the defendant and to what extent, is an issue that warrants this Court's interrogation and determination, so as to determine the exact amount owed to the plaintiff by the defendant, which is a triable issue. It is therefore in the interest of justice that for the suit between the parties herein to proceed to trial.

41. The upshot is that the application herein is merited. It is hereby allowed in the following terms -

    i. The default judgment entered by the Court against the defendant on 23rd February, 2022 and all consequential orders & decree against the defendant are hereby set aside;

    ii. Having set aside the interlocutory judgment, it is not necessary to issue an order for stay of execution and deposit of security as there is no default judgment and/or consequential orders to stay;

    iii. The defendant's defence and counter-claim, list of documents, list of witnesses and witness statement all dated 28th March, 2022 are hereby deemed as being properly on record subject to payment of the requisite fees within seven (7) days from today;

    iv. The defendant shall pay thrown away costs of Kshs 50,000/- to the plaintiff within seven (7) days from today;

    v. Failure to comply with order Nos. (iii) & (iv) shall lead to the default judgment of 23rd February, 2022 together with the consequential decree and all ex parte proceedings remaining in force.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omwoyo for the defendant/applicant

Mr. Mabuka for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.