



**Multitouch International v Nairobi County Government (Civil Suit 90 of 2016)  
[2023] KEHC 27 (KLR) (Commercial and Tax) (13 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 27 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 90 OF 2016  
A MABEYA, J  
JANUARY 13, 2023**

**BETWEEN**

**MULTITOUCH INTERNATIONAL ..... PLAINTIFF**

**AND**

**NAIROBI COUNTY GOVERNMENT ..... DEFENDANT**

**RULING**

1. Before me is the defendant's notice of motion dated June 30, 2021 brought inter alia under order 22 rule 22, order 10, rule 11 and order 12 rule 7 of the *Civil Procedure Rules*.
2. The defendant seeks the setting aside of the judgment and decree dated March 25, 2021 and leave to defend the suit. There is also a prayer that its statement of defence dated April 27, 2016 be reinstated and the matter be set down for full trial.
3. The application is premised on the grounds that the defendant filed its statement of defence on April 27, 2016 which raised numerous triable issues which forced the plaintiff not to fast track this matter and set it down for hearing.
4. That the matter became dormant and was referred to mediation in the year 2018 for parties to try an out of court settlement which did not bear fruit; that the matter was later transferred to the Milimani Chief Magistrate Courts where the plaintiff was mandated to move the court and set the matter down for hearing and final determination.
5. That to the defendant's surprise, on the June 24, 2021, the plaintiff served it with the party to party bill of costs filed on April 8, 2021. Immediately its advocates followed up on the matter and found that the plaintiff had un-procedurally filed an application to strike out the defendant's statement of defence and requested judgment against it.



6. The defendant's case is that the said application was never served upon it nor its advocates as required by law and thus the same went unopposed. That the plaintiff did not seek leave to enter summary judgment against the defendant as required under the law as the defendant is the County Government of Nairobi. That in the premises, the said judgment is illegal, irregular, null and void ab-initio and unless the said proceedings are set aside the defendant is likely to be prejudiced by the orders issued by this court in that the defendant would be condemned unheard.
7. In opposition the plaintiff filed a replying affidavit sworn by its director on December 3, 2021.
8. It was contended that the plaintiff filed the present suit against the defendant on March 23, 2016 whereby it sought payment of Kshs 9,957,455/= together with interest thereon. That the parties commenced deliberations on a possible out of court settlement culminating in a consent being arrived at but the same was never executed by the defendant's advocates. That thereafter, the court directed the matter be referred to mediation but the same did not yield fruits due to non-compliance on the part of the defendant.
9. That on November 30, 2020, the plaintiff filed a notice of motion dated November 25, 2020 seeking the striking out of the defence on record. That the same was served upon the defendant's advocates on December 11, 2020 and they duly received the same by stamping on the front page of the application.
10. Further that, contrary to the allegations by the defendant's advocates, they were duly served with a mention notice for February 25, 2021 which notice was duly received and stamped but the defendant's advocates were not present on the mention date and failed to respond to the aforementioned application as directed by the court. That in the premises, the application being unopposed was allowed as prayed.
11. It is the plaintiff's case that it was only after the defendant was served with the party and party bill of costs that the present application was filed. The allegation that the matter was transferred to the Magistrate's Court is denied. That on November 6, 2018, the defendant's committee on pending bills finalised its scrutiny of the plaintiff's claim and recommended that the plaintiff's claim was payable.
12. The defendant filed a supplementary affidavit sworn on May 11, 2022 by the County Solicitor, in rebuttal to the defendant's replying affidavit.
13. It was averred that the firm of Kabue Thumbi & Co Advocates is improperly on record as it has been retained by the defendant to represent it in numerous matters before the court and therefore it cannot pursue any claims against it. That there is no proof of service of the hearing notice of the said application upon the defendant and that there is no proof that the said application was heard even from the e-filing portal.
14. The court has considered the affidavits on record and the entire record. This is an application to set aside an order made ex-parte against the defendant.
15. I have seen the ruling of March 25, 2021. In that ruling, the court found that the defendant's defence was a mere denial and was set up only to delay the trial of the plaintiff's claim. The same was found to be frivolous. That the plaintiff had produced solid evidence to prove that the defendant was indebted to it.
16. The defendant's case is that it was not served with the application dated March 25, 2021 and that was why it was unopposed.
17. Before proceeding to consider the application *ex-parte*, the court was satisfied that the same had been served upon the defendant's advocates. In its replying affidavit, the plaintiff produced annexures 'CW3' 'CW5' and 'CW6' to show that the application dated March 25, 2021, the mention notice



and the ruling notice were all served on the defendant's advocates. The same were stamped by the said advocates to signify receipt thereof.

18. The said stamp was not denied as being that of the said advocates. Accordingly, the allegation that the application and the date of hearing were never served upon the defendant is incorrect.
19. The defendant also argued that since it is a government, the plaintiff ought to have sought and obtained leave to enter summary judgment against it. That for that reason, the said judgment is illegal, irregular, null and void ab-initio.
20. The ruling of March 25, 2021 struck out the defendant's defence under order 2 rule 15 of the Civil Procedure Rules. The said judgment was not in default of either appearance or defence. There is no requirement for leave where the government has duly entered appearance and filed its defence such as in this case. That contention is therefore a red herring and has no basis.
21. The other allegation raised by the defendant is that, the firm of Kabue Thumbi & Co Advocates is improperly on record as it has been retained by it to represent it in numerous matters before court and therefore it cannot pursue any claims against it. There is no evidence on record to demonstrate such a conflict of interest on the part of the said firm and, in any event, no application has been filed to disqualify the said firm.
22. The defendant also alleges that the matter was transferred to the Chief Magistrate's Court in 2021. This too is a baseless assertion with no evidence to support the same. Under section 107 of the Evidence Act, cap 80 Laws of Kenya, it is he who alleges that must prove. There was no evidence by way of an order to show that this matter had been transferred to that court.
23. In the premises, I find that the judgment entered herein was regular. The defendant was duly served but failed to oppose the application that struck out its defence.
24. Accordingly, the application dated June 30, 2021 is without merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

