



**Jungle Energy(K) Limited v Kenya Power & Lighting Company PLC (Civil Case E076 of 2022) [2023] KEHC 2969 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E076 OF 2022  
DO CHEPKWONY, J  
MARCH 17, 2023**

**BETWEEN**

**JUNGLE ENERGY (K) LIMITED ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY PLC ..... DEFENDANT**

**RULING**

1. It is important to provide a background of the case to provide context of the application. According to the Complaint dated January 28, 2022, the Plaintiff/Respondent, Jungle Energy (K) Limited and Kenya Power and Lighting Company PLC, (KPLC), the Defendant/Applicant entered into a contract dated May 18, 2017 under Tender Number KP1/9AA-3/OT/56/15-16 for supply of 10 Million concrete poles for street lighting. The contract was terminated and this led to Jungle Energy filing the suit for the following orders:
  - a. A declaration do issue that the termination of the contract by the Defendant was unlawful, unprocedural and void abinitio.
  - b. A declaration do issue that the Defendant is in breach of the terms of the contract dated May 18, 2017.
  - c. Special damages for loss of business and loss of profits as tabulated for Kshs 56,844,504.00.
  - d. Interest on (c) above at commercial rates from August 19, 2021 until payment in full.
  - e. Cost of the suit and interest thereon at court rates until payment in full.
  - f. Any other remedy that this Honourable court may deem fit.



2. Upon being served with the Summons to Enter Appearance and the Complaint, Kenya Power and Lighting Company PLC failed to enter appearance and file its Defence within the required timelines. Jungle Energy Company Ltd then filed a Request for Judgment dated May 4, 2022. Consequently, the Deputy Registrar entered an interlocutory Judgment in favour of Jungle Energy Company Ltd against Kenya Power and Lighting Company PLC (KPLC) as per the prayers in the Complaint in a ruling issued on May 31, 2022.
3. This Ruling precipitated the filing of the instant Notice of Motion dated June 8, 2022 pursuant to Article 50 of the Constitution of Kenya, Sections 1A, 1B, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 10 Rule 11 of the Civil Procedure Rules.
4. It is supported by an Affidavit of Sharon Jepkemoi Cheruiyot a Legal Clerk of the Applicant, Kenya Power and Lighting Company PLC 'KPLC' sworn on June 8, 2022.
5. The Application seeks the following orders;
  - a. Spent;
  - b. That this Honourable Court be and is hereby pleased to set aside the interlocutory judgment in default of defence against the Applicant issued on May 16, 2022.
  - c. That this Honourable Court be and is hereby pleased to admit the defence annexed as duly filed and properly on record.
  - d. That this Honourable Court be pleased to grant any orders that it deems just and fair.
6. The application is opposed vide a Replying Affidavit sworn by Patrick Wainaina, a Chief Executive Officer and Managing Director of the Respondent, 'Jungle Energy' Company Limited on June 22, 2022, wherein he avers that the Complaint dated January 28, 2022 was filed on March 9, 2022 and the matter fixed for mention on May 3, 2022, May 5, 2022 and May 16, 2022 respectively to confirm service of the Summons to enter appearance. Jungle Energy holds that the Complaint was served on April 19, 2022 to Kenya Power and Lighting Company (KPLC) who acknowledged receipt by stamping on them but it failed to file its documents on time and an interlocutory Judgment was entered against it.
7. Kenya Power and Lighting Company (KPLC) states that it learnt from the judiciary's online portal that the matter had been fixed for formal proof hearing on September 22, 2022 and hence seeks for the interlocutory judgment entered to be set aside so that it can have an opportunity to defend itself. KPLC holds that the draft defence raises triable issues and it will be prejudicial if the suit is determined as it will be condemned unheard. KPLC argues that Jungle Energy will not suffer any prejudice if the interlocutory Judgment is set aside and thus wishes to have the application allowed as prayed.
8. Jungle Energy argues that the claim of renovations being the cause of the delay in filing the defence on time raised by the Applicant has not been substantiated by any evidence. It holds that the Applicant was aware of the matter but deliberately failed to enter appearance and file a defence until the court issued directions on formal proof.
9. On the issue of the draft defence having raised triable issues, it is the Respondent's averment that the Applicant confirmed the existence of the contract which would expire 30 days after the last date of the agreed delivery. It was its responsibility to issue purchase orders and when it failed to do so, it purported that the contract was expired.
10. Further, the Respondent depones that the termination of the contract was to be done on notice, which was not done thus the defence is frivolous and intended to delay the matter. According to Jungle Energy



Company Limited, the dispute is simple as it emanates from a contract which KPLC breached and therefore it should pay the damages, hence the application which is only meant to delay the suit should be dismissed with costs.

11. On June 21, 2022, the court directed parties to dispose of the application by way of written submissions. The Applicant's submissions are dated ..... While the respondents are dated .....

### **Determination**

12. In determining the application dated June 8, 2022, I have carefully read through the grounds set out in the parties respective affidavits in support and rebuttal thereof and considered the arguments in the respective submissions alongside their cited case and statute law. I find the issues for determination being:-

- a. Whether the Applicant has made a case for the interlocutory Judgment entered against it on May 16, 2022.
- b. Whether the Applicant's draft defence raises triable issues for determination by the court.

13. On the issue of whether or not to set aside the interlocutory Judgment entered on May 16, 2022, the starting point is the law as provided for under Order 10, rule 11 of the Civil Procedure Rules, which reads:

' 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.'

14. Clearly, the wording of Order 10, Rule 11 of the Civil Procedure Rules, the power of the court to set aside interlocutory Judgment is indiscretionary and not mandatory terms which means that the court is expected to consider the facts and the circumstances of the case before exercising such discretion. This was the position of the Court of Appeal in the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -vs- Augustine Kubede (1982-1988) KAR*, Page 1036, where it 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.'

15. Also, when a court is called upon to set aside an *ex parte* Judgment a distinction has to be drawn as to whether the same was a regular or an irregular Judgment. This was elucidated in the case of *Mwala - vs- Kenya Bureau of Standards EALR [2001] 1 EA 148*, where the court stated,

' Distinction is to be drawn between a regular and irregular *ex parte* Judgment. Where the Judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the Judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of



discretion, but ex debito justitiae for a court should never countenance an irregular Judgment on its record'.

16. In this case, the Applicant argues that it has a right to be heard and should not be condemned unheard as guaranteed under Article 50 of the *Constitution*. It has beseeched the court to exercise its discretion and invoke the provision of Section 3A of the *Civil Procedure Act* upon the Applicant and not penalize it for the blunder of not filing its defence on time but grant it an opportunity to defend itself on merit.
17. I have gone through the record and find that the issue of service of the Summons and the Plaint has not been disputed and therefore the exparte Judgment that was entered against cannot be said to be irregular. The Applicant confirms that upon receipt of the pleadings, its offices were undergoing renovations but no evidence has been availed to confirm the same if at all. However, the failure to substantiate this claim of renovations as a cause of delay is one that can be alleviated by an award of costs. I say so because I am considerate of the fact that though there was delay, the same was not so inordinate since the Applicant filed application a few days after the interlocutory judgment was entered which is a demonstration that it has the intention of defending the suit. The Respondent on the other hand asserts that it served the pleadings upon the Applicant and interlocutory Judgment was only entered when the Applicant failed to respond to their pleadings and is therefore guilty of laches.
18. In *County Government of Tana River & Another –vs- Hussein Fumo Hiribae [2021] eKLR*, the court on throw away costs stated as follows:-

' In my strong view the respondent being awarded throwaway costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled. Requests for Exparte Judgements in a trial occurs on the fault of one party not taking full responsibility in the case management directions and imperative provisions on timelines in the *Civil Procedure Act* and Rules. It has been shown that the court in setting aside the Exparte Judgments insisted on award of throwaway costs to compensate the respondent for the effort put in and expenses incurred which turned out to be wasted, because of the blameworthy of the Appellant.'

In the circumstances, I find that the Respondent ought to be compensated for the time wasted as a result of the Applicant not adhering to the strict timelines provided under the Civil Procedure Rules.

19. The next question for determination is whether the annexed draft defence raises triable issues. The court in the case of *Job Kinloch –vs- Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, explained the meaning of a defence that raises triable issues as follows:

' Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgment or in any other manner.'

What then is a defence that raises no bona fide triable issue. 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.

20. In its submissions, the Applicant stated that the defence annexed to the application raises fundamental triable and weighty issues, which issues would in themselves warrant the setting aside of the interlocutory Judgment and require urgent judicial intervention to ensure justice is served to all parties. It is the Applicant's plea that this court is obligated to consider the issues raised in the draft



defence attached to the application as per the holding of the Court of Appeal in the case of *Tree Shade Motors Limited –vs- DT Dobie and Company (K) Limited & Another [1998] eKLR* in the following terms;

' The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgement, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend.'

21. Kenya Power and Lighting Company argues that the draft defence raises the following triable issues for the following reasons:-
  - a. The Plaintiff's claim is essentially for an alleged breach of contract dated May 18, 2017 for Tender No. KP1/9AA-3/OT/ 56/15-16 for the Supply of 10 M concrete poles for street lighting. The allegations of breach of contract are as pleaded by the Plaintiff in paragraphs 8 and 9 of the plaint dated January 28, 2022. It would be in the interest of justice for the court to determine whether there was a valid contract as at the time of the alleged breach.
  - b. As pleaded under paragraph 10 of the draft defence, supply of the poles was to be in accordance with the delivery schedule specified in the Schedule of Requirements. Therefore, if any amount is due to the Plaintiff (which is denied) the same would only be established once validity of the contract is confirmed by the court.
22. On the other hand, it is the Respondent's case that the draft defence has not raised triable issues in that:-
  - a. It is admitted that the parties herein entered into a contract with each other.
  - b. The Defendant merely denies the allegations advanced in the Plaint.
  - c. That there was a delivery schedule for supply of the goods.
  - d. That the Defence is a sham and merely seeks to embarrass the fair herein as the Defendant has not addressed itself to the procedure of the termination of the contract and seeks to allude that the contract expired due to the Defendant's own actions.
  - e. That the Defendant goes on to aver that no demand has ever been issued, yet a demand letter was issued to the Defendant and duly stamped by its Manager Legal services on October 18, 2021.
23. The Respondent argues that the KPLC has not demonstrated good faith as the application is full of misrepresentations and deceit and therefore the application ought to be dismissed with costs.
24. To determine whether the Draft Defence raises triable issues that ought to be considered in a full trial, I have read through the said draft Defence and find that the Applicant admits the existence of the contract and its validity of 30 days. However, it denies the averments of breach of the said contract and that it stopped issuing the LPO's to the Respondent. The Applicant also disputes the costs raised by the Respondent and states that there is no evidence to warrant the compensation sought. The Applicant further argues that Respondents' claims are fraudulent and a ploy to gain unjust enrichment. Looking at the draft defence, I find the issues raised therein requiring consideration at a full trial for the same to be interrogated on the validity of the contract, the cause of the breach if any, the termination of the contract, proof of loss of business and/or loss of profits claimed, for a determination and the reliefs to be granted by the court.



25. In the resultant, I find that the application dated June 8, 2022 has merit and proceed to allow the same with the following orders:

- a. The Interlocutory Judgment entered on May 31, 2022 be and is hereby set aside.
- b. The Applicant's/Defendant's draft defence be and is hereby admitted as duly and properly filed on record and accordingly served upon the Plaintiff/Respondent
- c. The Defendant to pay the Plaintiff costs of Kshs 15,000.00 being throw away costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

