



**Logitac Global Logistics Limited v Rentworks East Africa Limited (Commercial Case 342 of 2017) [2023] KEHC 24740 (KLR) (Commercial and Tax) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 342 OF 2017  
MN MWANGI, J  
OCTOBER 6, 2023**

**BETWEEN**

**LOGITAC GLOBAL LOGISTICS LIMITED ..... PLAINTIFF**

**AND**

**RENTWORKS EAST AFRICA LIMITED ..... DEFENDANT**

**RULING**

1. The defendant/applicant filed a Notice of Motion application dated 22<sup>nd</sup> January, 2018, pursuant to the provisions of Order 10 Rule 11, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, Sections 1A, 1B, and 3A of the *Civil Procedure Act* and all the enabling provisions of the law. The defendant seeks the following orders –
  - i. Spent;
  - ii. Spent;
  - iii. That the Honourable Court do set aside the default judgment issued on the 8<sup>th</sup> of December, 2017 and all consequential orders against the defendant/applicant;
  - iv. That the Court be pleased to grant the defendant/applicant unconditional leave to defend the suit; and
  - v. That costs of the application be borne by the plaintiff/respondent.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 22<sup>nd</sup> January, 2018 by Amos K. Rotich, learned Counsel for the defendant and Osman Abdullahi, an Officer of the defendant company. In opposition thereto, the plaintiff filed a replying affidavit sworn on 7<sup>th</sup> February, 2018 by Johan Taljaard, the plaintiff's Director.



3. The instant application was canvassed by way of written submissions. The defendant's submissions were filed on 8<sup>th</sup> November, 2018, by the law firm of Sagana Biriq & Company Advocates, whereas the plaintiff's submissions were filed by the law firm of Oraro & Company Advocates on 20<sup>th</sup> July, 2018.
4. Mr. Rotich, learned Counsel for the defendant submitted that Order 10 Rule 11 of the Civil Procedure Rules, 2010, vests unfettered jurisdiction on this Court to set aside a default judgment. He stated that the said provisions do not place any limitation on the Court's discretion by requiring the applicant to prove any conditions before the Court can exercise its judicial discretion and instead, it provides that if the Court does vary the judgment, it must be on such terms as may be just. Counsel submitted that the instant application was filed timeously since the default judgment was entered on 8<sup>th</sup> December, 2017 and being unaware of it, the defendant filed its defence to the amended plaint on 15<sup>th</sup> December, 2017 and served it upon the plaintiff on 19<sup>th</sup> December, 2017. He indicated that is when it became aware of the existence of the default judgment, and thereafter, the defendant filed the application herein on 22<sup>nd</sup> January, 2018. To augment his submissions, he relied of the case of *Shah v Mbogo* [1967] EA 116.
5. It was stated by Counsel that it is not in dispute that the amended plaint was not served on the defendant in person and that pursuant to the provisions of Order 8 Rule 1(2) of the *Civil Procedure Rules, 2010*, in order for the plaintiff to obtain a default judgment as against the defendant, it was mandatory that the amended plaint be served upon it in person since it is only after the defendant was served, that it was required to file a defence. He stated that for the said reason, the default judgment entered against the defendant is void ab initio. He cited the decisions in *CFC Stanbic Limited v John Maina Gitthaiga & another* [2013] eKLR and *Bernadette Canute v Herbert Sore Makatiani* [2016] eKLR and submitted that the defendant's failure to file a defence on time can be attributed to the defendant's Advocates who after receipt of the amended plaint were unable to obtain instructions on filing of a defence in good time.
6. Mr. Rotich relied on the *Black's Law Dictionary* 9<sup>th</sup> Edition at page 1644 on the definition of a "triable issue" and the case of *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 75 at p. 76, where the Court held that a "triable issue" is an issue which raises a prima facie defence and which should go to trial. He submitted that the defendant has a formidable defence that raises triable issues such as whether the amounts of USD 145,116.00 and USD 133,941.00 indicated by the plaintiff as the monthly rent is inclusive of the insurance payment.
7. Counsel submitted that in this case, judgment in default of the filing of a defence was entered against the defendant for USD 4,025,114.00 plus costs, which is a colossal sum of money that will gravely prejudice the defendant if imposed on it without its case being heard on merits. Counsel relied on the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010, Sections 1A and 3A of the *Civil Procedure Act* and stated that the defendant will be highly prejudiced in the event that this matter is summarily determined rather than decided on merits after an examination of the issues by this Court.
8. Ms. Mutua, learned Counsel for the plaintiff relied on the case of *Shah v Mbogo* (supra) where the principle governing the exercise of judicial discretion to set aside a judgment obtained upon the defendant's failure to enter appearance or file a defence were discussed. She also relied on the case of *Patel v East Africa Cargo Handling Services Ltd* (supra), where the Court laid down the principles of setting aside interlocutory judgments. She contended that the defendant herein is seeking to obstruct or delay the course of justice. She stated that the amended plaint was duly served on the defendant's Advocates on record on 14<sup>th</sup> November, 2017, a fact which is not disputed thus the allegation that the defendant was never served with the amended plaint is false.



9. Counsel referred to the provisions of Order 7 Rule 1 of the *Civil Procedure Rules, 2010*, which provides that a defendant ought to file a defence within fourteen (14) days of entering appearance. She stated that the defendant ought to have filed its defence to the original plaint on or before 14<sup>th</sup> November, 2017, but that was not done. He further stated that upon service of the amended plaint, the defendant ought to have filed its defence to the amended plaint on or before 29<sup>th</sup> November, 2017, which was not done. Ms. Mutua contended that the amended plaint neither raises new issues nor a different cause of action as it only addresses the computation of special damages suffered by the plaintiff.
10. She referred to the case of *John Kuria Gikuiyu v Grace Wangui Kamiti & another* [2011] eKLR and contended that in the event the application herein is disallowed, the defendant will not be left without recourse since it can sue its Advocates on record for professional negligence on the ground that it entrusted this matter to them but they failed to file a defence in time. Ms. Mutua further referred to the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Limited & Michael Rono* [2015] eKLR and reiterated that the defendant's defence does not raise any triable issues, since in its defence, the defendant admits that certain events frustrated the master rental agreement thus it was unable to meet its obligations. That it further pleads terms which do not form part of the agreement and alleges that it was unable to make payments due to circumstances beyond its control.
11. Ms. Mutua contended that in the event the application herein is allowed, the plaintiff will suffer a lengthy, costly and a disproportionate dispute resolution process which would be inimical to the overriding objective of the *Civil Procedure Act*, which is to ensure just, expeditious, proportionate and affordable resolution to disputes.

#### **Analysis and Determination.**

12. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the default judgment and any other consequential orders ensuing therefrom against the defendant should be set aside.
13. In the affidavit filed by the defendant sworn by Mr. Rotich, learned Counsel for the defendant, he deposed that they received an amended plaint dated 14<sup>th</sup> November, 2017 pursuant to a plaint dated 17<sup>th</sup> August, 2017. That on perusal of the amended plaint, it became apparent that it was substantially different from the initial plaint since it raised substantially new issues, a different cause of action and it sought different prayers.
14. Counsel averred that in order to adequately respond to the said amended plaint, they had to obtain instructions from the defendant but before instructions could be obtained, the Advocate who had initial conduct of this matter abruptly left the firm at the beginning of the month of December, 2017. Mr. Rotich further averred that the default in filing a defence only came to the firm's attention on 15<sup>th</sup> December, 2017, during a hand over of the said Advocate's files.
15. It was stated by Counsel that he contacted the client's Officer by the name Osman Abdullahi, who informed him that they were never served with the amended plaint. Counsel further stated that failure to file and serve a defence by the defendant was not deliberate or intended to obstruct or delay the cause of justice. He asserted that the defendant has always been intent on prosecuting this matter as evidenced by the memorandum of appearance and statement of defence filed.
16. In the affidavit filed by an Officer of the defendant sworn by Mr. Osman Abdullahi, he deposed that the default judgment entered against the defendant herein is irregular as the defendant was never served with the amended plaint dated 14<sup>th</sup> November, 2017. He averred that neither the defendant nor its



Advocates on record was served with a notice of entry of judgment, thus the defendant was not made aware of the entry of the default judgment.

17. He averred that save for costs, no prejudice shall be occasioned to the plaintiff should the application be allowed. He further averred that the defendant is ready and willing to meet any requirements or conditions that the Court may impose on it before issuing any orders.
18. The plaintiff in its replying affidavit deposed that the suit herein was instituted on 17<sup>th</sup> August, 2017 and summons to enter appearance together with the plaint were served on the defendant on 7<sup>th</sup> September, 2017, and on 31<sup>st</sup> October, 2017, the defendant filed a memorandum of appearance. The plaintiff averred that it became apparent that the computation of damages had not been done properly as reflected on the plaint, which prompted the filing of an amended plaint on 14<sup>th</sup> November, 2017.
19. The plaintiff deposed that once a firm of Advocates enters appearance on behalf of a litigant, all pleadings and notices are served on the said law firm thus there was no requirement for the amended plaint to be served on the defendant who had adequate representation. It further deposed that where no defence has been filed within the prescribed period, a plaintiff is entitled to apply for interlocutory judgment and that the plaintiff filed a request for judgment on 5<sup>th</sup> December, 2017, which was granted by this Court on 8<sup>th</sup> December, 2017, upon satisfaction that the defendant was properly served with summons to enter appearance and the amended plaint.
20. The plaintiff denied that there was no material disclosure by it in obtaining the default judgment. It asserted that the said judgment was entered lawfully, regularly and in accordance with the requirements of the Civil Procedure Rules. The plaintiff stated that failure to serve a notice of entry of judgment does not invalidate a regularly and lawfully obtained judgment.

If the default judgment and any other consequential orders ensuing therefrom against the defendant should be set aside.

21. The instant application was filed pursuant to the provisions of Order 10 Rule 11 of the [Civil Procedure Rules, 2010](#), which states as hereunder -

“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.”

22. From the above provisions, it is evident that this Court has the discretion to set aside an *ex parte* judgment for default of appearance and/or defence but Courts are reminded to exercise this discretion judiciously. It is trite that the discretion for setting aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & another (supra)* at p. 123.
23. This suit was filed against the defendant on 17<sup>th</sup> August, 2017, vide a plaint of even date. Summons to enter appearance together with the said plaint were then served upon the defendant on 7<sup>th</sup> September, 2017. On 31<sup>st</sup> October, 2017, the defendant filed a memorandum of appearance. Subsequently, the plaintiff filed an amended plaint on 14<sup>th</sup> November, 2017 and served it on the defendant's Advocates on record on the same day. On 5<sup>th</sup> December, 2017, the plaintiff filed a request for judgment since the defendant had not filed a defence and the said request was granted on 8<sup>th</sup> December, 2017.
24. The defendant through its Advocates on record filed the defendant's statement of defence on 15<sup>th</sup> December, 2017 and served the said defence on the plaintiff on 19<sup>th</sup> December, 2017. At this time, the defendant was not aware that the plaintiff had obtained a default judgment against it until 13<sup>th</sup>



January, 2018, when it was served with warrants of attachment, warrants of sale and a proclamation notice. Thereafter, the defendant filed the instant application seeking an order for the default judgment entered against it on 8<sup>th</sup> December, 2017, to be set aside.

25. The defendant contended that the default judgment entered against it is not regular since the amended plaint was not served on the defendant in person, and it is only after the defendant is served in person that it is required to file a defence. On perusal of the memorandum of appearance dated 30<sup>th</sup> October, 2017, filed by Counsel for the defendant on behalf of the defendant, it is clearly indicated as follows -

“Kindly Enter Appearance for the defendant herein, Logitac Global Logistics Limited whose address for service for the purposes of this suit shall be care of Sagana, Biriq & Company Advocates...”

26. The above extract of the contents of the defendant’s memorandum of appearance advised the Court and the plaintiff who was served with it that service of pleadings and/or any documentation on the defendant in respect to this suit would be done at the offices of its Advocates on record. The provisions of Order 8 Rule 1(2) of the Civil Procedure Rules, 2010, do not provide for service of the amended plaint on the defendant in person. It provides for filing of an amended defence on service of an amended plaint if the defendant had already filed a defence, and the time within which to file a defence or an amended defence after receipt of an amended plaint.

27. In light of the above, I agree with Counsel for the plaintiff that once a firm of Advocates enters appearance on behalf of a litigant, all pleadings and notices are to be served on the said law firm, and in this instance, there was no requirement for the amended plaint to be served personally on the defendant who had adequate representation. This Court finds that service of the amended plaint to the defendant’s Advocates on record constitutes proper and sufficient service on the defendant hence the default judgment herein is regular, lawful and enforceable.

28. Having made the said finding, this Court now has to determine whether it will be in the interest of justice to set it aside and allow the defendant to file its defence. In so doing, the Court has to consider whether the defendant’s defence raises triable issues or if it is only meant to frustrate the plaintiff. See the case of *Patel v EA Cargo Handling Services Ltd (supra)* where the Court 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.”

29. In the plaint filed on 17<sup>th</sup> August, 2017, the plaintiff averred that it agreed to lease to the defendant several motor vehicle equipment for a period of twelve (12) months commencing on 15<sup>th</sup> October, 2014, at a monthly rent of USD 145,116.00 and thereafter for a term of thirty-six (36) months at a monthly rent of USD 138,040.00. The plaintiff further averred that it was a term of the agreement that the rental instalments were payable quarterly in advance on each payment date and that the obligation to pay rent under the agreement was absolute and unconditional. The plaintiff contended that the defendant in breach of the agreement failed and/or neglected to pay the instalments as and when they became due, which resulted to repudiation of the said agreement.



30. The defendant however claims that the amended plaint filed on 14<sup>th</sup> November, 2017 raises new issues, introduces a new cause of action and seeks different reliefs from the ones contained in the original plaint. I have perused the said amended plaint, and I am in agreement with the Counsel for the plaintiff that the amended plaint neither raises new issues nor a different cause of action. The only variance is that it particularizes the computation of special damages allegedly suffered by the plaintiff.
31. In the defence annexed to the defendant's submissions, the defendant denies being indebted to the plaintiff and states that it made payments to the plaintiff between January 2015 and January 2017 amounting to the equivalent of USD 1,812,000.00. The defendant averred that the amounts indicated by the plaintiff as monthly rent is inclusive of the insurance payment, whereas there was to be a one-off payment of USD 6,500.00 for ATI Insurance cover and not the amount included by the plaintiff to be paid monthly, for one year.
32. It is the defendant's contention that the Master Rental Agreement which governed the relationship between the plaintiff and the defendant was frustrated by the plaintiff by failing to deliver the rented equipment to the defendant as per the provisions of clause 5.1 of the said agreement on or before the 15<sup>th</sup> October, 2014, so as to enable the defendant to commence its operations. Having considered the above allegation, I am satisfied that the defendant's defence does not contain mere denials but to the contrary, it contains bonafide triable issues such as whether the defendant is indeed indebted to the plaintiff and if the rental equipment was delivered within the timeline agreed on by the parties.
33. The defendant asserted that the delay in filing a defence in this matter was as a result of delay in being given instructions after receipt of the defendant's Advocate's amended plaint, as the Advocate who had initial conduct of this matter abruptly left the law firm at the beginning of the month of December 2017 and they only learnt of this default on 15<sup>th</sup> December, 2017, during a handover of the said Advocate's files. In the case of *Philip Chemowolo & another v Augustine Kubende* [1986] KLR it was stated that:
- “I think a distinguished equity Judge has said:
- Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit...”
34. The defendant's Counsel having been duly served with the amended plaint had a duty to file a defence within the prescribed timelines but they failed to do so. For this reason, I find that the mistake and/or failure to file a defence within the timelines prescribed by law was a mistake on the part of the Counsel for the defendant, which mistake was out of the defendant's control. As a result, the defendant is hereby excused and given an opportunity to defend this suit on merits.
35. Default judgment was entered against the defendant on 8<sup>th</sup> December, 2017, whereas the instant application was filed on 22<sup>nd</sup> January, 2018. The defendant submitted that the delay in filing the application herein was occasioned by the fact that it was not aware that default judgment had been entered against it until it was served with warrants of attachment, warrants of sale and a proclamation notice on 13<sup>th</sup> January, 2018. The application herein was filed nine (9) days after the defendant became aware of the existence of the default judgment and by that time, it had already filed and served its amended statement of defence upon the plaintiff. This means that the instant application was filed timeously and without any unreasonable delay.
36. In the end, this Court finds that the application dated 22<sup>nd</sup> January, 2018 is merited and it is hereby allowed in the following terms.



- i. The default judgment entered on 8th December, 2017 and all consequential orders ensuing therefrom against the defendant are hereby set aside;
- ii. The defendant is at liberty to file its statement of defence and all compliance documents within 30 days from today;
- iii. The defendant shall pay thrown away costs of Kshs 20,000/- to the plaintiff within 30 days from today failure to which the default judgment of 8th December, 2017 together with the consequential decree and all ex parte proceedings shall remain in force.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 6TH DAY OF OCTOBER, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Ms B. Wokabi – Court Assistant.

