Podravka v Towfiq Kenya Limited (Commercial Case 479 of 2022) [2024] KEHC 12937 (KLR) (Commercial and Tax) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 479 OF 2022

A MABEYA, J

OCTOBER 25, 2024

BETWEEN

PODRAVKA DD ..... PLAINTIFF

AND

TOWFIQ KENYA LIMITED ..... DEFENDANT

RULING

1. Before Court is the application dated 17/7/2023 brought under Articles 162(1)(a), 165(3)(b), 5(b), 23(3)(b) and (c) of *the Constitution* of Kenya, sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 22 rule 22(1), order 10 rule 11, order 19rule 2 and order 51 of the Civil Procedure Rules.

2. The application seeks the setting aside of the entire proceedings and the ex-parte judgment and decree of the Court. It further seeks leave for the defendant to be allowed to defend the suit and have it heard on merit.

3. In support of the application, the applicant relied on the grounds on the face of the Motion and the supporting affidavit of Abdirizack Bishar Aress sworn on 17/7/2023.

4. The applicant's case was that it was served with warrants of attachment by Beta Phase Auctioneers for execution of a decree. Upon consulting with its advocates, it learnt that the warrants stemmed from a court judgment. It claimed that it only became aware of the suit on being served with the warrants. That there was no evidence on record indicating that it had been served. That the ex parte judgment was entered without the court having access to all relevant facts.

5. It contended that the defense raised triable issues that should be considered on merit and urged the Court to grant leave to submit the draft defense. That the respondent would not suffer any prejudice as compared to what the applicant stood to suffer.

6. The respondent opposed the application through a replying affidavit of Vedran Kelek sworn on. He stated that the applicant was served with the summons and plaint on 21/12/2022, as evidenced by the affidavit of service dated 23/7/2023, which accompanied the request for judgment. That the draft defense and counterclaim indicated that the applicant lacked a valid defense. The respondent characterized the application as an abuse of court process and noted that no explanation was provided for the applicant's failure to enter appearance.

7. The applicant retorted with a further affidavit of Abdirizack Bishar sworn on 4/9/2023. He claimed that the affidavit of service did not provide proof of service upon the defendant. That there was no individual named Mr. Abdi Mohamed employed as a general manager for the applicant. That the affidavit of service was not part of the court record on the e-filing platform and had been prepared solely in response to the application.

8. The application was canvassed by way of written submissions which I have carefully considered. It was submitted for the applicant that in a corporation, summons and pleadings are served on the secretary, director or principal officer. That the record does not indicate whether the applicant was served as the affidavit of service was not on record. It was further submitted that none of the principal officers of the applicant was served with the pleadings or the summons. That for want of service, the ex-parte judgment was irregular and should be set aside as a matter of right ex-debito justitiae.

9. The respondent submitted that the summons and pleadings were served upon the applicant and that the applicant had failed to give any reasonable cause as to why it failed to enter appearance and file a defence. That the draft defence did not raise any triable issue.

10. I have considered the record and the written submissions by Counsel. This is an application to set aside an interlocutory judgment entered against it on 31/1/2024. Order 10 rule 11 of the Civil Procedure Rules 2010 gives the Court discretion to set aside an interlocutory judgment and it provides 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."

11. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede (1982-1988) KAR, the Court of Appeal 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."

12. Further, in Patel vs EA Cargo Handling Services Ltd (1974) EA 75, the Court held that: -

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

13. Finally, in *James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015* eKLR, the Court of Appeal held: -

> "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 the case. From the outset, it cannot be gainsaid that a distinction has always existed between a 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 appearance 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. 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)."

9. From the foregoing, the factors to consider in an application for setting aside an interlocutory judgment are; the reason for failure to enter appearance, time that has lapsed since entry of judgment, the prejudice suffered by the parties and whether the defence raises triable issues.

10. The applicant's position was that it only became aware of the suit after being served with the warrants of attachment. It denied being served with any summons or pleadings. It further contended that the affidavit of service was not available on the e-filing portal. In contrast, the respondent claimed that the affidavit of service dated 23/7/2023 confirmed that the applicant was served with both the summons and the plaint.

11. I have considered the affidavit of service sworn by Michael M Masua that was annexed to the plaintiffs replying affidavit. He stated that upon receipt of the documents he went to the offices of the applicant and was ushered into the offices of the general manager. He identified his name as Mr. Abdi Mohamed on whom he tendered the Summons and Plaint.

12. The applicant contested the affidavit of service as not having been filed in the court portal. That the applicant has no employee by the name of Abdi Mohammed. One thing is clear, contrary to the applicant's assertions, the record shows that the request for judgment made on 23/1/2023 was accompanied with Mr. Masua's affidavit of service.

13. In law, it is trite that ordinarily, evidence of service is proved by an affidavit of service. In the present case we have an affidavit of service whose contents have been denied and challenged. The applicant was categorical that it was never served and that it has no employee by the name Abdi Mohamed who is alleged to have been served.

14. In my view, where such an eventuality arises, it is imperative that the process server who is alleged to have effected service be cross-examined. In the present case, on delivering its further affidavit, the applicant lodged and served the respondent with a Notice of Intention to Cross-examine the process server. Since the matter proceeded by way of written submissions, this matter was not pursued. In view thereof, what do we take it for?

15. We have tow contrasting positions by the parties. The respondent states that service was effected upon the applicant. The applicant contends otherwise. There is an affidavit of service that have been challenged on material particular, that there is no one by the name of the person that was allegedly served.

16. In this regard, the view the Court takes is that, the evidentially burden of proof kept on swinging like a pendulum. The applicant denied service, the evidentially burden swung to the respondent who filed an affidavit of service to counter that denial. The burden then shifted to the applicant who filed a further affidavit denying the contents of that affidavit of service and went further to issue a notice of intention to cross-examine the deponent. At that point, the evidentially burden shifted back to the respondent to produce and offer the process server for cross-examination to defend his averments. The respondent did not offer the process server and the pendulum stopped on it.

17. Under sections 107, 108 and 112 of the *Evidence Act* Cap 80, the burden of proof lies on the person on whom if additional evidence is not offered to displace the evidence already produced would lose. In the present case, the evidence on record is sworn by the parties. The only way the Court would have been able to determine one way or the other whether service was effected is by having the process server cross-examine. The applicant issued the notice but the respondent did not offer the process server.

18. If the process server appeared, he would have explained the offices of the applicant, why he chose to serve a general manager and not the principal officers identified by the law; whether he effected service after confirming that the alleged recipient had authority to receive summons on be half of the company; why the alleged person gave his name but declined to sign the documents as proof of receipt. There are many issues that he would have clarified which remain grey.

19. In view of the foregoing, I hold that on a preponderance of probability, there is no evidence that service was effected upon the applicant. Accordingly, the interlocutory judgment cannot stand.

20. Accordingly, I find merit in the application. The interlocutory judgment and the proceedings herein are hereby set aside. The defendant is directed to file its defence and documents within 14 days of this ruling. Costs shall be in the cause.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE