



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 359 OF 2016**

**JOSAP LOGISTICS AND SUPPLIES LIMITED.....PLAINTIFF**

**VERSUS**

**GREAT RIFT VALLEY DRILLING (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. A crucial aspect of the Notice of Motion dated 13<sup>th</sup> November 2020 lacks candour and so the Motion does not deserve to be allowed.

2. It is for the following prayers:-

1. Spent

2. *THAT pending the hearing of this application interpartes, the firm of M/s Njuguna, Kahari & Kiai Advocates, be granted leave to come on record for the Defendant/Applicant after Judgment in place of LJA & Co. Advocates.*

3. *THAT the Notice of Change of Advocates dated 13<sup>th</sup> November 202, annexed herein be deemed to have been duly filed and served with leave of Court.*

4. Spent

5. *THAT upon the hearing interpartes, the ex-parte Judgment and orders of 12<sup>th</sup> April 2017, and the decree issued on 5<sup>th</sup> July 2019 in favour of the Plaintiff as against the Defendant herein and all other consequential orders be set aside and/or vacated and the Defendant/Applicant be granted leave to file and serve its statement of Defence out of time.*

6. *THAT upon granting prayers 2, 3, and 4 hereinabove the suit be set down for hearing de novo.*

7. *THAT costs of this Application be provided for.*

3. Central to the Application are the contents of the supporting affidavit of David James Stewart Coulson sworn on 15<sup>th</sup> November 2020. In it he deposes:-

**“2. THAT sometimes in November 2020 the Defendant/applicant was served with a Notice to appear before the Court on 16<sup>th</sup> November 2010, to show cause why they should not be committed to civil jail. (Annexed hereto and marked “DJSC-1” is a copy of the Notice to show cause attesting to the same).**

**3. THAT subsequently, the Defendant/Applicant discovered that:-**

**i. THAT the Defendant’s then Advocate on record, M/s LJA Advocates, had entered appearance in this matter but they failed, refused and/or neglected to file a statement of defence on behalf of the Defendant/Applicant.**

**ii. THAT the matter proceeded for hearing ex-parte and on 12<sup>th</sup> April 2017 this Honourable Court had delivered a judgment in favour of the Plaintiff as against the Defendant herein stating *inter alia*:-**

a) **THAT judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs.24,851,058 together with interest thereon at the prevailing commercial rates from the date of filing suit until payment in full.**

b) **THAT costs of suit and interest thereon.**

**iii. THAT the Defendant/Applicant further discovered that the Plaintiff/Respondent has since extracted a decree and it is in the process of executing it. (Annexed hereto and marked "DJSC-2" is a copy of the decree attesting to the same)."**

4. The short story by Mr. Coulson is that after the Defendant was sued herein, it instructed LJA Advocates to represent it. That only in November 2020 did the Defendant become aware that the said firm had failed, refused and/or neglected to file a statement of Defence on its behalf. Only then did it become aware of a default judgment against it.

5. It turns out, however, that the Defendant became aware of the default judgment much earlier than Mr. Coulson stated on oath. In a replying affidavit sworn on 23<sup>rd</sup> November 2020 by Mr. Joseph Mwangi Wachiuri, he deposes to a meeting held on 29<sup>th</sup> August 2018 at the offices of Coulson Harney Advocates. Present were Mr. David Coulson, a Mr. Kabue Thumi, a Mr. Sean Omondi and himself. The meeting was to discuss how the decretal sum herein was to be settled. Mr. Thumi is the advocate of the Plaintiff while counsel Omondi was on the side of the Defendant. Emails were subsequently exchanged between counsels.

6. An email sent by Mr. Kabue on 30<sup>th</sup> August 2018 at 4.52am shows Mr. Kabue forwarding pleadings in this suit to Mr. Omondi. That mail is acknowledged by Mr. Omondi in an email of 30<sup>th</sup> August 2018 in which he requests:-

**"Please also share a copy of the judgment and the decree."**

7. This took a long time coming and Mr. Kabue forwards a copy of the decree on 9<sup>th</sup> July 2019. In the forwarding letter he attributes the delay on the court file missing.

8. In a further affidavit sworn by Mr. David Coulson, in reply to the contents of the affidavit of Mr. Joseph Wachiuri, Mr. Coulson completely avoids the assertions by Mr. Wachiuri about the meeting of 29<sup>th</sup> August 2018. He neither denies nor confirms the meeting. He makes no comment of the contention that as early as then, the Defendant had instructed Mr. Omondi in respect to the settlement of the decree.

9. Instead Mr. Coulson chooses to, for the first time, raise certain issues of law which includes a challenge to this Court's jurisdiction to hear the suit in the first place.

10. This Court takes it that the events as narrated by Wachiuri are not controverted and are therefore a true. In considering the merit and bona fides of the Application before Court, it is crucial that by, at least 29<sup>th</sup> August 2018, the Defendant was well aware that judgment had been passed against it in this matter. The statement in support of the Motion that it only learnt of the ex parte judgment in November 2020 is simply false. The date of the Notice of Motion is 13<sup>th</sup> November 2020 and the Defendant wants to give the impression that it moved promptly to Court on discovering the ex parte judgment. The truth, however, is that it was aware of the judgement two years earlier.

11. It is common ground that the Defendants instructed LJA to represent it the matter and the said firm entered appearance but failed to file a defence or take any other steps. The ex parte judgment entered is therefore a regular one. To be deserving of the Court's discretion to set aside a regular judgment, the defaulting applicant must be candid in its plea. The Court frowns upon the attempt by the Defendant to mislead it and declines to exercise discretion in the Defendant's favour.

12. In closing, I need to comment on some legal arguments raised by the Defendant. One is that this Court has no jurisdiction over this matter because of the existence of an Arbitration Agreement in the contract of 11<sup>th</sup> November 2013 between the parties. Even if such Arbitration agreement existed, the Court's jurisdiction can only be ousted by the party seeking ouster invoking the terms of the Arbitration agreement. That has not been done to date. Quite the opposite, the argument on jurisdiction is inconsistent with the prayers in the Notice of Motion itself which, inter alia, seek that the Defendant be granted leave to file and serve its statement of defence out of time and that the suit be set down for hearing de novo. A concession that this Court is properly seized of the matter.

13. As to the contention that court fees on the plaint was never paid, the Plaintiff has explained that it was a victim of fraud within the Judiciary for which it was not to blame and that it had to pay court fees again on 19<sup>th</sup> December 2019. The Court was shown a copy of the payment receipt. As the fees has been duly paid, that becomes a non-issue.

14. The other matter raised is the propriety of the execution proceedings pursued by the Plaintiff. The Motion before Court is not about execution but a plea for setting aside of the ex parte Judgment. The Defendant can raise whatever grievance it has with the execution process by way of a separate application.

15. The upshot. The Notice of Motion dated 13<sup>th</sup> November 2020 is dismissed with costs.

**DATED AND SIGNED THIS 5TH DAY OF JULY 2021**

**F. TUIYOTT**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2021**

**D. S. MAJANJA**

**JUDGE**