REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NUMBER E416 OF 2019

MEHTA ELECTRICALS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

CIVICON LIMITED.....DEFENDANT/APPLICANT

AEA LIMITED.....OBJECTOR/APPLICANT

RULING

1. This Ruling is in respect to two applications. The first application is the Defendant's Notice of Motion dated 28th July, 2020 and the 2nd Application is Objector's Notice of Motion dated 12th August, 2020.

The Defendant's Notice of Motion dated 28th July 2020

2. This Application was brought under **Article 40, 50(1)** and **25(c)** of the **Constitution of Kenya 2010, Order 12 Rule 7, Order 51 Rules 1** and **4** of the **Civil Procedure Rules, 2010, Section 1A, 1B & 3 A** of the **Civil Procedure Act, CAP 21** Laws of Kenya and all the other enabling provisions of the Law. The application seeks orders that:

> ***a) The interlocutory default judgment entered on 13th July, 2020 against the Defendant together with the consequential decree and all interlocutory proceedings be and is hereby set aside.***
>
> ***b) The Defendants be and are hereby granted leave to defend this suit and the suit proceed and be heard de-novo.***
>
> ***c) The Defendants be and are hereby granted leave to file and serve a Defence to the Plaintiff's Plaint dated 6th November, 2019, the draft of which is annexed to the supporting affidavit herein, upon payment of the requisite court fees.***
>
> ***d) The costs of this Motion be in the Cause.***

3. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by **BEN KIILU**, the Defendant's acting Chief Executive Officer. He averred that on 21st July, 2020, they received proclamation notices dated 21st July, 2020 threatening an action within 7 days of the date thereof for a Sum of USD 947,837.35 being the decretal sum and a further sum of Kshs. 1,054,157.00 being the party and party costs, emanating from a default interlocutory judgment entered by this Court against the Defendant on 19th June, 2020 and a decree to the same effect was issued on 13th July 2021.

4. Since they had not attended Court for any hearing on this matter since sometimes in late 2019 when they instructed the Firm of Kamunda Njue and Company Advocates to defend them upon becoming aware of the same, they reached out to the said Firm but it was unresponsive. It is then that they instructed their current Counsel on record to find out what had transpired. Counsel proceeded with commendable speed despite the restrictions in place due to the Covid-19 pandemic and perused the Court file. She found out that although the Defendant's previous Counsel had filed a Memorandum of Appearance on 31st January 2020, he did not file any further documents as far as the Defendant's Defence is concerned.

5. He averred that the Defendant's legal department had been following up on this matter up to the month of February 2020. However, after the Covid-19 pandemic broke in early March 2020, the Country closed down and normal operations had not fully resumed when the Defendant was caught unawares by the entry of the said judgment. He noted that other than summons to enter appearance, the Plaintiff has never served the Defendant or its previous Counsel with any other documents but proceeded quietly to request for the interlocutory judgment taking advantage of the Covid-19 pandemic disorganization and then surprised the Defendant with the said proclamation notices.

6. He stated that according to the Plaintiffs documents, the decretal sum emanates from a quotation for an electrical installation in Rwanda. However, the said project with the employer, Kivuwatt Limited was terminated before it materialized and that is why there are no signed contracts between the Plaintiff and the Defendant. He averred that although the Plaintiff sent invoices to the Defendant, the same were subject to confirmation of the contract which never materialized and if there was any work done by the Plaintiff in Kivuwatt-Gas Extension Project in Rwanda, the same was never confirmed. As such, the Defendant did not commit to pay the Plaintiff as alleged and thus as it stands, the Plaintiff's alleged due payments are highly disputable.

7. He argued that if the Plaintiff's claim is that there was an implied contract, the same had to be confirmed by Kivuwatt Limited from the work done which was not done and this is within the Plaintiff knowledge yet it demands to be paid without the necessary contractual supporting documents and/or verification of work done. It was further noted that upon termination of the project in Rwanda, all activities at the project were stopped as well as all payments including those of the Defendant.

8. It was contended that subjecting the Defendant to pay such huge sums of money when clearly they are unsupported by necessary contractual documents without hearing the Defendant who has categorically disputed the basis thereof is highly unjust and will unjustifiably plunge the Defendant into a financial crisis if not bankruptcy. He contended that such financial crises will have a spillover effect to innocent parties especially the Defendant's employees hence it is only just that such drastic effects emanate from a just determination of the Court after hearing all Parties. The Defendant added that it was thus evident from all the foregoing that its Defence raises triable issues warranting a full hearing by this Court.

9. Further, the deponent noted that he has since learnt that there is also on record a certificate of costs dated 16th July 2020 condemning the Defendant to pay a sum of Kshs. 1,051,707.58 as costs. He contended that the same is highly irregular as the Plaintiff's Advocate never taxed any Bill as required and it is not clear on what basis the said certificate of costs was arrived at. He urged the court not to punish the Defendant due to mistakes of its previous Counsel but grant it its day in Court since the Defendant is ready and willing to abide by this Court's conditions for an expedited hearing.

10. He stated that unless the orders sought are granted, the Defendant will be thrown out from the seat of justice where its last hope of defending the case lies in addition to being condemned unheard contrary to Article 50(1) as read together with Article 25 of the Constitution of Kenya 2010 which decrees the right to fair hearing as illimitable and non-derogable. Lastly, he noted that this Application has been brought at the earliest possible opportunity without any undue delay.

11. In opposition to the Application, the Plaintiff filed a Replying Affidavit sworn on 24th September 2020 by its Director **PRAVIN SONI** contending that the Defendant has come to court with unclean hands by falsely alleging that no other documents were served upon it or its erstwhile Advocates other than the Summons to Enter Appearance. He noted that on 15th January 2020, the Plaintiff instructed a duly licensed court Process Server by the name Titus Munyao Nyenge to effect service of the Summons to Enter Appearance as well as Plaint, Plaintiff's List of Witnesses, Plaintiff's List of Documents and Plaintiff's witness statement upon the Defendant herein which service was effected the following day on 16th January 2020 and the Defendant acknowledged receipt of the same through one of its officers by the name Mr. Lewis Mukuzi.

12. He stated that as further testament of the fact that the Defendant was duly served with the documents stated above, the Defendant's aforesaid Advocates came on record by filing a Memorandum of Appearance. Since the Defendant's Advocates failed to file its Statement of Defence within the prescribed period, the Plaintiff's Advocates made a formal request for Interlocutory Judgment to be entered against it.

13. An interlocutory Judgment was entered against the Defendant on 19th June 2020 and thereafter, the Plaintiff's Advocates notified the Defendant's erstwhile Advocates about the entry of Judgment through a Notice of Entry of Judgment dated 23rd June 2020 which was stamped received on 24th June 2020. He averred that despite being notified of the entry of judgment against their client, the Defendant's former Advocates, without any just or lawful reason, still failed to take any action at that point in time to avert execution.

14. Further, he stated that contrary to the position taken by the Defendant regarding costs, a Certificate of Costs can be issued under **Paragraph 68A** of the **Advocates Remuneration Order** when the Registrar of the High Court enters a final judgment under **Order 49, Rule 2** of the **Civil Procedure Rules, 2010**. That in line with said provision, the Plaintiff's Advocates requested the Court to issue a Decree and Certificate of Costs vide a letter dated 23rd June 2020 without the need of having to first file a Bill of Costs which documents were lawfully and procedurally issued by the Deputy Registrar on 16th July 2020.

15. He contended that more fundamentally, the Draft Defence annexed to the Supporting Affidavit of Ben Kiilu does not raise a single triable issue worth being canvassed at a hearing. Specifically, he stated that the Defendant's draft Statement of Defence confirms at paragraph 4 that the Defendant engaged the Plaintiff as a sub-contractor to carry out electrical installation works on its behalf in the Kivuwatt Gas Extension Project in Rwanda; confirms at paragraph 5 that the Plaintiff's quotation to undertake the electrical works was forwarded to the Employer; and the Employer accepted the quotations; and confirms at paragraph 6 that the Plaintiff actually carried out the works it was contracted to undertake as a result of which it became lawfully entitled to be paid by the Defendant.

16. He posited that despite alleging that the Gas Extension Project was terminated in mid-2012, the Defendant has not pleaded that it ever communicated that position to the Plaintiff or that it continued to engage with the Plaintiff through its authorized representatives well into 2013 through email correspondence and definitively confirmed vide an email dated 28th February 2013 at 12:17pm that a total gross sum of USD 519,412.16 was due and payable to the Plaintiff.

17. He noted that after sending the said email to the Plaintiff, the Defendant's Operation's engineer called Martin McCaskill sent a further internal email to one of on its staff on the same date at 14:29 requesting that the Plaintiff be advised on how and where to present its invoice for payment. The latter email which was copied to the deponent herein further asked that payment be released to the Plaintiff on the instruction of Mr. Martin McCaskill. In his view, the implication of the said email was that payment due to the Plaintiff had already been received by the Defendant but was only to be done after Mr. McCaskill had given authorization for the payment to be made.

18. In addition, it was contended that the Defendant has not furnished the Court with any plausible reasons as to why its former Advocates failed to file the Statement of Defence within the prescribed timelines after filing the Memorandum of Appearance, or even after being served with the Notice of Entry of Judgment. It was argued that no material whatsoever has been placed before the Court for consideration so as to determine whether or not to exercise its discretion in favour of granting the orders sought in the Defendant's application.

19. The Plaintiff was of the view that whereas Courts have held that the mistakes of an Advocate ought not to be visited on a client; such mistakes must be as a result of excusable error and not negligence. It noted that Courts have added that an Advocate has a duty not only to his client, but also to the Court and the opposing side and the client has an equal and corresponding duty to diligently engage with their Advocate to ensure that their case is being prosecuted or defended well. He argued that in the instant case, both the Defendant and its former Advocates failed to exercise diligence in their respective duties and such failure is not excusable in the circumstances.

20. Moreover, it was contended that in the circumstances of the instant case, the scales of justice tilt in favour of disallowing the application as that the Plaintiff will suffer immense prejudice if the application is granted for it will be kept away from enjoying the fruits of its Judgment arising from a long outstanding and readily acknowledged debt by the Defendant. The Plaintiff argued that allowing the instant application would be rendering the timelines set by the Civil Procedure Rules inconsequential and merely academic which was not the intention of the Rules Committee which formulated the Rules. In the Plaintiff's view therefore, it is in the interest of Justice that the instant Application be dismissed with costs to it.

Submissions

21. The Application was canvassed by way of written submissions. The Defendant's written submissions are dated 26th October 2020 whilst the Plaintiff's written submissions dated 11th December 2020.

22. In its aforesaid submissions, the Defendant formulated three issues for determination namely:

*i. **Whether the court should set aside the interlocutory judgment endorsed on 13th July 2020?***

*ii. **Whether the court should grant the Defendant leave to defend the suit?***

*iii. **What orders should the court make as to costs?***

23. The Defendant submitted that **Order 10 Rule 11 of the Civil Procedure Rules 2010** permits this court to vary or set aside a judgment and any consequential decree or order which has been entered in default of defence on such terms as are just. It cited the case of **Remco Limited v Mistry Jadva Parbat & Co. Ltd & 2 Others (2002) 1 EA 233** where the court explained the difference between a regular and irregular default judgment. The Defendant submitted that since it was served with summons to enter appearance, it is evident that the default judgment entered herein is a regular one. It stated that in the circumstances, the court should consider whether its Draft Defence raises bona fide triable issues.

24. The Defendant reiterated that the failure to file a Defense within the required time was a mistake of its erstwhile counsel which ought not to be visited upon it. While acknowledging the fact a litigant has a duty to pursue the prosecution or progress of his or her case, it maintained that its legal department had been diligently following up on the matter with its erstwhile advocates up to the month of February 2020 then the Covid-19 pandemic engulfed the country thus affecting normal business operations.

25. The Defendant further reiterated the averments in its supporting affidavit on why it deems its draft defence as raising triable issues. It relied on the case of **Tree Shade Motors Ltd v DT Dobie & Anor (1995-1998) 1 EA 324** the Court of Appeal stated inter alia that even if service of summons is valid, the judgment will be set aside if a Defendant shows that it has a reasonable defence which raises triable issues. Reliance was also placed on the case of **Signature Tours & Travel Limited v National Bank of Kenya Limited [2018] KLR** cited with approval the holding in **Sebei District Administration v Gasyali (1968) EA 300** where court set down factors to be considered in setting aside a default judgment as follows:

> ***"In my view the court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence, if one has been brought to the notice of the court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."***

26. Further, the Defendant argued that every person has a constitutional right to be heard and no party should be deterred from approaching the seat of justice. In support, it cited the case of **Multiscope Consulting Engineers v University of Nairobi & another [2014] eKLR** where the court held that a right to a hearing and fair trial by extension as enshrined in **Article 50(1)** of the **Constitution** is a fundamental human right and the cornerstone of the rule of law. Thus, it is the duty of this court to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

27. The Defendant further relied on the case of **Mungai v Gachui & Another [2005] eKLR** where it was held that a Court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity.

28. On the issue of costs, the Defendant stated that it is wholly within the discretion of this court to determine the same but urged the court

to be guided by the holding in **Signature Tours & Travel Limited v National Bank of Kenya Limited (supra)** where the court admitted a statement of defence that had been filed out of time and awarded the Plaintiff throw away costs of Kshs 10,000.

29. On the other hand, the Plaintiff submitted on two main aspects. The Plaintiff was emphatic that the Defendant has failed to sufficiently demonstrate that there was actually a mistake committed by its erstwhile Advocates in failing to file a Defence on time, which ought not to be visited on it. In support of this, it relied on the case of **Raffaele Trolese v Pitarello Pietro Luigi [2017] eKLR** where W. Korir J. refused to allow an application on the basis that the previous counsel of the applicant therein had been negligent since the Applicant did not adduced any evidence in that regard.

30. The Plaintiff also reiterated that the Defendant's draft Defence does not raise any triable issue that warrants the setting aside of the e*x parte* judgment but is a sham which should not be entertained.

The Objector's Notice of Motion dated 12th August 2020

31. This Application was brought pursuant to **Article 40, 50(1)** and **25(c) of the Constitution of Kenya 2010, Order 22 Rule 51, 52 & 45, Order 51 Rules 1,** and **4** of the **Civil Procedure Rules, 2010, Section 1A, 1B & 9A** of the **Civil Procedure Act,** CAP 21 Laws of Kenya and all the other enabling provisions of the Law**.** The Application seeks Orders that the Decree Holder through his agents including JOEL TITUS MUNYA TRADING AS MAKURI AUCTIONEERS or any other Auctioneers be precluded from proclaiming, or having proclaimed, from attaching or selling the Objector's equipment in answer of the Decree herein. The Objector also seeks costs of the Application.

32. The application is predicated on the grounds on the face of it and supported by an Affidavit sworn on even date by **NICHOLUS KITHINJI** the Objector's Chief Executive Officer. He averred that on the afternoon of 11th August, 2020, they were made aware that some of their equipment stored at Kibarani Yard attached as per the schedule marked as annexture "NK-1, were in the process of being moved in preparation of a public auction. After a deeper interrogation, they learnt that the said equipment had been listed on a Notice of Proclamation dated 21st July 2020, by JOEL TITUS MUNYA *TRADING A*S MAKURI AUCTIONEERS. The said Auctioneer was under the instructions of the Plaintiff herein who holds a decree of this Court dated 16th July, 2020 emanating from a default interlocutory judgment against the Defendant dated 13th July, 2020 for the sum of USD 947,897.35 being the decretal sum and a further sum of Kshs. 1,054,157.00 being the party and party costs thereof.

33. He averred that the Objector was not and has never been a party in this Suit and therefore was not aware of the default judgment and thus only came to learn of the pending warrants of attachment by sheer happenstance. He stated that part of the goods listed for auctioning were the equipment belonging to the Objector which had been procured vide a Sale Agreement dated 12th June 2019 for a consideration of the sum of Kshs. 200 Million. The said consideration was paid on 19th September 2019 thereby conferring the title in the said equipment to the Objector as against any other person. Thus, the Defendant herein retains no rights whether legal or equitable over the said equipment and as such the same cannot be attached in satisfaction of this Court's decree granted in the favour of the Plaintiff.

34. Further, he stated that the Objector has in fact entered into financial obligations with several banks using the said equipment as Security and the erroneous attachment threatens recovery actions against the Objector in a period of financial crises precipitated by the Covid-19 pandemic. In his view therefore, he has satisfactorily demonstrated that the Objector has legal and/or equitable interest in the equipment proclaimed and the Defendant does not have such interests and therefore this Court ought to allow the Objectors objection.

35. The Plaintiff opposed this application, vide a Replying Affidavit sworn by its Director **PRAVIN SONI** on 20th August 2020. It was averred that the Objector has not adduced any evidence whatsoever to prove that it has a legal or equitable interest in any of the assets listed in the schedule of assets set out in the Proclamation Notice served on it by the Auctioneers. It was contended that the Objector has not adduced any evidence whatsoever to prove or demonstrate that the process of transfer of any of the assets listed in the schedule of assets set out in the Proclamation Notice has been initiated by the Defendant to the Objector.

36. He averred that the receipt dated 13th September 2019 allegedly issued to the Objector by the Defendant is not conclusive proof that the Kshs. 200 Million was paid by the Objector to the Defendant or that the alleged purchase of equipment for which the receipt was issued related to the assets listed in the schedule of assets set out in the Proclamation Notice since the assets are not identified in the receipt. It is therefore doubtful whether the equipment referred to in the receipt is the same as the equipment which was attached.

37. Further, he contended that the Objector's application has not met the threshold to justify lifting of the attachment. In his view, the sale agreement annexed to the Supporting Affidavit constitutes a deliberate collusion effort between the Defendant and the Objector to cunningly hoodwink this Honourable Court into believing that the assets attached belong to the Objector and not the Defendant. The intention of this ploy is to defeat the already commenced process of execution and to prevent the Plaintiff from realizing the fruits of its judgment. It was also his view that the instant application is therefore mischievous and a complete waste of this Honourable Courts time hence it is in the interest of justice that the Application be dismissed with costs to the Plaintiff/Respondent.

38. The Objector's aforementioned Chief Executive Officer responded by way of a Supplementary Affidavit sworn on 22nd September 2020. He stated that the allegations of collusion between the Objector and Defendant are untrue, unfounded and grossly malicious as the Plaintiff has not adduced any evidence to support the alleged collusion. Further, he noted that it is beyond any doubt that the agreement of purchase of the equipment not only predates the Plaint, the Decree and the consequent proclamation but also the dispute originating the said decree. This is in view of the fact that the default decree is dated 16th July 2020, the Plaint that originated the said decree was filed on 22nd November 2019 and the dispute that was brought about by the Plaint crystallized on 8th October 2019.

39. He went on to state that pursuant to the said Agreement and receipt evidencing payment of consideration, a number of Motor Vehicles have since been transferred into the Objector's name hence the Plaintiff's allegations are just but sheer speculation. He also noted that in any

case, the validity of the transactional documents have not been challenged by any party herein. In addition, he said that pursuant to the said sale transaction, most of the registrable equipment has already been transferred and the ones that have not yet been transferred are due to pending security obligations. However, all of the said equipment were either in the actual or constructive possession of the Objector. It was thus his contention that an auctioneer is under a duty to investigate the ownership of any property before executing, which was done in this case where the auctioneer just invaded the Objector's equipment stored in a shared yard facility at Kibarani Mombasa and Salama in Machakos.

40. Additionally, he noted that the equipment purchased by the Objector constitutes both registrable and non-registrable items. He stated that with respect to non-registrable items such as furniture, computers, office equipment, scrap metals, generators, fabricated offices, air conditioners, water tanks, air compressors, PVC Tanks etc, there is no other way to demonstrate ownership other than purchase receipts. As such, it is misguided for the Plaintiff to expect the Objector to demonstrate transfer and/or registration.

41. He also averred that as regards registrable equipment, the Auctioneer mischievously and unlawfully failed to provide sufficient details so as to clearly identify the goods intended to be proclaimed but rather hid in vague and ambiguous description such a*s "plate-less motor vehicle, container, assorted scrap metal, motor vehicle spare parts, skeleton trailers, lathe machines, assorted old containers, construction cranes, steel-press machine, drilling machine, Graders, any other movable property…*"etc. As a result, the Auctioneer ended up attaching all equipment including those that had already been transferred to the Objector.

42. That, other than Link Belt Crane KAJ 589L, Prime Mover KBU 412 R & 413R and Telehandler KHMA 821B that the Auctioneer specifically identified in their proclamation notice, the rest of equipment in the list of assets marked as Annexure "NK-1" were attached although they were not specifically proclaimed. In his view therefore, it is clear that the attachment was wrongful, unlawful and illegal because of the following.

43. In response, the Plaintiff's aforementioned Director lodged a Further Affidavit maintaining that all the assets proclaimed by the auctioneer belonged to the Defendant at the time the proclamation was done and that the transfer of the motor vehicles to the Objector happened after the proclamation on 21st July 2020 with the obvious intention of defeating the execution process. He stated as proof of the said fact, his advocates wrote a letter to the National Transport and Safety Authority (NTSA) on 24th September 2020 asking for confirmation of ownership of a list of vehicles as at 21st July 2020 when the proclamation was done. NTSA responded the following day on 25th September 2020 through a letter of even date which clearly confirms that as at 21st July 2020 when the proclamation was done, the proclaimed motor vehicles actually belonged to the Defendant and not the Objector. That from the said letter, it is clear that other than two vehicles namely; KBU 678J and KBQ 722L which were transferred to the Applicant on 6th July 2020 before the proclamation was done, the rest of the vehicles were all hastily transferred to the Applicant by the Defendant a few days after the proclamation to defeat the execution process.

44. He argued that the Defendant's conduct of transferring the proclaimed assets to the Applicant after proclamation violated the express provisions of **Rule 14** of the **Auctioneers Rules, 1997** which *inter alia* prohibits the transfer of any proclaimed assets before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing. For the avoidance of doubt, he confirmed that the Defendant has not paid in full or at all, the amount which is stated in the court warrants. In his view therefore, it is evident that there has been collusion between the Defendant and the Objector to illegally defeat the execution process through willful misrepresentation and/or non-disclosure of material facts and is undeserving of the order sought in its application.

45. The application was also canvassed by way of written submissions. However, only the Objector filed written submissions dated 22nd September 2020 and supplementary submissions dated 11th March 2021.

46. In the Objector's written submissions dated 22nd September 2020, it came up with three issues for the court's consideration which it submitted on as follows:

I. Whether the Notice of Proclamation dated 21st July, 2020 and the consequent process of attachment is legally incompetent

47. The Objector reiterated that the Notice of Proclamation dated 21st July, 2020 and the whole process of attachment emanating therefrom are not only legally incompetent but unlawful. It submitted that the impugned Notice of Proclamation contains vague and ambiguous description as the Auctioneer applies such terms as assorted and any other movable property. It noted that some of the items such as computers are not even identified as to how many they were. Critically, 90% of the proclaimed goods are not valued. It contended that the Auctioneer casually indicated *"to be valued"* under the valuation section contrary to the provisions of **Order 22 Rule 8** of the **Civil Procedure Rules** and **Rule 12** of **the Auctioneers Rules, 1997.**

48. The Objector submitted that several Courts have frowned upon vague, ambiguous and generic notices of proclamation. It relied on several cases where notices of proclamation and the consequential attachment were found to be invalid in view of ambiguity. These are: **Hasmukh Sumaria & 6 Others v Gut Ventures Limited [2006] eKLR, Hughes Limited v Mohammed S Kassam [2008] eKLR, Channan Agricultural Contractors Kenya Ltd v Rosemary Nanjala Oyula & 2 others (2013) eKLR**, and **African Merchant Assurance Co. Ltd v Hezron Getuma Onsongo [2019] eKLR**.

49. The Objector further reiterated that the Auctioneer acted unlawfully in attaching the Objector's goods that were never proclaimed in the first place. It contended that the Auctioneer cannot hide in the ambiguity of the notice of proclamation such as "*any other movable property of the JD*" to justify attachment of equipment capable of specific proclamation but were never specifically proclaimed. In support of this submission, it relied on the case of **Channan Agricultural Contractors Kenya Ltd v Rosemary Nanjala Oyula & 2 Others (supra)** where the Court held that an auctioneer cannot proclaim "*any other movable property of the JD"* without adherence to Rule 12 of the Auctioneer Rules. It also relied on the case of **Otieno Yogo & Co. Advocates v Chrisantus Oketch [2015] eKLR**.

50. Finally, it reiterated that an Auctioneer has an obligation of investigating the ownership of the goods proclaimed before attaching them. It argued that failure to do so not only amounts to a dereliction of statutory duty but also mars the whole process of proclamation and attachment rendering it invalid.

II. Whether the Objector has legal and/or equitable interest in the equipment (the subject matter of the attachment).

51. The Objector submitted that in the event this Court was to arrive at the unlikely finding that the Notice of Proclamation dated 21st July, 2020 and the process of attachment thereof can withstand the legal test of validity, under **Order 22 Rule 51** of the **Civil Procedure Rules 2010**, an objector is supposed to demonstrate that they have a legal and/or equitable interest in the property to be attached. It was submitted that the sale agreement and payment of the consideration thereof, coupled with the searches of the motor vehicles demonstrating transfer of the said motor vehicles from the Defendant to the Objector establishes legal interest on the part of the Objector. As such, the proclaimed motor vehicles cannot be attached in satisfaction of the Plaintiff's Decree. In support of this submission, the Objector relied on the case of **Akiba Bank Limited v Jetha & Sons Limited [2005] eKLR.**

52. As regards non-registrable items in the impugned notice of proclamation, the Objector submitted that Courts have been clear that an Objector is only required to demonstrate ability to pay in the form of payment receipt. On this, it relied on the case of **Japser Tech Enterprises Ltd v Joseph Mathai Ndungu & Another (2006) eKLR**.The Objector maintained that it duly paid for the said goods and has herein attached a receipt for the same and in the absence of any evidence that can defeat this transaction, the Court ought to find in favour of the Objector.

53. With respect to Link Belt Crane KAJ 589L, Prime Mover KBU 413R & 412R and Telehandler KHMA 821B which had been specifically proclaimed but had not yet been transferred into the name of the Objector, it maintained that it retains an equitable interest in the same pursuant to the aforementioned Agreement and payment of consideration. Reliance was placed on the case of **East & Central Africa Enterprises Limited & Another v Dorcas Wairimu Ndirangu & 2 others (2020) eKLR**

III. Whether the Objector is entitled to the Orders sought

54. On this, the Objector also echoed its previous averments and stated that it has accordingly demonstrated that it is deserving of the orders sought in its Application. It urged the court to breathe life into its right to property in the equipment purported to be attached by finding that the Objection is merited and allow the same with Costs.

55. In its in supplementary submissions dated 11th March 2021, the Objector stated that none of the listed motor vehicles were subject of the Plaintiff's Notice of Proclamation dated 21st July 2020 and thus they were illegally and wrongfully attached. It was argued that the motor vehicles listed in the letters marked PS-1 and PS-2 exchanged between the Plaintiff and NTSA do not appear in aforesaid Notice of Proclamation. It took issues with the Plaintiff attaching Motor Vehicles KBU 678J and KBQ 722L despite confirming that the same had been transferred prior to the notice of proclamation. It also urged the court to ignore the Plaintiff's allegation that there was collusion between the Objector and the Defendant to defeat execution. Finally, it submitted that that the attachment of all the subject motor vehicles is not only unlawful and wrongful but is also tantamount to conversion.

Analysis and Determination

56. I have considered the two applications filed by the Defendant and the Objector herein, the various responses to the same filed by the Plaintiff, the submissions made by the parties and the authorities relied on. I will begin by considering the Defendant's application as the court's finding thereon will determine the course of the Objector's Application.

57. The only issue for determination in the Defendant's application is whether the Defendant has established a proper basis to warrant the setting aside of the default judgment?

58. A default interlocutory judgment may be set aside under **Order 10 Rule 11** of the **Civil Procedure Rules** which stipulates 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."***

59. A reading of the above provision shows that the court's discretion to set aside or vary an ex parte judgment entered in default of appearance or defence is intended to be exercised to avoid injustice. In the case of **Patel v 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."***

60. In the case of **Philip Kiptoo Chemwolo & Mumias Sugar Company Ltd v Augustine Kubende [1986] eKLR,** the court posited 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"***

61. In **Shah v Mbogo [1967] EA 116,** the Court stated that:

> ***"The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".***

62. In the instant case, the Defendant does not deny that it was served with Summons to Enter Appearance. This means that the ex parte default judgment sought to be set aside is a regular one and can only be set aside through the exercise of this court's discretion and not as a matter of right. The exercise of the court's discretion under these circumstances is guided by a consideration of several factors which include the reason or explanation given for failure to enter appearance or file a defence within the stipulated period; the length of time that had passed since the default judgment was entered; whether the Defendant's intended defence raises triable issues and the prejudice each party is likely to suffer. *In* **James Kanyiita Nderitu & Another v Marios Philotas Ghikes & Another [2016] eKLR,** the court stated thus:

> ***"In a regular default judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he failed to enter appearance or to file a Defence, resulting in default judgment. Such a Defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules to move to 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 to the reason as 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 interests of justice to set aside the default judgment."***

63. The court will therefore have to consider each of the conditions set out above. First is to consider whether the Defendant proffered plausible reasons for the failure to file a Defence within the period prescribed by law. The Defendant claims that it did not file a Defence since the Plaintiff only served them with Summons to Enter Appearance. The Plaintiff refuted this claim noting that on 16th January 2020, Titus Munyao Nyenge, a duly licensed court Process Server acting on its instructions, effected service of the Summons to Enter Appearance as well as Plaint, Plaintiff's List of Witnesses, List of Documents and witness statement upon the Defendant herein, who acknowledged receipt of the same through one of its officers by the name Mr. Lewis Mukuzi.

64. I note that the Defendant did not controvert the Plaintiff's averments above. I have also confirmed that there is on record a return of Service sworn by the said Titus Munyao Nyenge showing that the Defendant was duly served with the documents indicated above on 16th January 2020.

65. The Defendant also blamed the failure to file its Defence within the required time on its previous Counsel claiming that it was a mistake of counsel which ought not to be visited upon it. I find this to be a flimsy excuse because no evidence has been placed before this court to show the tangible steps taken by the Defendant in following up his matter or that the said Advocates failed to file a Defence despite its instructions to do so. Indeed, it is well settled that a case belongs to a litigant and not his or her advocates and thus it is upon the litigant to be vigilant and proactive so as to ensure that his or her case progresses well. This reason is therefore not plausible.

66. Next is to consider whether the Defendant's draft Defence raises triable issues. I have perused the annexed draft Defence and I note that the Defendant avers that the Gas Extension Project in Rwanda in which it sub-contracted the Plaintiff was stopped by Kivuwatt Limited, the employer. It also avers that the invoices sent to it by the Plaintiff were subject to confirmation of the contract which never materialized. In my view, these are triable issues which require a determination on merit.

67. Finally, as regards the length of time that had lapsed since the default judgment was entered, I note that the default judgment was entered on 19th June 2020 and this application was filed on 28th July 2020. That is a period of one month and nine days which is fairly short.

68. In totality, I find that it is in the interest of justice that the interlocutory judgment entered herein against the Defendant be set aside and the parties be given an opportunity to ventilate their issues in a full trial. Having found so, it will be unnecessary and a mere academic exercise to delve into the merits or otherwise of the Objector's application. Nevertheless, emphasis is that no attachment/proclamation or execution of the judgment can proceed, having found that the Defendant should be accorded an opportunity to defend the suit.

Deposition

69. In the upshot, I make the following Orders:

i. The Defendant's application dated 28th July 2020 is hereby allowed in the following terms:

> ***a. The default interlocutory judgment entered herein on 19th June, 2020 and all consequential orders is hereby set aside***
>
> ***b. The Defendant shall file and serve its Statement of Defence and all accompanying documents within TWENTY ONE (21) days from the date of this Ruling.***
>
> ***c. In default of compliance with order (b) above, the order vacating the interlocutory judgment shall automatically lapse without further reference to the Court.***
>
> ***d. The Defendant shall pay the Plaintiff throw away costs of Kshs. 30,000/= within 14 days of this ruling.***

ii. The Objectors application dated 12th August, 2020 is allowed and the costs of the same shall be borne by the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 8TH JULY, 2021.

GW.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Ms Wangari h/b for Mr Wandati for the Plaintiff.*

2. *No appearance for Mr.Mwangor the for the Objector.*

3. *No appearance for M/s Kitoo & Associates for the Defendant***.**