REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E 031 OF 2020

SENDY KENYA FREIGHT LIMITED.....PLAINTIFF

-VERSUS-

MULTIPLE SOLUTIONS LIMITED.....DEFENDANT

RULING

1. There are to applications which should be determined; the one filed by the Defendant and is dated **18th March, 2021** and the other which has been filed by the Plaintiff and is dated **6th April, 2021**. The common features in both applications are that, they are both by way of **Notice of Motion** and are seeking to test the veracity of the statement of defence filed on **10th February, 2021**. I shall refer to the first application as "the Defendant's application while the second one will be referred to as "the Plaintiff's application".

2. The Defendant's application is expressed to be brought under **Order 10 Rule 11 of the Civil Procedure Rules, 2010** and **Section 3A** of the **Civil Procedure Act** and any other enabling provision of the law and is seeking for an order that the interlocutory Judgment entered as against the Defendant on **23rd February, 2021** be set aside and the statement of defence on record be deemed as duly filed and served on time.

3. The Plaintiff's application on the other hand seeks that an order be issued dismissing the statement of defence in the event that the interlocutory Judgment is set aside and a Judgment be entered against the Defendant for the sum of USD584,509.09 together with interests at court rates at 14% p.a as from **5th March, 2020**.

4. I wish to start with the Defendant's application for obvious reason that it is seeking the default Judgment set asisde and the statement of defence to be deemed as filed on time. The determination of the Plaintiff's application is dependent on the success of the Defendant's application and in the event that it fails then there would be no need of proceeding to the Plaintiff's application.

The Defendant's Application

5. The application is supported by the **affidavit** of its advocate on record, ***Chabi Brian Otieno*** and the grounds which are broadly cast on the face of the application being that, the Defendant filed a statement of defence on **9th February, 2021** but somehow the court registry staff did not place the same on record resulting into a default Judgment being entered against the Defendant on **23rd February, 2021**. He adds that the default Judgment was erroneously entered and on **11th March, 2021**, the Deputy Registrar acknowledged that the default Judgment was an oversight on part of the court. Nonetheless, the Deputy Registrar advised that the Defendant makes a formal application as in the nature now presented.

6. The Defendant amplified those grounds in their written submissions dated **26th April, 2021** and filed on **27th April 2021**. The Defendant submitted therein that the discretionary power of the court to set aside interlocutory Judgment is provided for under **Order 10 Rule 11** of the **Civil Procedure Rules** and should be exercised in favour of the Applicant to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However this discretion cannot be exercised in favour of an Applicant who has deliberately sought to obstruct or delay justice. These submissions have been buttressed by excerpts from the cases of **Philip Kiptoo Chemolo and Mumias Sugar Company-vs-Augustine Kubede (1982-1988)KAR**, **Shah –vs- Mbogo (1967) E.A 116** and **Pithon Waweru Maina-vs-Thuka Mugiria (1982-1988) 1 KAR 171.**

7. The Plaintiff has opposed the application and in doing so filed a **Replying Affidavit** on **7th April, 2021** sworn on **6th April, 2021** by its Vice President, **Nyambura Karita.** Her view is that the statement of defence can only be deemed as properly on record once it bears a court stamp and the requisite court fees having been made. However, since the defence had not been stamped at the time the interlocutory Judgment was entered, the Defendant was rightly considered as not having filed a statement of defence to the claim. It is further argued that

the default Judgment cannot be considered as irregular since the Defendant was rightly served with summons and therefore it can only be considered regular before considering whether there was an extrinsic factor to make it unprocedural. Lastly, it is argued that the inordinate delay of 21 days has not been explained and this would prejudice the Plaintiff. here reliance is placed on the cases of **East Africa Cables Limited –vs- Central Cables Limited (2019) eKLR**, **Jackuelyn Rita Wairumu –vs- Daso Des Limited University of Robi (2004) eKLR**.

Analysis and Determination of the Defendant's Application

8. I have considered the application fully and the written submissions as filed by both parties. This is an application for setting aside an interlocutory Judgment on the grounds that the same was entered on ground of mistake and inadvertence on part of the court. In my view, the only issue for determination therefore is *whether given the state of affairs this court set aside the ex-parte Judgment or better still whether the Defendant has made a case for setting aside the default Judgment*.

9. The jurisdiction of the court to set aside ex-parte Judgment for default of appearance and defence is provided for under **Order 10 Rule 11** of the **Civil Procedure Rules, 2010,** which provides:

> "**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.**"

10. The Court of Appeal in addressing the circumstances under which an ex-parte Judgment could be set aside stated in the case of **Gicharu Kimani & Associates Advocates –vs- Samwel Kazungu Kambi [2020] eKLR** as follows:-

> **"Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that its within the ambit of the guiding principles laid down in the case of James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015 eKLR (Msa), the Court of Appeal stated as follows:**
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> **"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 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})'. In an irregular default Judgment, on the other hand, Judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default judgement on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v Attorney General {1986-1989 1EA 456})"** (underlined emphasis added).

11. The argument that has been brought forth in the instant case, is that the exparte Judgment was entered into advertently by the court and failure by the court registry to place the defence on record on time. In this case, the Defendant is therefore not alleging that the exparte Judgment is irregular, but although the same was regularly entered by oversight in the part of the court and should therefore be set aside.

12. The court record reflects that the Defendant filed its defence on **10th February, 2021** while the interlocutory Judgment was entered on **23rd February, 2021,** way after the defence was filed. The Deputy Registrar further acknowledged that the interlocutory Judgment was entered as a failure of the court registry failing to file the Defendants document and as such the default Judgment was entered into on inadvertence of the court.

13. This court is therefore persuaded that the default Judgment was entered not because of indolence on the part of the Defendant but by a mistake on the court registry official thus the same should be set aside and the Defendant granted leave to defend its suit and avoid further injustice resulting from inadvertent error on part of the court.

14. In the upshot, the Defendant's application dated the **18th March, 2021** is merited and the same is hereby allowed as follow:-

> **a. The interlocutory Judgment entered herein on 23rd February, *2021 against Defendant and the subsequent and consequential orders and proceedings therefrom be and are hereby set aside.***
>
> **b. That the statement of defence filed on 10th February is hereby deemed as fully file and the same to served upon the**

Plaintiff with 7days from the date hereof.

c. The Plaintiff is directed to fix a mention date thereafter from the court registry to confirm compliance with pre-trial directions as provided for under Order 11 of the Civil Procedure Rules.

d. That the costs of the second application shall be in the main cause.

The Plaintiff's Application

15. The application seeks for an order to strike out the statement of Defence for being frivolous, vexatious and otherwise, an abuse of the court process. Also, that Judgment be entered against the Defendant for USD584,509.09 together with interests at court rates of 14% P.a from **5th March, 2020**.

16. The application is also supported by a**ffidavit** of **Nyambura Karita** and among other grounds that the statement of defence contains only mere denials that there was no contract between the Plaintiff and the Defendant yet there exist emails between the parties discussing the terms of the contract. Further that the emails shows that the Defendant knew of the existence of the Plaintiff contrary to the mere denial by the Defendant. That it is not true that the contract between the parties was frustrated by the by Covid-19 since the services which the Plaintiff seeks payment for were delivered before the 1st Covid case was reported in Kenya. Based on those grounds, the Plaintiff avers that it would be in the interest of justice the statement of defence be struck out and the Plaintiff be allowed to enjoy fruits of its Judgment.

17. In its submissions, the Plaintiff described the defence as a sham since there are materials to show that the Plaintiff rendered service to the Defendant but no payments were ever done. As such, the defence does not show any triable issue since the Defendant cannot deny the Plaintiff's existence given that the invoices issued by the Plaintiff were ultimately signed and stamped by the Defendant. On this, the Plaintiff relied on the case of **Samuel Mureithi Murioki & another –vs- Kamahuha limited [2018] eKLR.**

18. The Defendant opposed the application through a **Replying Affidavit** sworn by its **General Manager Operation and Customer Relations, *Clive Critchlow*** on **19th April, 2021**. He deponed that the application made by the Plaintiff is in bad faith because it seeks to deprive the Defendant its right to be heard as set out under **Article 50** of the **Constitution** and it would be a technicality to strike out the statement of defence. Lastly, the Defendant argued that interest of justice tilts in allowing the Defendant audience to ventilate its defence.

19. These grounds were further explicated in the submissions filed on **27th April, 2021**, where it was submitted that instances in which a court can strike out pleadings is captured in **Order 2 Rule 25** of the **Civil Procedure Rules**, which provides that a court can strike out pleadings only when they fail to disclose any reasonable cause of action or defence in law, or when the pleadings are scandalous, frivolous and vexatious. It is argued that the defence herein is not frivolous nor does it consists mere denials but rather raises issues of law which can only be addressed upon adduction of further evidence. In the Defendant's view, a pleading cannot be dismissed even when it discloses only one arguable issue.

20. The submissions were buttressed by a plethora of judicial precedents including the cases of **Mercy Nduta Mwangi Kengara & Co. Advocates –vs- Invesco Assurance Company Limited [2019] eKLR, Co-operative Merchant Bank Ltd –vs- George Fredrick Wekesa, Civil Appeal No.54 of 1999, Beatrice Wanjiku Muhoho –vs- Hon. Attorney General [2012]eKLR** and **Bob Martin Omondi –vs- Lona Olilo [2020] eKLR.**

Determination of the Plaintiff's Application

21. I have carefully considered the application, the Supporting Affidavit and the Replying Affidavit filed herein by the parties. I have also considered the various submissions made and the authorities cited. The Motion is expressed to be brought under **Order 2 rule 15** of the **Civil Procedure Rules** which deals with striking out of pleadings and it provides as follows;

"15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be."

22. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of **Blue Shield Insurance Company Ltd –vs- Joseph Mboya Oguttu [2009]eKLR** restated these principle thus:

"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his Judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant,

he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

> **"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."**

We too would not express our opinion on certain aspects of the matter before us. In that Judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

> **"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."**
>
> **We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the Judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."**

23. The same sentiments were echoed by **Danckwerts L.J** when the House of Lords considered a similar matter in the case of **WENLOCK V MOLONEY, [1965] 2 All E.R 871 at page 874**, as follows:

> **"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."**

24. Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that that a Plaintiff should not be kept away from his Judgment by unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR).**

25. A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defence does not indeed comprise of mere denials. Whereas the Plaintiff alleged that the Defendant merely denied the existence of the contract between them despite the existence of emails discussing the terms of the contract, the Defendant alleged that that the purported contract was frustrated and could not be performed owing to Covid-19 Pandemic. The Plaintiff on the other hand stated that the services it is demanding payment for were rendered before the Covid 19 cases were reported in Kenya hence the Defendant is merely denying its responsibilities to pay the amount claimed.

26. In my view these issues can only be determined after evidence is adduced by both parties. Where there is any single triable issue, the matter ought to go to full hearing. It would be unfair therefore to condemn the defendant without hearing its side of the story. This will give both parties a chance to present their respective cases and exercise their right to be heard.

27. In the upshot, I find that no basis has been made for the prayer to striking out the defence being granted. Accordingly, the **Notice of Motion** dated **6th April, 2021** fails and the same is hereby dismissed. The costs of this application to abide the outcome of the suit after full trial.

It is hereby so ordered.

SIGNED and **DATED** at **MOMBASA** this **14th** day of **JULY, 2021**.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF JULY, 2021

A. ONG'INJO

JUDGE

In the presence of:

Mr. Kongere advocate for Plaintiff

M/S Ndiro & Associates advocates for Defendants