REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 33 OF 2020

AGENCE FRANCE-PRESSE.....PLAINTIFF/RESPONDENT

VERSUS

EZIOK WUBUNDU OKOH.....DEFENDANT/APPLICANT

RULING

The Notice of Motion dated 23rd February, 2021 seeks the following orders:-

> **1. THAT this Honourable Court grants leave to the firm of M/s Lucy & Masomi Associates/Advocates to come on record for the Defendant/Applicant.**
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> **2. THAT pending hearing and determination of this Application *inter-partes* this Honourable Court be pleased to review, vacate and/or set aside the judgment and decree entered on 19th October 2020 for the Plaintiff against the Defendant.**
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> ***3.* THAT a stay of execution and implementation of the order and/or decree of the court delivered on 19th October 2020 be and is hereby granted pending the hearing and determination of this application *inter partes.***
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> **4. THAT this Honourable Court be pleased to grant the Defendant leave to file her Statement of Defence and defend the suit out of time as per the Draft Statement of Defence annexed to this application.**
>
> **5. THAT Cost of the Application be provided for.**

The application is supported by the applicant's affidavit sworn on the same date. The respondent filed a replying affidavit sworn on 8th March, 2021 by Francois Ausseill. Parties agreed to determine the application by way of written submissions.

The applicant concede that summons were served upon her on 10th March, 2020. She forwarded the summons to her advocates, M/s Okach & Company Advocates and instructed them to enter appearance and file a defence. It is submitted that the applicant became aware that a default judgment had been entered when auctioneers visited her residence on 16th February 2021 intending to proclaim her property. This has made it necessary to seek the prayers for stay of execution and setting aside the judgment. Counsel submit that the application has been made without undue delay as it was filed soon after the auctioneers visited the applicant. It is further argued that contrary to the provisions of Order 22 Rule 6 of the Civil Procedure Rules which requires the issuance of a ten days' notice informing the defendant about the entry of judgment, no such notice was issued.

Counsel for the applicant further submit that the applicant will suffer substantial loss. The plaintiff intends to proclaim the defendant's properties to the extent of Kshs.27,604,220/-. The applicant is unemployed and depend on her husband. It is also argued that since the applicant intends to defend the suit and the current application is not one seeking orders of stay of execution pending appeal, there is no requirement for the provision of security.

Counsel for the applicant contend that the draft defence raises triable issues. The defendant vehemently denies that she made part payment to the tune of Kshs.600,000 for the claimed amount. It is also denied that the defendant defrauded the plaintiff. Counsel referred to the case of **PATEL –V- E.A. CARGO HANDLING SERVICES LTD (1974) E. A 75** where the court stated:-

> **"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."**

It is further urged that the mistakes of counsel should not be visited on an innocent litigant. Counsel relies on the case of **PETER KIPYEGON KIRUI V. AGRICULTURAL DEVELOPMENT CO-OPERATION & 2 OTHERS (2007) eKLR** where it was stated:-

> **"……..I say so because even if an advocate had erred due to laxity, negligence or sheer laxity, the court would not be giving an indulgence to such an advocate, if it should decide not to visit such a mistake on the client. In my considered view, there cannot be an absolute bar to the court exercising its discretion favourably simply because the advocate acting for a party had been lax, negligent or careless when he made a mistake."**

The application is opposed. It is submitted that the judgment was obtained regularly and the court's discretion to set aside the judgment should not be exercised in favour of the applicant. Counsel relies on the case of **PITHON WAWERU MAINA –V- THUKU MUGIRIA (1980) eKLR** where Kneller J.A. (as he then was) observed:-

> **"The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.**
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> **The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.**
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> **This 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.**
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> **The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "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 also submitted that the applicant has not denied service of summons to enter appearance and the plaint. The Deputy Registrar duly entered the judgment after a request for judgment was made almost six months later after the defendant was served with the summons.

Counsel for the plaintiff/respondent further contend that the applicant did acknowledge her indebtedness to the plaintiff. On 30th April, 2016 she freely executed a Deed of settlement and made part payment of Kshs.900,000. Since then she failed to make any further payments. Upon being served with the summons the defendant never made any enquiries with her advocate for a period of six months. Counsel urged the court to condemn the applicant to pay throw away costs should the application be granted.

The application herein seeks to set aside a default judgment. Once that request is granted, the prayers for stay of execution will be subsumed in those orders setting aside the judgment. The applicant does concede that she was properly served with the summons and passed them over to her advocates who failed to enter appearance and file defence. Some of the grounds upon which the application is made is that the Deputy Registrar, Hon. L.A. Mumasaba lacked the requisite jurisdiction to hear and determine the matter. The claim is for 119,400 Euros, 17,438 U.S.Dollars and Kshs.6,800,544/42 which amount is beyond the Deputy Registrar's jurisdiction.

The plaint dated 5th December, 2019 seeks a grand total sum of Kshs.22,604,220/42. The defendant was duly served with summons on 10th March, 2020 as per the affidavit of service of Dennis Ignatius Omwancha, a court process server. Order 10 Rule 4 of the Civil Procedure Rules 2010 states as follows:-

> **"(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**
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> **(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form**

The plaintiff's request for judgment was done via a letter dated 20th August, 2020 addressed to the Deputy Registrar. The request does not indicate the amount of money claimed in the plaint and is a slight variation to form Number 13 of Appendix A of the Civil Procedure Rules which form indicate how a request for judgment has to be made. The letter simply indicate that what is requested is as per the plaint. Although this is not an issue raised by the applicant, counsel for the plaintiff ought to have used the proper format provided by the Civil Procedure Rules.

With regard to the issue of the jurisdiction of the Deputy Registrar to enter the judgment, I do find that the Deputy Registrar had the requisite administrative powers to enter the judgment as requested by Counsel for the plaintiff. The Deputy Registrar did not hear and determine the matter as claimed by the applicant. The registrar simply exercised her administrative role to enter the judgment since the defendant had failed to respond to the summons despite having been duly served. The summons were issued by the same Deputy Registrar on 17th November, 2020. The summons partly read:-

> **"Should you fail to enter appearance within the time mentioned above, the plaintiff may proceed with the suit and judgment may be given in your absence."**

There is no requirement that where the amount claimed in the plaint is above the pecuniary jurisdiction of the Deputy Registrar, then a request for judgment has to be handled by a Judge. The Deputy Registrar's jurisdiction in relation to entering default judgment is not limited. This is one unique aspect of the pecuniary jurisdiction of a Deputy Registrar. The other one involves taxation of Advocates' bills of costs which at times exceed the registrar's pecuniary jurisdiction. I am satisfied that the default judgment was properly entered.

The discretionary power of the court to set aside a default judgment is unlimited. In the case of **NJOROGE –V- PRESTIGE AIR SERVICES LTD (1991) KLR 447,** Wambilyangah J (as he then was) held as follows:-

> **1. There are no limits to the judge's exercise of discretion except that if he does vary the judgment he does so on terms that are just; the main concern of the court being to do justice to the parties and the court will not impose conditions on itself that will fetter its discretion.**
>
> **2. The discretion 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 person who deliberately seeks to obstruct or delay the course of justice.**
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> **3. In exercise the discretion, the court should consider the nature of the action, the defence, however irregularly it may have been brought to the notice of the court and the question of whether the plaintiff can be reasonably compensated by costs for to deny a subject a hearing should be the last resort of the court.**

Similarly, in the case of **MACAULEY –V- DE BOER & ANOTHER (2002) 2 KLR 260, Onyancha J** (as he then was) held as follows:-

> **"1. The High Court has inherent power and discretion to set aside an *ex-parte* judgment after deciding that the circumstances of the case before it are such that it would be in the interest of justice that such a judgment should be set aside.**
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> **2. The court in deciding whether to set aside a judgment will take into consideration the following factors:-**
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> **a) the reasons why the defaulting party failed to file defence within the prescribed time,**
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> **b) whether or not the applicant's application was filed without delay;**
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> **c) whether or not the applicant's application has prima facie a good defence;**
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> **d) whether or not the applicant has generally acted diligently**
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> **e) whether or not the granting of the prayer to set aside would be easily compensated in costs and that it would, considering all circumstances of the case, be to the ends of justice to exercise the court's discretion in favour of the applicant; and**
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> **f) every case will be considered in the context of its own circumstances and no two cases may easily be exactly the same.**

The plaintiff contends in its plaint that the defendant was its employee. The amount being claimed arose out of the employer/employee relationship. The applicant submit that she has a good defence and annexed a copy of the proposed defence. She denies that she agreed to pay the claimed amount and that she made part payment towards settling the debt.

Given the nature of the dispute and the amount of money involved, I do find that it would be prudent to exercise the court's discretion in favour of the applicant. There is need to have the dispute determined on its own merit. Although the applicant's explanation that she passed over the summons to her advocates may be weak since there is no evidence that the applicant did a follow up with the said advocates, I am still convinced that the interest of justice will be served if the default judgment is set aside and the applicant accorded an opportunity to defend the plaintiff's claim.

I do find that the application dated 23rd February, 2021 is merited and the same is hereby granted as prayed. The applicant to file and serve her defence within fourteen (14) days hereof. In view of the fact that the applicant was duly served with the summons, I do order that she meets the plaintiff's costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021

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S. J. CHITEMBWE

JUDGE