



REPUBLIC OF KENYA



**Dhir Holdings Ltd v Peter Kibiru Mbugua t/a Pelu Enterprises (Civil Case E060 of 2020)
[2021] KEHC 108 (KLR) (Commercial and Tax) (16 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E060 OF 2020
MW MUIGAI, J
SEPTEMBER 16, 2021**

BETWEEN

DHIR HOLDINGS LTD PLAINTIFF

AND

PETER KIBIRU MBUGUA T/A PELU ENTERPRISES DEFENDANT

RULING

APPLICATION OF 17TH AUGUST 2020

1. The Judgment/Debtor sought under the Certificate of Urgency, the Court to set aside the exparte interlocutory judgment entered against Judgment/debtor and to be granted leave to file Statement of Defense.
2. The Applicant deposed that the Decree holder's agents M/S Next Gen Auctioneers proclaimed the Applicant's properties, motor vehicles and assorted materials and equipment as shown in the Proclamation marked PKM 1.
3. The Applicant deposed that he received the Proclamation on 22nd July 2020 and visited his advocates and on enquiry he found out that judgment was entered against him of Ksh 48,710,505/-
The suit was filed against him on 20th February 2020 and Interlocutory judgment was entered on 5th June 2020 against an Affidavit of Service filed by Joseph Munyiri sworn of 2nd June 2020 and thereafter judgment was entered for Ksh 36,888,847.18/- with Interest & Costs.
4. The Applicant deposed that he was unaware of the suit and he was not served with Plaint and Summons to Ener Appearance as deposed in the Affidavit of Service.



5. The Applicant deposed that if served at his place of work /business, then there is likelihood that a person not authorized to receive Court Documents might have received them on his behalf without his knowledge.
6. If the Decree-holder proceeds to attach and sell the attached properties, the Applicant shall suffer irreparable damage and it would be prejudicial and unfair to be condemned unheard.
7. The Applicant sought that he is granted leave to file Statement of Defense out of time.

REPLYING AFFIDAVIT

The Decree holder /Respondent Dilip Naran Patel opposed the Application on the following Grounds;

8. The Judgment was as a result of service of Court process through Joseph Munyiri on 9th March 2020 at 12 noon as per the Affidavit of Service annexed to the Replying Affidavit marked DNP1.
9. The plaintiff failed to enter appearance within the statutory timelines and on 2nd June 2020, his Advocates requested for entry of Interlocutory judgment as per annexed letter marked DNP2. Which was granted on 5th June 2020.
10. On 18th June 2020, the Advocates caused Notice of Entry of Judgment and Intention to execute marked DNP 3.
11. The Decree-holder annexed and reiterated content in the Plaint and documents annexed which include;
 - a. Credit Application Form & Personal Guarantee dated 1st December 2016 duly signed by the Defendant annexed as DNP 5
 - b. Sale & Supply of Goods Contract (not annexed or supplied to Court) the Plaintiff Company agreed to supply the Defendant building cement and delivered the said cement between 2nd October 2018-17th October 2018 annexed are DNP 6 the copies of Invoices, Delivery Notes & LPOs.
 - c. The Judgment Debtor defaulted and failed to pay for the goods supplied and delivered and postdated cheques bounced due to insufficient funds as shown by DNP7.
 - d. The Judgment Debtor made commitment to settle the outstanding debt as shown by Annexure DNP 8.
 - e. In April 2019, the Judgment Debtor agreed to settle the amount by providing transport services and paying Ksh 500,000/- for 3 years and the same proposal failed. As shown by Annexures DNP 9 & 10.

SUBMISSIONS

12. The Plaintiff submitted that The Defendant was duly served with Plaint & Summons to Enter Appearance as evidenced by the Affidavit of Service filed in Court and therefore the Interlocutory judgment of 5th June 2020 is a regular judgment.
13. The Plaintiff further submitted that setting aside Court orders/judgment/Ruling is provided for by Order 10 Rule 11 CPR 2020; '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'.
14. With Reference to the Defendant's Statement of Defense, the Plaintiff/Respondent relied on the following case-law to buttress the point that the Statement of Defense by the Applicant does not raise



triable issues for hearing & determination; HCCC 79 of 2013 *Saudi Arabia Airlines Corporation vs Premium Petroleum Co Ltd* cited in *Ecobank Kenya Ltd vs Bobbin Ltd & 2 Others* [2014] eKLR & *Equatorial Commercial Bank Ltd vs Jodam Eng Works Ltd & 2 Others* [2014] eKLR in which the Courts considered grounds to set aside judgment and observed; ‘A statement of Defense is said to be reasonable Defense if that Defense raises prima facie triable issue....’

15. The Applicant submitted sought to be heard and not condemned unheard by seeking leave out of time to file Defense which raises triable issues for hearing and determination.
16. The Applicant alleged that the oral contract between him and Plaintiff was to market and get the Plaintiff clients to buy cement from the Plaintiff and he was paid fees. In 2017, he introduced customers who collected cement worth Ksh 70,000,000/- and defaulted. To maintain cordial business relations, the Applicant agreed on repayment of the amount from 2017-March 2020 and was sued for the balance. The applicant alleges that he paid Ksh 38,000,000/- that the plaintiff did not disclose.
17. The Applicant contests service of Court process and relies on *James Kanyiitta Nderitu & Anor* [2016] eKLR
18. The Applicant sought that the Court exercises judicial discretion in its favor and relies on *Patel vs EA Cargo Handling Services Ltd* (1974) E.A 75 which held; ‘there are no limits or restriction on the Judge’s discretion to set aside or vary an exparte judgment except that if he does vary the judgment he does so on terms that maybe just.’
19. The Applicant relied on *Butt vs Rent Restriction Tribunal* (1982) KLR to pursue stay of execution of the decree and Interlocutory exparte judgment.
20. The Applicant sought fair hearing under Article 47, 50 & 159 of CoK 2010 and not be condemned unheard. Reliance was placed on the following case-law; *Sebel District Administration vs Gayali & Others* (1968) EA 300; *Richard Murigu Wamai Vs Ag & Anor* [2018] & *Mungai vs Gachuhi & Anor* [2005] eKLR

DETERMINATION

After considering the pleadings and submissions the issues for determination are;

1. Whether the exparte Interlocutory judgment of 5th June 2020 was/is a regular judgment?
 2. Whether the Defendant’s Defense raises triable issues for hearing & determination?
- 21 The Plaintiff annexed to the Replying Affidavit & the Affidavit of Service that confirms that the Process Server visited the Defendant’s business premises and served the Defendant personally. This Court has gleaned at the Delivery Notes which show delivery of cement to Pelu Enterprises, so the Process Server knew and went to the Defendant’s business premises and effected service to the Defendant and no one else. If it was any one else the Defendant would have deposed that he obtained Court Process from his employee or agent which he did not. The mere denial of non -service of Court process against evidence from documents annexed to the Plaintiff’s pleadings that show delivery made to Pelu Enterprises must fail in light of compelling evidence on record. The service of Court process was proper and a Regular judgment was entered on the Court record.



- 22 In the case of *James Kanyita Nderitu & Hellen Njeri Nderitu vs Marios Philotas Ghikas & Mohammed Swaleh Athman* C.A. No 6 of 2015, the Court of Appeal considered regular and irregular judgments 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 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. E.A. 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 judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue 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.

- 23 The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

On whether, the Defense raises triable issues this Court finds as follows;

- a. The Plaintiff annexed copies of Invoices Delivery Notes & Local Purchase Orders and Statement of Account of Pelu Enterprises; The Court was not shown the Contract between the parties on agreement for The Defendant to order cement and upon delivery make payment of the same.



- b. The Defendant's version as alleged is not of purchase of cement from the Plaintiff but of rendering marketing services and introducing customers to him. It is further alleged that the cement was delivered to other unnamed customers who defaulted and the Defendant agreed to make repayments of the debt. Without the contract between parties, this Court cannot conclusively find that there was a contract for purchase/sale of cement between the parties.
- c. Of the annexed documents, there are some on the Letterhead of Mombasa Cement Co. Ltd and not the Plaintiff Company. Mombasa Cement Co Ltd is not party to these proceedings and its involvement or nexus is not explained.

24 All these matters raise triable issues for hearing and determination of the suit. Therefore, despite the Court's finding that Service of Court Process was legal and proper and hence a regular judgment was entered, due to the contested issues, the Court shall set aside the said judgment so as to allow the hearing and determination as follows;

DISPOSITION

1. Interlocutory judgment entered on 5th June 2020 is hereby set aside and all consequential orders on condition the Defendant pays Ksh 1,000,000/- within 120 days from 16th September 2021 into a joint account held by the Advocates for the Plaintiff & Defendant on record.
2. Thereafter, the Defendant shall file and serve the Statement of Defense and Plaintiff file Reply to Defense within the requisite period.
3. After close of pleadings, the matter shall be placed before Incoming Judge for directions on way forward.

Each Party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MUDANYA FOR APPLICANT-PRESENT

MARANGA FOR RESPONDENT- PRESENT

COURT CLERK -TUPET

MUDANYA: We wish to have Copy of the Ruling.

COURT: After corrections the Ruling shall be availed on 20th September 2021 upon payment of requisite Fees.

