Civicon Limited v East Africa Portland Cement Company Limited (Civil Case E279 of 2019) [2021] KEHC 208 (KLR) (Commercial and Tax) (5 November 2021) (Ruling)

Neutral citation: [2021] KEHC 208 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E279 OF 2019

MW MUIGAI, J

NOVEMBER 5, 2021

BETWEEN

CIVICON LIMITED ..... APPLICANT

AND

EAST AFRICA PORTLAND CEMENT COMPANY LIMITED .... RESPONDENT

RULING

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion Application dated 11th November 2019 for orders that; -

    a. The Court grants a temporary order of stay of execution of the ex parte judgment entered against the Defendant/Applicant on 23/10/2019, order, decree and all other subsequent proceedings or consequential orders issued or made herein pending the hearing and determination of this Application.

    b. The Court sets aside the ex parte judgment of this Court entered on 23/10/2019, order, decree and all other subsequent proceedings or consequential orders as well as all ex parte proceedings made or issued in default of appearance and defense by the Defendant/ Applicant.

    c. The Court orders that this matter be referred for arbitration pursuant to Clauses 67.1 and 67.9 of the contracts between the parties.

    d. The Court stays all the proceedings herein pending conclusion of the arbitration.

    e. The Court issues an order granting the Defendant/Applicant leave to defend the matter in arbitration.

f. The Court in the alternative to issue an order granting the Defendant/Applicant leave to enter appearance and file defense.

g. The Court makes such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met.

2. Which application is supported by the sworn affidavit of Sheila Kahuki dated 11th November 2019 and based on the grounds that;

1. An ex parte judgment in default of Appearance and defense was entered against the Defendant/Applicant by the Court on 23/10/2019.

2. The summons as well as initial court papers pertaining to this matter were served at a time when the Defendant/Applicant was undergoing serious restructuring which culminated in all employees being declared redundant and hence the lack of attention to this suit and other matters.

3. It is not clear how and upon whom the summons and initial court papers herein were served because all employees had been sent home and were in the process of applying afresh for available opportunities. The same could have been misplaced and thus could not be acted upon in good time owing to the fact the Defendant/Applicant has two (2) offices one in Athi River and the other one in Upper Hill Area of Nairobi.

4. The process of restructuring which had culminated in all employees being declared redundant and hence the apparent lack of attention to this suit and other matters could not have been foreseen but arose to the hard economic times being witnessed in Kenya.

5. The misplacement of the summons as well as initial court papers is a bona fide human mistake and consequently failure to enter appearance and file defense in good time on the part of the Defendant/Applicant was not deliberate and hence excusable.

6. The subject contract forming the basis of this dispute has an arbitration clause and would be prudent to enforce the same by having it referred for arbitration.

7. Kenyan public policy encourages the use of alternative dispute resolution mechanisms and in the disclosed circumstances, this matter should be referred for arbitration as envisaged in the parties' contract.

8. The Defendant/Applicant has a very good defense to the Plaintiffs/Respondent's claim, which it should be allowed to put across through full hearing and determination of this matter.

9. The Application has been brought for hearing and determination without any or any unreasonable delay soon after learning about the court case.

10. No prejudice will be occasioned to the Plaintiff/Respondent if this Application is allowed as it will still have an opportunity to prosecute the claim fully during the inter partes hearing of the matter.

11. On the other hand, if the Court is inclined not to allow this application, the Defendant/Applicant will be condemned to satisfy a colossal judgment amounting Kshs.67, 044, 061.96 together with costs and interest thereon without ever having had an opportunity to consider its defense as well as go through a hearing and hence will suffer great prejudice, harm and substantial loss.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Geoffrey Njue Muthee dated 17th February 2021 and stated;

    1. The Plaintiff instructed its advocates to institute this suit by filing a Plaint dated 29th August 2019 on 10th September 2019. Subsequently, the Summons to enter appearance, the Plaint, Plaintiffs list of witnesses, witness statement, and the Plaintiff's list and bundle of documents were served upon the Defendant on 23rd September 2019.

    2. The copy of the summons to enter appearance and the pleadings returned to this court by the process server bear the stamp of the Defendant which is a clear indication that they had been received at their offices.

    3. The Defendant has not disputed service of the said summons and pleadings. The Defendant failed to enter appearance and/or file a Defense within the prescribed time following which the Plaintiff requested for judgment on 9th October 2019.

    4. The Defendant attribute its failure to act upon the summons to enter appearance on a restructuring exercise. The Plaintiff should not be inconvenienced by the Defendant's internal affairs, their restructuring process or otherwise. The wheels of justice do not stop spinning at the convenience or whims of any party.

    5. The foregoing demonstrates that the ex parte judgment on record is lawful and regular which the court may set aside or vary upon such terms as are just; and the court may exercise its discretion if it is shown that a bona fide triable issue exists.

    6. The Defendant does not have any defense to the Plaintiff's suit because:

        a. On 17th July 2020, the Defendant's then Acting Head of Finance and Strategy wrote to the Plaintiff and made an offer to settle the amounts sought in the Plaint over a period not later than 31st December 2020. The proposal entailed payment of Kshs.3M per month as interim payment plan as the Defendant fundraised to settle the remainder. (Copy of the letter is at page 7).

        b. The Plaintiff responded to this proposal through an email on 14th October 2020 accepting the payment proposal without prejudice offer, a contract was concluded between the parties and the Plaintiff is entitled to give evidence of the contract and give evidence of the 'without prejudice' letter. (Copy of the correspondence at pages 2-3)

        c. The correspondences exchanged between the Plaintiff and the Defendant when this suit was still ponding is clear evidence that the Defendant not only acknowledged its indebtedness to the Plaintiff but made proposals to settle the debt. There is therefore no triable issue raised in the Defendant's draft defense and that its intended defense is a sham and should be rejected by the court.

        d. That the Defendant has never honored the terms of the proposal as the Plaintiff has never received any money from the Defendant.

    7. The court should not stay the proceedings in this matter and refer the matter to Arbitration because the Defendant entered unconditional appearance and filed the present application. In the premises, the Defendant did not comply with the provisions of Section 6 of the *Arbitration*

Act, for the reasons that, it did not file its application promptly, after entering appearance. The Defendant has therefore, acquiesced and already submitted to the jurisdiction of the Court.

8. The interest of justice would not be served in setting aside the judgement without security from the Defendant. Such setting aside should be conditional, upon the entire decretal sum now due being placed in an interest earning account in the joint names of the parties.

DEFENDANT/APPLICANT'S SUBMISSIONS

4. It was the Applicant's submission that it is not in dispute that the Defendant/Applicant was served however, the documents were served at a time when the Defendant/Applicant was going through a major re-structuring process. The resultant effect of the restructuring process was that all of the Defendant/Applicant's employees were declared redundant and hence the confusion and lack of attention to this suit and other matters.

5. Furthermore, it is not clear how and upon whom the initial court papers and summons were served upon seeing as all the employees had been sent home in the process of applying afresh for available opportunities.

6. It was the Defendant/Applicant's averment that the misplacement of the summons as well as initial court papers is a bonafide human mistake and consequently the failure to entre appearance and file defense in good time on the part of the Defendant/Applicant was not deliberate, pre-meditated and hence excusable.

7. The Defendant relied on the case of *Evans vs Bartlam 19677 2 All ER 646* where the Court stated;

> " To ask for a stay of execution is not a process by which the person asking obtains a benefit from the judgment nor does the opposing part if the stay is granted alter his position to his detriment. Therefore, asking for time to pay the amount due under a judgment in default of defense does not prevent a party from applying to have the judgment set aside."

8. It is the Defendant/Applicant's further submission that once the trial court decides the suit on merit, it becomes Functus officio. The trial court cannot revisit the issues that were before it in a subsequent application. Revisiting the issues that were ventilated in a trial would amount to a trial court sitting on its own appeal which is improper.

9. That being the case, the Defendant/Applicant after entering appearance could not exercise any other right before the trial court except seeking an order to set aside the ex-parte judgment obtained on 29rd October 2019 and to stay execution of any other consequential orders or decree that arose as a result of the aforementioned judgment which is the bone of contention herein.

10. The Defendant/Applicant was well aware that the trial court after delivering the ex- parte judgment on 29rd October 2019 became Functus officio and until the ex-parte judgment delivered is set aside, referral to arbitration cannot arise.

11. In the case of *Menginya Salim Murgani versus Kenya Revenue Authority [2014] eKLR* the Supreme Court stated;

> " It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

12. On whether correspondences exchanged on a "without prejudice" basis be forced upon the parties, the Plaintiff submitted that he aforementioned "without prejudice" letter was not by any means a formal contract nor was it an admission of liability on the Defendant/Applicant's part. The marginal notes under Section 29(1) of the *Evidence Act* are clear in that they envisaged a situation where admissions could be made without prejudice in civil cases. The said section stipulates that;

> In civil cases, no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

13. The annexures relied upon by the Plaintiff/Respondent vide the Replying affidavit dated 17th February 2021 ought to be expunged from the court record as this will not be fair play seeing as the letter dated 17th July 2020 related to a "without prejudice" conversation and the Defendant/Applicant's consent needed to be procured prior to its production.

14. It was the Defendant's submission that the Defendant/Applicant herein should not be punished and condemned to pay the huge sum of Kshs.67, 044, 061.96 plus costs and interests from the time of filing his suit when he clearly has a plausible defense. The Defendant/Applicant cannot be condemned without being accorded an opportunity to defend himself or clarify whatever is in dispute.

15. The Defendant submitted that that the subject contract forming basis of this dispute has an arbitration clause and it would be prudent to enforce the same by having this matter referred for arbitration. It is until the ex-parte judgment is set aside, referral of this suit for arbitration cannot arise. All other consequential steps can only follow suit after the ex-parte judgment has been set aside. In *Westmont Power Kenya Limited v Kenya Oil Company Ltd [2011] eKLR* the court stated;

> We are unable to agree with Mr. Esmail's proposition that it was incumbent upon the appellant to demonstrate that he had a good defense to the claim for the ex parte judgment to be set aside. There is no question here of the appellant wanting to, or being subjected to, the filing of a defense, when the appellant says clearly that the parties are subject to an arbitration agreement and have chosen to resolve their dispute in a different forum. That is the only issue that the superior court was obliged to determine, that is whether the matter was one that ought to be referred to arbitration, but it chose to ignore the application dated 13th March, 2002, and entered ex parte judgment. We repeat what this Court said in the case of Omino vs Lalji Meghji Patel (supra) that when an application under section 6 (1) of the Act is made by a party to an arbitration agreement, it is incumbent upon the court to which such application is made to deal with it so as to discover whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the agreement."

16. The Kenyan public policy has in the recent past been encouraging the use of alternative dispute resolution mechanisms and in the disclosed circumstances, this suit should be referred for arbitration as envisaged in the parties' contract.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

17. The Respondent submitted that the judgment which the Defendant is seeking to set aside was entered by the Court after the Defendant failed to enter appearance within the time provided under the law. The Defendant's failure to enter appearance prompted the Plaintiff to request judgment in accordance with the provisions of Order 10 of the Civil Procedure Rules, and the court subsequently endorsed the Request for Judgment. The court in *Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2*

Others[2002] 1 EA 233 set out the principles that should guide courts of law in considering an application for setting aside ex parte judgements as follows:

> "(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.
>
> (ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules."

18. Further, the Plaintiff submitted that the Defendant does not dispute that the Plaintiff served them with the summons to enter appearance. Their only contention is that they were going through a major restructuring process which led to a lot of confusion and lack of attention to this suit and other matters. However, this is not a good reason. The Defendant should have put in place measures to ensure that 3rd parties are not prejudiced by whatever internal process they were undertaking.

19. It was the Respondent's submission that the court should not set aside the judgment and relied on the case of *Oriental Commercial Bank (K) Ltd versus Maendeleo Pharmacy 2006 (K) Ltd & 7 others [2007] eKLR* where the court held;

> "I do find that the 1st to the 6th Defendants have no defense on the merits, and that the draft defense annexed hereto, as far as it touches on these six Defendants, is a sham. The draft defense has no merits, to the favor of the 1st to the 6th Defendants. In addition, these Defendants have admitted the debt and any promises made to repay the same as exhibited in the annexed correspondences were dishonored."

20. On whether the matter should be referred to arbitration, the Plaintiff submitted that the Defendant already submitted to the jurisdiction of the court and cannot thereafter seek to have the suit referred to arbitration. In this regard, the Defendant entered unconditional appearance on 8th November 2019 and filed the Application on 11th November 2019. The Defendant delayed in making their application and took a substantive step of submitting to the jurisdiction of the court.

21. In addition to the above, it is manifest from Section 6 (1) of the Arbitration Act that even where an application for stay is timeously brought, the applicant would have to satisfy the court that there is in existence an arbitrable dispute. In the correspondence the Defendant admitted the Plaintiff's claim. In the circumstances, there is no dispute to be referred to Arbitration.

DETERMINATION

22. I have considered the pleadings filed herein and the submissions made by the parties. The issues for determination are;

    1. Whether the ex parte judgment should be set aside?
    2. Whether the matter should be referred to arbitration?

Whether the ex parte judgment should be set aside?

23. Order 10 Rule 11 of the *Civil Procedure Rules* empowers the court to set aside an ex parte judgment for default of appearance and defense. In *Shah versus Mbogo & another [1967] E.A* it was held that:

> "The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."

24. The threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte judgment. In *Wachira Karani versus Bildad Wachira [2016] eKLR* the court held that:

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

25. It is not in dispute that the Defendant/Applicant was served however, the documents were served at a time when the Defendant/Applicant was going through a major re-structuring process that culminated in all employees being declared redundant. Thus, it was not clear how and upon whom the summons and initial court papers herein were served because all employees had been sent home.

26. The reason given for the Respondent's failure to attend court is that the summons and initial court papers herein were served and the same could have been misplaced and thus could not be acted upon in good time owing to the fact the Defendant/Applicant has two (2) offices one in Athi River and the other one in Upper Hill Area of Nairobi.

27. I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case.

Whether the matter should be referred to arbitration?

28. It is the Court's finding that the Applicant did not comply with the provisions of Section 6 of the Arbitration Act No. 4 of 1995, where the Court would have considered the Arbitration Agreement and/or if there is a dispute for arbitration. The Defendant did not file this application promptly, after entering appearance and filing the present application annexed with a draft defense dated 11th November 2019. The Defendant entered unconditional appearance and filed the present application. The Applicant has therefore, submitted to the jurisdiction of the Court. The matter cannot therefore be referred to Arbitration.

29. The draft defense dated 11th November 2019 filed by the Defendant raises triable issues as it disputes the interest and penalties.

DISPOSITION

In light of the foregoing, the court sets aside the ex parte judgment entered on 23rd October 2019 and Defendant/Applicant is granted leave to file defense within 30 days of the Ruling.

It is so ordered.

DELIVERED SIGNED DATED IN OPEN COURT ON 5TH NOVEMBER 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE