REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 73 OF 2019

KENYA POWER AND LIGHTING CO.LTD.....APPELLANT

VERSUS

MWILWA DASE INVESTMENT CO.LTD.....RESPONDENT

(An appeal from the ruling of the Senior Resident Magistrate (Hon. Eric Malesi SRM) dated 2nd July 2019 in Kakamega CMCCC No. 319 of 2018)

JUDGMENT

1. The suit before the primary court was by the respondent herein, by its plaint dated 8th October 2018, was for an order of specific performance, to direct the appellant herein to issue to the respondent bills of quantities in respect of performed contracts and settlement of bills. The case was that the appellant had awarded to the respondent various contracts for a variety of services, which the respondent performed, but the appellant refused to issue the respondent with bills of quantities for the completed works and settlement thereof.

2. The appellant did not appear, allegedly upon being served, whereupon judgment was entered as prayed, by an order made on 20th December 2018. The matter was subsequently listed for formal proof on 26th February 2019, when Alfred Limitsi Matunda, testified on behalf of the respondent. Judgment was read on 19th March 2019, in terms of the orders sought in the plaint, with the award attracting interest at court rates. A bill of costs was assessed, on 9th April 2019, at Kshs. 133, 956.

3. The appellant thereafter, on 24th April 2019, lodged an application at the primary court, principally seeking the setting aside of the default judgment of 19th March 2019 and the decree of 9th April 2019, and of the consequential orders. It also sought stay of execution of the judgement and decree, and unconditional leave to file defence. The principal ground was that, although the appellant was properly served, it instructed an advocate to take up the defence, but he never did, and it was established that the instructions never got to him, as they were sent through an address that was no longer effective. The application was argued on 4th June 2019, and was dismissed in a ruling, delivered on 2nd July 2019, on grounds that inadvertence was not demonstrated in the failure to appear and file defence, and that the defence raised no triable issues.

4. The appellant was dissatisfied with the ruling and orders of 2nd July 2019, hence this appeal, where it raises several grounds that are articulated in its memorandum of appeal, dated 26th June 2020.

5. The legal basis upon which a court may intervene in cases where default judgment is entered, to enable a party defend, are legion. The Constitution of Kenya 2010, is one of them, through Articles 50 and 159(2) (d), with regard to fair hearing and the eschewing of technicalities of procedure by the courts. The Civil Procedure Act, Cap 21, Laws of Kenya, is the other. Section 1 (a)(b), states the overriding objectives that the rules of procedure are intended to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Section 3A of the Act is also relevant, the inherent powers of the court to prevent abuse of power and to do justice. The Civil Procedure Rules are also relevant. Order 10 Rule 11 of the Civil Procedure Rules, enables the court, where judgment has been entered under the Order, to set aside or vary such judgment, and any consequential decree or order, upon such terms as are just.

6. The courts have weighed in on these, in a variety of decisions on the statutory provisions that I have referred to above, in such cases as *Francis Kimani Kariuki vs. Hudson Wamabiri Kamulamba* [2005] eKLR (Kimaru J), *Maina vs. Muguria* [1983] KLR 78 (Potter, Kneller JJA & Chesoni Ag JA), *Shah vs. Mbogo* [1967] E.A. 116 (Harris), *Shabir Din vs. Ram Parkash Anand* [1955] 22 EACA 43 (*Sir Barclay Nihill P, Sir Enock Jenkins Ag VP & Briggs JA*), *Mbogo vs. Shah* [1968] EA 93 (Sir Charles Newbold P, Sir Clement de Lestang VP & Law JA), *Kanji Naran vs. Velji Ramji* [1954] 21 EACA 20 (*Sir Barclay Nihill P, Sir Newnham woley VP & Briggs JA*), *James Kanyiita Nderitu & Anor vs Marios Philotas Ghikas & Anor* [2016] eKLR (**Makhandia, Ouko & M'inoti, JJA**), *Tree Shade Motors Limited vs. DT Dobie And Company (K) Limited & Another* [1998] eKLR (**Kwach, Tunoi & Bosire, JJA**), *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd* [1996] eKLR (Gicheru, Lakha JJA & Bosire Ag JA), *CMC Holdings Limited vs. Nzioki* [2004] 1 KLR 173 (Tunoi, O'Kubasu JJA & Onyango-Otieno Ag JA), *Patel v E.A. Cargo Handling Services* [1974] EA 75 (Sir William Duffus P, Law Ag VP & Musoke JA), *Lucy Bosire vs. Kehancha Div. Land Dispute Tribunal and 2 others* [2013] eKLR (Odunga J), *Chemwolo & another vs. Kubende* [1986] KLR 492 (Platt, Gachuhi & Apaloo JJA), *Sebei District Administration vs. Gasyali and others* [1968] EA 300 (Sheridan J), among others. The principles for setting aside in the circumstances are well settled and I need not repeat them here.

7. From the facts of the case that was before the trial court, it will be noted that the appellants were served with a memorandum to enter appearance, but they did not appear. I note that they did instruct advocates, but they sent the communication to the wrong address. The appellant has attached a copy of that letter dated 4th December 2018. I believe the appellant should have been entitled to benefit of the doubt. There was demonstration of inadvertence. Regarding the defence, the events relate to contracts entered into and performed in Kakamega, the legal office of the appellant appears to be in Nairobi, and the advocates instructed based at Nakuru. The appellant is a huge organization. Material for the purpose of framing a defence might not have been at hand for them to place before court a more substantial defence. I am of the persuasion that this is a proper case for setting aside and for leave to defend.

8. One other thing. The plaint filed at the primary court sought only one prayer, which is worded as follows: “An order of specific performance directing the defendant to issue bills of quantities to the plaintiff in respect of performed contracts and settlement of the bills.” The final orders in the judgment of 19th March 2019, reads as follows: *“I therefore grant the orders sought in the plaint.”* My understanding of the plaint is that the respondent was asking the court to direct the appellant to issue it with bills of quantities for the performed contracts. It was not a money claim, for there is no mention of any money in the prayers. To my mind, the prayers are crafted in vague language.

9. Secondly, the suit was about specific performance, I doubt whether the order of specific performance is available to recovery of money for services rendered. It is something of a surprise that the decree, as extracted, is for a principal money sum of Kshs, 3, 570, 213.55, yet there was no prayer in the plaint for that amount, and the judgment entered by the court could not have been for that amount. A party is bound its pleadings. The pleadings did not pray for judgment in that sum, and a decree ought not to have been extracted awarding an amount that was not prayed for. This is a clear case of crafty pleading to avoid paying high court fees at the time of filing. But such crafty pleading can only lead to vagueness, which in the end can be costly, as in this case

10. I do find merit in the appeal herein, for the reasons given above. I do allow the same. The judgment of 19th March 2019 is hereby set aside. The appellant shall have twenty-one days, from the date of this judgment, to file and serve a defence. Throwaway costs of Kshs. 30, 000.00 are awarded to the respondent. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH. DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE