



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL CASE NO. 8 OF 2019**

**TAKAFUL INSURANCE OF AFRICA LTD (KENYA).....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF GARISSA.....1<sup>ST</sup> DEFENDANT**

**THE COUNTY SECRETARY, GARISSA COUNTY.....2<sup>ND</sup> DEFENDANT**

**CHIEF OFFICER FINANCE & ECONOMIC**

**PLANNING, GARISSA COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The core prayer in the instant matter is setting aside of default judgment entered on 28/10/2019 against defendants for sum of Kshs.221,365,643/- and all consequential orders arising therefrom together with costs, and mater be heard on merit and defendants be granted leave to file defence out of time.

2. The same application is based on Order 10 rule 10, Order 12 rule 7 of the Civil Procedure Rules interalia. The same is anchored on grounds that –

**ü The service of summons to enter appearance and other hearing notices including for entry of judgement and formal prove were not properly served upon defendants/applicants thus violated provisions of Civil Procedure Rules.**

**ü No formal proof was undertaken.**

**ü The draft/proposed defence raises triable issues interalia.**

3. The application is supported by affidavit sworn by Ismail Aden Dabar on 10/12/2019 which reiterates the contents of the grounds.

4. The same deponent has sworn a further affidavit on 28/1/2020.

5. To oppose the application, the respondents/plaintiffs have filed an affidavit sworn by Halima Hussein on 13/1/2020.

6. The parties agreed to canvass application via submissions which they have filed and exchanged.

**APPLICANTS' SUBMISSIONS**

7. The Defendants/Applicants submit that they were unaware of the instant suit and that the service of pleadings was sketchy, improper and in doubt. The judgment was obtained irregularly and thus urge court to exercise its wide discretion to set it aside as it will be just to do so. They rely on the provisions of Order 10 rule 11 of the Civil Procedure Rules.

8. They submit that the provisions above cited vest court with unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational consideration.

9. They have annexed to their application a draft defence which they contend raises serious triable issues meriting a full trial and urge that in their further affidavit they have demonstrated that the amount claimed by the plaintiff/respondent was paid.

10. They rely on the case of *CFC Stanbic Bank of Kenya Limited vs Backstone Mining Group & 2 Others [2018] eKLR* which in arriving at its decision as guided by *Duffus P in Patels vs East Africa Cargo Services Ltd (1974) EA 75* 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 to it by the rules..... 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.”**

11. They also cite the case of *Tree Shade Motors Ltd vs D.T. Dobie & Another [1995-1998] 1EA 324* where the court rendered itself thus:

**“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defence showed a reasonable defence on the merits, the court should set the ex-parte judgment aside.”**

12. They also rely on *Shah vs Mbogo [1967] EA 166, Sebel District Administration vs Gasyali & Others [1968] EA 300, Richard Murigu Wamai vs Attorney General & Another [2018] eKLR, William Ntomauta M’ethanga sued as M’mauta Nkari vs Baikiamba Kirimania [2017] eKLR.*

13. They contend that they were not properly served with the summons and pleadings and even on the flipside where the same was properly conducted; the draft defence is solid and raises triable issues warranting the full determination of the suit.

14. Further, they urge that, a great deal of injustice and hardship will be visited on the defendants in the unlikely event the Court fails to set aside the irregularly obtained judgment.

15. They argue that, the judgment condemns the applicants to pay an amount that it has already paid and another amount for services that were not rendered in the first place and the nature in which the plaintiff was awarded the tender is subject to an ongoing investigation by the Ethics and Anti-Corruption Commission.

16. Thus applicants submit that, they have constitutional right to be heard since the concern of the courts is to do justice to the parties and not to impede justice or to drive away parties from the seat of justice especially considering that the applicants’ draft defence is genuine, arguable and raises bona fide triable issues.

17. On whether the defendants should be granted leave to file its defence and to defend the suit on merits, annexed to the application is the defendant’s draft statement of defence which raises triable issues.

18. They cite the case of *Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR* in defining “*triable issue*” as on that need to not succeed but warrants the intervention of the court observed that:

**“What then is a defence that raises no bona fide trial issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”**

19. They also rely on *Gupta vs Continental Builders Ltd [1976-80] 1KLR,, Giciem Construction Company vs Amalgamated Trade & Services LLR No. 103 (CAK), Patel vs East Africa Cargo Services Ltd (1974) EA 75 ,Hosea Kiplagat vs John Allan Okemwa [2018] eKLR*

20. They submit that the draft statement of defence annexed to the application not only denies the averments by the plaintiff but also brings to the fore new and relevant issues that the plaintiff willfully concealed from this Honourable Court.

21. They argue that, the plaintiff has misled this Court by claiming that no payment was ever made by the applicants herein and they conceal the fact that they breached the contract by terminating the services they owed the defendants, above all else a possible fraudulent tender award is herein involved.

22. On what prejudice will be suffered, they contend that, the amount awarded by the interlocutory judgment is a large amount which the defendants will be constrained to pay if the judgment is not set aside and the matter heard on merit.

23. They submit that, the only prejudice the plaintiff/respondent might suffer if this application is allowed is loss of time which can be compensated by cost. They rely on the case of *Ecobank Kenya Limited vs Minolta Limited & 2 Others (2017) eKLR.*

#### **PLAINTIFF’S/RESPONDENT’S SUBMISSIONS**

24. On whether service was effected upon the defendants, the respondent submit that, on the 16<sup>th</sup> September 2019 the plaintiff filed suit against the defendants and indeed the same was served upon the defendants as provided by law.

25. That after expiry of the requisite time to enter appearance the plaintiff requested and obtained default judgment and thereafter issued the requisite notice to the defendants of entry of judgment. The execution ensued. Every step of the law was followed.

26. The respondent contends that, at paragraph 4 of the supporting affidavit by one Ismail Aden Dabar the deponent has admitted the defendants having been served but at paragraph 5 that summons he alleges that they were not properly served and but fails to clarify how improper the service was.

27. The respondent contend that, a request for judgment letter is normally addressed to the court and there is no requirement to serve upon the adversary. The copy of the affidavit of service marked HIH1 in the replying affidavit of Halima I. Hussein deposed on 15<sup>th</sup> January 2020 has not been challenged whatsoever. The defendants failed to ask for the cross examination of the process server to ascertain service by a qualified process server.

28. It is argued that, at paragraph 3 of the supporting affidavit of the application under consideration herein, the deponent confirms having received notice of entry of judgment and even annexed it.

29. On whether there was need for formal proof on a liquidated claim, the respondent submits that, Order 10 rule 4 of the Civil Procedure Rules on a liquidated claim does not require formal proof. The said rule provides as follows:

**“(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appeal 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.**

**(2) Where the plaintiff makes a liquidated demand together with some other claims, and the defendant fails, or all the defendants fail to appear as aforesaid, the court shall, on request in Form 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided under sub-rule (1) but the award of costs shall wait judgment upon such other claims.”**

30. Sub-rule (1) under which judgment was requested did not require formal proof because it is a liquidated claim without other claims. It is only sub-rule (2) of Order 10 rule 4 which demands for a formal proof after entry of default judgment.

31. The respondent contend that, the defendants cannot be heard to argue that the procedure of tendering to procure the services rendered by the plaintiff was not regular and once it is under investigation the plaintiff cannot be paid. Internal arrangements which is normally referred to as the doctrine of indoor management, cannot affect outsiders who are entitled to assume that everything is in order.

32. The plaintiff argues that it rendered services which were enjoyed by the defendants and which services must be paid for. Therefore there cannot be a good defence as alluded to by the defendants other than a sham.

33. It is argued that the draft defence does not raise any triable issue and the counterclaim is a bait to mislead the court into granting a stay. Whereas in their draft counterclaim they assert that they have paid the whole amount claimed in the plaint, in their further affidavit deposed by one Ismail Aden Dabar on 28<sup>th</sup> January 2020 they have purported to prove a figure of Kshs.168,000,000/- as have been paid.

34. Assuming that they will prove payment of this figure, there is a balance of Kshs.53,365,643/- which the defendants should be compelled to pay to the plaintiff immediately.

35. On whether the defendants are entitled to the reliefs sought, the respondent contention is that, it has been proved that the defendants were in slumber land and hence they have not met the threshold of being granted the orders they have sought. Plaintiff's rights have crystalized and it will be unfair to interfere with them. It cites the case of Civil *Appeal No. 326 of 2014, Orion East Africa Ltd vs Ecobank Kenya Ltd & Another*.

36. It is also noteworthy that the auctioneers engaged to execute have raised their fee note that must be honored by the defendants. The warrants of attachment together with the proclamation attaching the auctioneer's fee note have been filed alongside these submissions. The auctioneers have charged a fee of Kshs. 4,554,312/-.

37. The respondent finally proposes that, in the unlikely event that a stay is granted or any other order issued, either the defendants be ordered to pay the plaintiff amount of Kshs.53,351,945/= being the balance after taking into consideration what has been attached in the further affidavit, or 50% of the decretal amount of Kshs.221,365,643/= which is equivalent to Kshs.110,682,822/= be deposited in an interest earning account in a reputable bank in the joint names of the advocates for the plaintiff and advocates for the defendants pending the determination of the suit.

#### **ISSUES, ANALYSIS AND DETERMINATION**

38. I have considered the arguments advanced by the respective parties and find the issue to determine is whether the Applicant has satisfied the legal requirements for grant of the orders sought. The provisions dealing with entry of a default judgment are set out under Order 10 Rule 4(1) of the Civil Procedure Rules, 2010. It provides that:-

**“where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to appear, the court shall, on request in Form 13 of the 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 judgment, and costs.”**

39. The Court's power in considering an Application to set aside an interlocutory judgment is discretionary. As held in the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) EA 75:-*

**“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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.”**

40. In the same vein, the Court in the case of; *Shah vs Mbogo (1967) EA 166*, held that:-

**“This 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”**

41. However, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the Applicant's case as to whether it raises any triable issues.

42. In the case of; *Patel vs E.A. Cargo Handling Services Ltd (1974) (Supra)* the Court held that:-

**“That where there 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 a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.”**

43. Similarly in the case of; *Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

**“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”**

44. From perusal of record I find, that on the 16th September 2019 the plaintiff filed suit against the defendants and indeed the same was served upon the defendants as provided by law.

45. After expiry of the requisite time to enter appearance the plaintiff requested and obtained default judgment and thereafter issued the requisite notice to the defendants of entry of judgment. The execution ensued. Every step of the law was followed.

46. At paragraph 4 of the supporting affidavit by one Ismail Aden Dabar the deponent has admitted the defendants having been served but on the same breath at paragraph 5 contends that the summons was not properly served and but however fails to clarify how improper the service was.

47. The copy of the affidavit of service annexed in the replying affidavit of Halima I. Hussein deposed on 15th January 2020 has not been challenged whatsoever. The defendants failed to ask for the cross examination of the process server to ascertain service by a qualified process server.

48. Thus the court holds that the service of summons was properly effected upon the defendants.

49. The court also observed that, a request for judgment letter was addressed to the court and there is no rule or authority cited by the applicants which prescribed any requirement to serve upon the rival party.

50. At paragraph 3 of the supporting affidavit of the application under consideration herein, the deponent confirms having received notice of entry of judgment and even annexed it.

51. The applicants complain that formal prove was not undertaken after entry of judgement in default of appearance. Under the provisions of Order 10 rule 4 of the Civil Procedure Rules on a liquidated claim, the prescription is to the effect that:

**“(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appeal 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.**

**(2) Where the plaintiff makes a liquidated demand together with some other claims, and the defendant fails, or all the defendants fail to appear as aforesaid, the court shall, on request in Form 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided under sub-rule (1) but the award of costs shall wait judgment upon such other claims.”**

52. Sub-rule (1) under which judgment was requested did not require formal proof because it is a liquidated claim without other claims. It is only sub-rule (2) of Order 10 rule 4 which demands for a formal proof after entry of default judgment.

53. The fundamental conclusion is that there has been no excusable mistake and/or compelling reason that has been presented before Court to warrant the orders prayed for in the Application. The maxim of equity states that, equity aids the vigilant and not the indolent. The applicants seeking for a remedy for their indolence is bad in law and an afterthought, since the Court rightfully exercised its discretion in issuing judgment in default of filing a defence.

54. However, I do appreciate that, every person has a constitutional right to be heard, and that parties should not be deterred from approaching the seat of justice. In this regard, I have considered the Statement of defence annexed to the Affidavit in support of the Application and I find the Applicants have raised the issues to the effects that the draft statement of defence annexed to the application brings to the fore new and relevant issues that the plaintiff willfully concealed from this Court.

55. The plaintiff did not disclose that whether any payment was ever made by the applicants herein, that, it conceals the fact that it breached the contract by terminating the services they owed the defendants, above all else the contract subject herein involves possible fraudulent tender award in the first instance.

56. On what prejudice will be suffered, the amount awarded by the interlocutory judgment is a large amount which the defendant will be constrained to pay if the judgment is not set aside and the matter is heard on merit.

57. The respondent in its part has submitted that, in the unlikely event that a stay is granted or any other order issued, either the defendants be ordered to pay the plaintiff amount of Kshs.53,351,945/= being the balance after taking into consideration what has been attached in the further affidavit, or 50% of the decretal amount of Kshs.221,365,643/= which is equivalent to Kshs.110,682,822/= be deposited in an interest earning account in a reputable bank in the joint names of the advocates for the plaintiff and advocates for the defendants pending the determination of the suit.

58. In summation, I wish to refer to the holding in the case of; in *Sebel District Administration vs Gasyali & Others (1968) E.A. 300*, the Court, observed that:-

**“In my view the Court should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defence within the prescribed time. 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 wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”**

59. In the light of the aforesaid, I allow the instant Notice of Motion and make the following orders;

**a) The default judgement herein is set aside subject to the following conditions;**

**i. Kshs.53,351,945/= is deposited in a joint interest earning account in Kenya commercial bank of Kenya Garissa branch in names of the parties advocates within a period of forty five (45) days from dates herein.**

**ii. The defence and/or counterclaim together with bundle of documents be filed and served upon respondent advocate within 14 days.**

**b) Costs to the respondents Ksh.100,000/- be paid within 45 days.**

**c) In default of any of the above conditions (a) i, ii and (b) the application will stand dismissed and execution process to proceed.**

**d) The auctioneer to file his bill in court for the deputy registrar to assess under the relevant provisions of the law.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2020.**

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**C. KARIUKI**

**JUDGE**