REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL SUIT NO. 2 OF 2019

WESLEY MOKUA NYARIKI.....PLAINTIFF/APPLICANT

=VRS=

MOGUSII FARMERS GROUP COMPANY LIMITED...DEFENDANT/RESPONDENT

RULING

By the Notice of Motion dated 14th November 2019 seeks to set aside the interlocutory judgment entered herein on 15th May 2019 *ex debito justitiae* and for an order to enlarge time for filing of a defence or that the defence on record be deemed as properly filed.

The grounds for the application are that the failure to file a defence on time was occasioned by mistake on the part of counsel representing the applicant; that Notice of entry of Judgment was not served upon counsel for the applicant; that the defendant/applicant will be condemned unheard should this application be disallowed and that the defence on record raised triable issues. Further, that the respondent will suffer no prejudice if this application is granted and that the suit is not one for a liquidated claim and ought to have gone for formal proof. The application is supported by the affidavit of Johnson Mitiema Nyang'au sworn on 14th November 2019 in which he reiterates the grounds on the face of the application and contends that the applicant stands to be condemned unheard if the application is not granted and will suffer irreparable loss and damage yet instructions were issued to an advocate who failed to act on time. He further deposed that it is in the interest of justice and fairness that the interlocutory judgment entered on 16th May 2019 be set aside.

In opposition to the application counsel filed nine grounds of opposition the first of which is that the application is defective for not citing the provisions of law under which the court is to exercise its discretion; that the applicant is bound by the acts and omissions of the advocate; that delay in bringing this application is inordinate and is evidence that the applicant is privy to their earlier advocates fault (if at all) or that they deliberately withheld due instructions to their advocates, present and current. Further, that the application lacks bona fides and is an abuse of the court process and an affront on the court's independence in so far as it seeks to be granted *ex debito justitiae* yet the default judgment was entered regularly and lawfully. It is also contended that the applicant has not come to court with clean hands as it still delayed in coming to court once served with the notification of sale and further that the applicant has not demonstrated that it has a defence on the merits. Finally, that the advocates now on record is not properly on record as provided under Order 9 Rule 9 of the Civil Procedure Rules.

This court heard counsel for the parties on 18th December 2019. Counsel for the applicant submitted that their efforts to settle the matter amicably failed because counsel for the respondent did not turn up. He then reiterated the grounds set out in the face of the application and the supporting affidavit. He contended that although the respondent contends he was contracted to build a factory worth Kshs. 200 Million there is nothing in his bundle of documents to demonstrate that he was in fact contracted or even whether he did the works and that the matter is therefore one that should go on trial to determine if he was contracted or if he did the works.

Mr. Kerosi submitted that the defence raised triable issues. He wondered how much the works would have cost if the architecture designs alone cost Kshs. 28 Million. He indicated his intention to ask this court to move to the site to see if indeed there was a factory. He urged this court to set the judgment aside and fix the matter for hearing.

Mr. Bwonwong'a held brief for counsel for the respondent. He submitted that the respondent obtained a judgment which was not set aside and he proceeded to extract a decree which he executed. Mr. Bwonwong'a submitted that the applicant has come to court too late when the application has been overtaken by events. He reiterated that the defence was filed too late without seeking leave and that even if the judgment is set aside and the properties have been sold it will serve no purpose. He asked this court to dismiss the application.

In reply Mr. Kerosi submitted that the respondent will not suffer any loss if the application is allowed as he will still have a chance to explain what works were done. He contended that no sale took place although the day of the sale has passed. He urged this court to deem the defence filed as being properly on record. He urged this court to allow the application.

Article 159 (2) (d) of the **Constitution** places a duty on this court to determine cases brought before it without undue regard to procedural technicalities and therefore I shall ignore the grounds of opposition raised in regard to the form of the application and determine it on the merits. In any event the application has cited the provisions of the **Civil Procedure Act** and R**ules** which it involves.

By a plaint filed herein on 4th March 2019 the respondent sued the defendant for a sum of Kshs. 28,387,579.60/= together with interest from the date of filing suit till payment in full. He also prayed for the costs of the suit. The applicant through the firm of J.M. Nyagwencha & Co. Advocates duly entered appearance by filing a Memorandum of Appearance on 19th March 2019. The applicant was then expected to file a defence within fourteen days **(See Order 7 Rule 1 of the Civil Procedure Rules)** but did not do so. On 15th May, 2019 the respondent filed a request for judgment and two days later on 17th May 2019 judgment was entered against the applicant. The record shows that it was not until 4th June 2019 that the applicant filed a statement of defence dated 15th May 2019. This was long after default judgment had been entered. **Order 10 Rule 11** of the **Civil Procedure Rules** states: -

> ***"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 the just."***

What this provision means is that this court has a discretionary power to set aside an exparte judgement however obtained. However, as with all discretionally power it must be exercised judicially. The court is guided in the Principle set out by Harris J in the Case of **Shah v Mbogo & Another [1967] EA 116 cited with approval by the court of Appeal in Mbogo v Shah [1968] EA 93** that ***"the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, mistake or error but is not designed to assist a party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."***

The defence in this case was filed hopelessly out of time and without leave. However, this court is still under an obligation to consider it as it has been brought to the court's notice and it must be borne in mind that a defence on the merits is not necessarily one that must succeed ***(see Patel v EA Cargo Handling Services Ltd [1974] EA 75)***. At a cursory perusal of the record the applicant is not at all deserving of the exercise of this court's discretion in its favour. As I have stated the defence was filed long after entry of judgment and even then it sat on its laurels and did not file this application until five months had lapsed. I would myself have been tempted to arrive at that conclusion had I not taken a close look at the plaint. The claim is one for breach of contract for services rendered. It is a claim for professional fees allegedly due to the respondent for undertaking certain services as contradicted by the applicant.

In my view although the claim is for a specific sum of money it is not for a liquidated amount as the sums are not ascertainable by simple arithmetic. The respondent would have to satisfy the court as to how he got the figures which he claims as fees. In so finding, I am fortified by the decision of the court of Appeal in **Henmanus Phillipus Steyn v Giovanni Gnechi Ruscone Civil Appeal No. 171 of 2009** cited in **Adventis Limited v Superior Homes (K) Limited & Another (2015) eKLR** where the court held that: -

> ***"The respondent's claim was based on contract. The contract between the appellant and the respondent was for the performance of a specific assignment at an agreed fee. The respondent's claim was for that fee and accruing interest, and more. It was a claim based on contract and for a contractual sum. The trial judge in his judgement appears to have confused a liquidated claim and special damages. The two are not the same. The respondent's claim was neither special nor liquidated damages. It was a claim for services rendered, not for any particular damage..... As stated earlier the respondent's claim was neither of those, and in our judgement nothing turns on submissions made by Mr. Michuki on the manner the respondent's claim was pleaded or proved. The respondent was required to call evidence to show a contract existed between him and the appellant, the specific terms of that contract, and in the event of breach how much was due to him, arising from that breach."***

Similarly, the claim by the respondent herein was not a liquidated claim. This is even more so given that there is nothing in this bundle of documents to show that the sum claimed was what was agreed between the parties. The contract is also not one of the documents in his bundle. It behoved him therefore to prove that there was a contract between him and the applicant, the terms of that contract and the fees payable to him in any event. That could have been possible if the matter went to formal proof. The upshot is that the exparte judgment was not regularly obtained. At most the Deputy Registrar ought to have entered an interlocutory judgment and directed the matter to go for formal proof. Accordingly, the application has merit.

Counsel for the respondent submitted that this application is for dismissal as counsel for the applicant is not properly on record and I agree that he is not. The substance and merits of the application however militate against its dismissal on such a technicality. In the circumstances the application is allowed and the default judgment entered herein on 17th May 2019 is hereby set aside together with all consequential orders. However, while costs should follow the event, in this case the applicant shall bear the costs of the application given the circumstances. It is so ordered. The defence on record is hereby deemed as duly filed.

Signed, dated and delivered at Nyamira this 6th day of February, 2020.

E. N. MAINA

JUDGE