REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E044 OF 2014

SAICARE ENTERPRISES LIMTIED.....PLAINTIFF

VERSUS

MANA PHARMACY.....1ST DEFENDANT

SAMUEL OULULA WANGUBA.....2ND DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **17th June 2019** by which (the Defendant/Applicant) seeks for Orders that:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. This Honourable court be pleased to set aside the Default Judgment entered on 22nd May 2019 and all consequential orders and leave be granted to the Defendants to defend the case and the Statement of Defence filed on 14th June 2019 to be deemed to be properly filed and on record.**
>
> **4. The costs of this Application be in the cause**

(2) The application was premised upon **Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 10 Rule 11, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010** and all other enabling provisions of the law. The same was supported by the Affidavit of even date sworn by **JOHN SWAKA** the Advocate on record for the Defendant Applicants and the Further Affidavit of **17th June 2019.**

(3) **SAICARE ENTERPRISES LIMITED,** the Plaintiff/Decree- Holder filed Grounds of Opposition dated **24th June 2019** opposing the application.The matter was canvassed by way of written submissions. The Defendant/Applicants filed their written submissions on **4th September 2019**, whilst the Plaintiffs filed their submissions on **27th September 2019**.

BACKGROUND

(4) The Plaintiff filed this suit by way of the Plaint dated **26th March 2019** seeking judgment against the Defendants as follows:-

> **"(a) A mandatory Order directed against the Defendant(s) for the immediate payment to the Plaintiff s sum of Kenya shillings Twenty Two Million, Seven Hundred and Nineteen Thousand, nine Hundred and thirty Six and Twenty Six Cents (Kshs.22,719,936.26) being the monies owed.**
>
> **(b) Special damages being Kshs.Eighteen Thousand (18,000/=) as bank charges for the bounced cheques.**
>
> **(c) Interest on (a) and (b) above**
>
> **(d) Mesne profits.**

(e) Costs of this suit."

(5) Summons were duly served upon the Defendant and on **3rd May 2019** Counsel for the Defendants filed his Memorandum of Appearance. However no Defence was filed within the 15 day period as stipulated by law.

(6) On **22nd May 2019** the Plaintiffs sought Interlocutory Judgment and on **29th May 2019** Judgment in Default of Defence was entered. The matter was then listed for Formal Proof.

(7) On their part the Defendant submit that they were initially represented by the firm of **Eshuchi & Associates**. Subsequently vide the Notice of Change of Advocate filed on **8th May 2019** the firm of **Osundwa & Company Advocates** came on record for the Defendants. It is submitted that failure to file the Defence was due to an oversight and honest mistake on the part of the new Counsel who came on record and filed a second Memorandum of Appearance instead of filing a Defence. The Defendants contend that upon realizing the error their Advocates moved and filed the Defence on **14th June 2019** which they insist was within the stipulated 15 day period, only to realize that default judgment had already been entered. Hence the present application.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the rival written submissions in this matter as well as the relevant law. It is common ground that judgment in default of defence was entered in this case on **29th May 2019.** It is also not in dispute that by that date no defence had been filed in the matter. Summons were served upon the Defendants on **7th May 2019**. The Defendants had 15 days from that date the service to enter appearance and to file a defence. The Memorandum of Appearance was duly filed on **3rd May 2019** and defence ought to have been filed on or before **18th May 2019**. The Request for default judgment was made on **22nd May 2019** well after that date.

(9) Counsel for the Defendant submits that no formal application for interlocutory judgment was made. However this is not the correct position. The record clearly indicates that on **22nd May 2019** a "**Request for Judgment**" was filed in Court.

(10) From the above I find that the judgment in default entered in this matter was regular. The Defendants are now seeking to have that regular judgment set aside. In **WELDCON LIMITED -VS- CHINA NATIONAL AGRO – TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATION & Another [2017] eKLR**, it was held:-

> **"In sum, the Courts discretion to set aside a regular default judgment entered pursuant to the provisions of 010 Rule 11 of the Civil Procedure Rules is unlimited and unfettered and is not to be vitiated by any extraneous factor but may be influenced by the defence tendered or reasons advanced by the Applicant for the delay or default. <u>The main concern, as has been pointed out severally, is to do justice between the parties and in this regard the defence tendered ought to be the point of consideration</u>…**
>
> **A reasonable defence will suffice even though the circumstances which led to the default/delay ought to endear the Applicant to the court"** [own emphasis]

(11) Likewise in the case of **JAMES KANYIITA NDERITU & Another –VS- MARIOS PHILOTAS GHIKAS & ANOTHER [2016] eKLR** it was held:-

> **"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered and one, which is irregularly entered. 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.."**

(12) In this case the Defendants have explained their omission to file their defence in time as arising due to a mistake on the part of their Advocate. The reasons advanced though understandable are not very persuasive. Nevertheless the paucity of reasons is not the only factor the court needs to consider. The merits of the defence must also be considered. Where a defence raises triable issues then a Defendant ought to be allowed an opportunity to be heard.

(13) In **PATEL –VS- E.A CARGO HANDLING SERVICES LTP E.A** it was held:-

> **"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."**

(14) 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 in 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."**

(15) A triable issue is not one which must necessarily succeed at trial. I have perused the defence and I am satisfied that it does indeed raise triable issues. I can do no better than to quote my learned sister **Hon Justice Grace Nzioka** who in the case of **RICHARD MURIGU WANYAI –VS – ATTORNEY GENERAL & ANOTHER [2018] eKLR** where she stated as follows:-

"In summation, I wish to refer to the holding in the case of **SEBEI 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 compensate the Plaintiff for any delay occasioned by setting aside and be permitted to defend"** [own emphasis]

(16) Finally I find that there is no prejudice the Plaintiff is likely to suffer if this application is allowed. Accordingly I do make the following Orders:-

(i) The default judgment entered on **22nd May 2019** and all orders consequential thereto be and are hereby set aside.

(ii) The Defendants are granted leave to defend this suit and the Statement of Defence filed on **14th June 2019** is deemed properly filed and on record.

(iii) The said defence to be served within seven (7) days hereof.

(iv) The Defendants to pay to the Plaintiff Getting Up costs of **Kshs.20,000/=.**

(v) The Defendants to meet the costs of this application.

Dated in **Nairobi** this **15th** day of **April 2020.**

…….

Justice Maureen A. Odero

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court .

…….

Justice Maureen A. Odero