REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 158 OF 2003

BHUPINDER SINGH DOGRA.....PLAINTIFF

VERSUS

COAST DEVELOPMENT AUTHORITY.....DEFENDANT

RULING

1. By an application by way of Notice of Motion dated the 9th May, 2017, the defendant seeks an order that the court be pleased to set aside the partial judgment entered herein on the 24th September, 2015. By the said Judgment the defendant was adjudge to owe the plaintiff the sum of Kshs. 21,974,035/ plus costs and interests. In the conclusion paragraph of the ruling entering the said judgment, the Judge said:-

> ***"a) Judgment is hereby entered for the plaintiff against the defendant in the sum of Kshs. 21,974,035/= plus costs and interests. The balance of the plaintiffs claim shall proceed to full hearing.***
>
> ***b) The plaintiff is awarded the costs of the Notice of Motion."***

2. The grounds shown to found the application are said to be, inter alia, the fact that, the suit against the defendant had been struck out way back in the year 2004 after which the counsel then representing the defendant closed his file even without pursuing costs on the basis that the plaintiff could not be traced and that the defendant did not owe the sum adjudged to the plaintiff.

3. The Application was opposed by the plaintiff, who filed Grounds of opposition dated 12th October, 2017. The grounds of opposition fault the application for; being *res judicata* pursuant to the court ruling dated 23rd June, 2017 and that the application is totally defective having been overtaken by event and thus a prime candidate for dismissal.

4. Parties equally filed written submissions. Submissions by the defendant/ applicant are dated 11th October, 2017 and filed the same day while those by the plaintiff/respondent are dated the 18th October, 2017 and filed on the 19th October, 2017. Both submissions refer to decided cases each party considers support their respective positions. I have had the benefit of reading the written as well as the oral submissions offered and the decided cases.

5. Before I delve into the issues for determination, it is important to highlight the chequered history of this matter in court. The suit was filed in court on the 9th July, 2003 by a plaint dated 8th July, 2003. The matter then proceeded with interlocutory applications including one by the defendant for setting aside a default judgment which was allowed by consent and leave granted to file a statement of defense out of time within 10 days from the 28th November, 2003. That order was later set aside. However the plaint was later amended with the concomitant right upon the defendant to also amend the statement of defense.

6. On the 11th March, 2004, the matter came before Mwera J for the hearing of an application to strike out the plaint. On that day the court file records that Mr. Gikandi then on record for the plaintiff conceded to the plaint being struck out with costs to the defendant. Even that order was later set aside and the plaintiff granted leave to defend the application on condition that he pays to the defendant costs of Kshs. 68,300. The record is thereafter silent on what became of that application. However on the 10th March, 2014 Counsel appeared before Kasango J when they recorded an order by consent that the both sides get leave to amend the pleadings then on record.

7. Pursuant to that consent the plaintiff filed the amended plaint on the 1st April, 2014 but there seems not to have been filed an amended defense. I say it seems so because I have perused the entire file and did not come by such a pleading.

8. By an application dated 19th March, 2015 but filed on the 23rd March, 2015, the plaintiff curiously applied that:-

a) The defendant's defence dated 14th October, 2003 be amended to include an admission of Kshs. 21,974,035;

b) That Judgment be entered for the plaintiff in the sum of Kshs. 21,974,035 plus interest and the rest of the claim to proceed for full hearing.

9. That application was expressed to have been brought pursuant to order 13 Rule 2 Civil Procedure Rules as well as Sections 1A and 1B of the Act. The grounds upon which it was made were that *a pending bills committee of the Ministry of Finance had assessed the plaintiffs invoices and concluded that there was a sum of Kshs. 21,974,035 outstanding and due for payment as at 31st August, 1998.*

10. For that reason it was contended that that sum is payable and that the plaintiff was entitled to Judgment for the sum as the defendant did not have a defense to that part of the claim. The facts were reiterated in the affidavit in support and documents exhibited. I find the prayers in the application curious for two reasons. The first reason is that an adversary is taking charge of the opponent's legal counsel and ordering it to admit its claim. The second curiosity is that even before the amendment is effected, there is a prayer for judgment on admission. I hold the view that hose two prayers could not justly be made and dealt with together

11. The application was evidently served because on the date fixed for hearing, 12th May, 2015, one Mr. Ndirangu attended court and indicated that he was holding brief for Mr. Odera advocate with instructions to make an oral application to cease acting. When such was declined, he indicated that he had no further instructions to proceed and opted to be absent at the time the matter was allocated for hearing. The matter then proceeding in the absence of the defendant and without any response to the application and in a reserved ruling delivered on the 24th September, 2015 the court rendered itself as follows:-

"In my view, in as far as the amount found as due by the verifying report is concerned; the defendant's defence is intended to delay the fair trial of this suit. I do therefore find that there is merit in the plaintiffs application.

Further the plaintiff's suit is not time barred as claimed by the defendant having regard to the provisions of Cap 22 of the Laws of Kenya.

Judgment is hereby entered for the plaintiff for Kshs. 21,974,035 plus costs and interests. The balance of the claim shall proceed to full hearing. The plaintiff is awarded costs of the Notice of Motion."

12. That is the decision the current application seeks to set aside and for leave to amend the statement of defence in accordance with the draft annexed. The application is expressed to be brought pursuant to Article 159 of the Constitution, Sections 1A, 1B 3A and 63 (e) of the Civil Procedure Act as well as order 10 rule 11, order 36 rule 27 and 10 and order 51 Rule 21 of the Rules.

13. Undeniably, Order 10 Rule 11 has no application in the matter because there is indeed a defence on record and no default judgment is on record to be set aside. I will thus consider the application on the broader consideration of the right to be heard devoid of technicalities. It is noted that the application is brought on the basis of the fact that the amended plaint was never served upon the defendant, the defendant having been notified that the suit had been struck out, it was never notified that the same was revived and that the defendant had never admitted owing to the plaintiff the sum of Khs. 21,974,035 as it is contended that the defendant has no evidence of work done by the plaintiff hence it has a good and cogent defence to the plaintiffs claim. The Affidavit in support sworn by one DR. MOHAMED KEINANA HASSAN, the Managing Director of the defendant/applicant, reiterates the grounds of the application and exhibits several documents among them; letter by Ms Timamy & Co. Advocates intimidating striking out of the suit and the fact that they were proceeding to close the file as they could not trace the plaintiff to recover the costs; the order issued on 29th September, 2015 granting leave for the defendant defence to be amended and at the same time entry of judgment for the sum of Kshs. 21,974,035, chamber summons dated 12th December, 2015 seeking to cease acting for the defendant on the basis that the firm of Timamy & Co. had ceased getting instructions from the defendant since the suit was struck out supported by an Affidavit of one Okoth Duncan Odera Advocate swearing to the facts of lack of instructions since July, 2004, that the firm did not receive any further instructions to represent the defendant and could not take any further steps in the matter. There is also annexed and exhibited a draft amended defence.

14. I have taken note of all the matter asserted by the parties in the papers filed together with the oral submissions offered and will determine the application on the basis of two issues:-

a) Should leave be granted to amend the defence?

b) Should the judgment dated 24th September, 2015 be set aside?

<u>Leave to amend</u>

15. It is now trite and well established principle of law that leave to amend a pleading should be freely given unless it be shown that a prejudice would result to the opposite party by a vested right being dissipated by such leave. As things stand today, the larger part of the plaintiff's claim of Kshs. 117, 017,070 remains outstanding to be proved by evidence at full trial. That being the status of the matter and without any allegation of any prejudice to be occasioned to the plaintiff/applicant this is a clear case for the leave to be granted for the defendant to amend the statement of defence as proposed in the draft amended defence. I allow the application and order that the amendment shall be filed and served within 14 days from the date of this decision.

<u>Setting aside</u>

16. While I take note that an advocate appeared in court and indicated to appear for the defendant applicant, I also note that Mr. Okoth Odera

Advocate, who described himself as a practitioner in in the firm of Timamy and company, who were known to be on record for the defendant has sworn an Affidavit and asserted that since 2004, the firm did not have instructions to appear for the defendant having had the suit struck out and closed their file. I also take regard of the fact that the defendant denies having issued any further instructions to the advocates firm after the intimation that the suit had been struck out. I however find it strange that the suit having been struck out and while Mr. Odera asserts that he never had instructions since 2004, and that he did not have instructions to appear for the defendant, the same advocate having filed Grounds of opposition dated 24th December, 2013 was in court on the 10th March, 2014 and recorded a consent for the amendment of the pleadings but still filed no amended defence.

17. I have equally taken notice that in the statement of defence filed in court on the 1st December, 2003 it was expressly pleaded that the plaintiff suit against the defendant was statute barred. That pleading must be seen in the light of the plaintiff pleadings at paragraph 6 of the original as well as the amended plaint which aver that the sum claimed was due as at 9th July, 1997.

18. On the face of that pleading it is indeed an arguable case whether the suit could have been validly filed after the 8th July, 2003. That is a matter which ought to be canvassed by production of evidence at trial

19. The second reason I do find that there is an arguable point to be argued at trial is the fact that by Cap 449, Coast Development Authority Act, the defendant is a body corporate with own identity not appended to any Ministry of the Government of the Republic of Kenya. On the basis of such legal status, I do consider it an arguable point whether the Ministry of Finance could validly be deemed to make any admissions or concessions without recourse to the defendant.

20. The third part I consider to be of concern to court is that the defendant is a public entity whose activities and budgetary allocations are funded by the tax payers of Kenya. It must be treated as such and viewed as having a public face and interests at stake. Even though it must be treated as any another litigant, the law as established in this country is that where private and public interests are to be weighed, private interests must give way to public interests. this position was ably put by kiage JA in **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR** in the following words:-

> **"… I need not quote any excerpts from it, content to say that the courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests".**

21. This is not to say that public bodies must be treated in a sacrosanct manner. It only means that the common and communal interests of public bodies should, in all deserving cases, outweigh private interests.

22. In this case, I have commented that I find it disturbing that an advocate having indicated to a client that a suit against it had been struck out with costs, which costs could not be recovered because the plaintiff could not be traced, the same advocate attended court some more than nine years later and recorded a consent to amend pleading but totally failed to amend the defence. He also avoided attending court for an application for Judgment on admission only to come to court later and seek to cease acting after that application had been allowed.

23. Having taken into account all the above factors I consider material to the determination of the application, I do find that by default of Counsel, the application for amendment and judgment on admission was allowed without the participation of the defendant. Where such default or misstep occurs, the law is that, unless a grave prejudice incapable of compensation by an award of costs will result, the court has the discretion, for the sake of substantial justice, to set aside as a way of remedying the default or misstep. This was aptly put by the Court of appeal in the now famous case of ***Philip Chemuolo & another vs Augustine Kubenbe (1982-1988) KAR 103*** where the court said:-

> **"Blunders will continue to be made from time to time and it doesn't follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline".**

24. I am prepared to take it that by some blunder of counsel the defendant applicant has found itself with a judgment it views should not have been entered if not for the blunder. I resist the temptation that the mere occurrence of blunder should condemn the defendant unheard. I am minded to set aside and I do grant to the defendant/applicant the orders sought.

25. But again, by the court orders of 24th September, 2014, the defendant was granted leave, curiously at the instance of the plaintiff, to amend the defence and plead an admission of some 21,974,035. Once that order was issued as extracted, and in absence of the defendant, it was only reasonable that the defence ought to have been amended, admission made in the pleadings before a judgment based on such admission could be entered. Here it would appear that judgment on admission was entered before the intended admission could be pleaded.

26. It is one situation that calls for the court to invoke its inherent powers to do justice and avoid hardship to set aside such a judgment without regard to undue technicalities as to whether it would have been more appropriate under the rules to seek review.

27. In coming to this conclusion I have formed the opinion that by reason of the absence of defendants advocate from court, an irregular judgment was entered. Where such happens the court has an inherent duty to set the same aside as of right. I do set the judgment of 24th September, 2014 aside together with all consequential proceedings and orders. The plaintiff has the liberty to pursue his application for amendment and judgment but after due service upon the defendant.

28. I award the costs of the Notice of Motion dated 9th may 2017to the defendant applicant.

Dated, signed and delivered at Mombasa this 18th day of January 2019.

P.J.O.OTIENO

JUDGE