



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 82 OF 2018**

**JERICHO FURNITURE LIMITED.....PLAINTIFF**

**-VERSUS-**

**APOSTLE OF JESUS REGISTERED TRUSTEES...DEFENDANT**

**RULING**

1. The Plaintiff **JERICHO FURNITURE LIMITED** is a limited liability company incorporated under the companies Act, Cap 486. The Defendant **APOSTLE OF JESUS REGISTERED TRUSTEES** is a religious institution.
2. Parties entered into a contract, dated **18<sup>th</sup> November, 2016**, whereby the Plaintiff was to supply to the Defendant's hostel center, in Karen, assorted furniture valued at Ksh 36,210,500. The contract provided the total cost included delivery of that furniture on site in Karen.
3. The Plaintiff filed this claim seeking judgment against the Defendant for Ksh 32,210,500 being the balance of the amount, it pleaded, was owed by the Defendant.
4. On **2<sup>nd</sup> July 2018** the Deputy Registrar entered judgment for the Plaintiff in default of appearance/defence.
5. There are two applications under consideration. The first is dated **30<sup>th</sup> August 2018**, filed by the Defendant. By that application the Defendant seeks the setting aside of the default judgment of **6<sup>th</sup> July 2018**. The second application is dated **12<sup>th</sup> October 2018** filed by the Plaintiff. The Plaintiff seeks, by that application the interim stay of execution granted by the Court on **31<sup>st</sup> August, 2018** be set aside. It is obvious, looking at the prayers sought by the two parties, that the determination of the Defendant's prayer for setting aside judgment will determine the Plaintiff's application. For indeed, if the judgment is set aside there will be no basis for execution by the Plaintiff. If however that judgment is not set aside the Plaintiff will be at liberty to execute the judgment. It follows that I will only consider the Plaintiff's application is so far as costs are concerned.
6. The Defendant's application is based on the ground that it had filed a defence by the date when the Deputy Registrar entered judgment in default. It is also based on the ground that the Plaintiff failed to serve it with Notice of the entry of judgment.
7. Although I could not trace a copy of the Defendant's defence in the Court file a copy was attached to the affidavit dated **12<sup>th</sup> October 2018** of **George Lalla Oduor**, a director of the Plaintiff.
8. The Defendant's defence was filed, from the date reflected on the Court stamp, on **17<sup>th</sup> June 2018**. Judgment in default was entered on **2<sup>nd</sup> July 2018**. The Defendant had filed a Memorandum of Appearance on **11<sup>th</sup> June 2018**.
9. The Defendant was first served by the Plaintiff, with the summons and Plaint on **12<sup>th</sup> March, 2018**. On the Deputy Registrar requiring the Defendant to be re-served, the Plaintiff re-served the summons on **18<sup>th</sup> May 2018**.
10. By virtue of **Rule 6 of the Civil Procedure Rules (the Rules)** the Defendant was required to enter as appearance within 15 days of service. The Defendant, by my calculation, should have filed an appearance on **3<sup>rd</sup> June 2018**, and not **11<sup>th</sup> June 2018** the date it filed its appearance.
11. On filing an appearance the Defendant was required to file its defence within 14 days. As stated before the Defendant filed its defence on **27<sup>th</sup> June 2018**. As per Rule 7 of the Rules the Defendant should have filed its defence by **17<sup>th</sup> June 2018**.

12. From the above analysis it becomes clear that the Defendant did not keep to the time lines set out in the Rules on the filing of an appearance and defence. The Deputy Registrar cannot, therefore, be faulted for entering judgment in default on **2<sup>nd</sup> July 2018**. The default judgment was regularly entered by the Deputy Registrar and the Defendant is therefore not entitled to setting aside of that judgment *ex debito justitiae*, as a matter of right. This finding is in keeping with the provision of **Rule 10 (4) (1) of the Rules** which provides:

*“Where the Plaintiff makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons or all the Defendants fail so to appear, the Court shall, on request,....enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from filing of the suit, at such rate as the Court thinks reasonable, to date of the judgment and costs.”*

13. The Defendant failed to file its appearance within the prescribed period, that is within 15 days of service of summons.

14. Although, as stated above, that judgment entered herein was a regular judgment, Order 10 Rule 11 of the Rules affords this Court discretion to set such a judgment. That Rule provides:

*“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 are just.”*

15. In the case **Prime Bank Limited v Paul Otieno Nyamodi [2014] eKLR** the Court amplified that Rule as follows:

*“..notwithstanding the regularity of an **ex parte** judgment, a Court may set aside the same if he has reasonable defence on the merits” and **Civil Case No 222 of 2010 Winnie Wambui Kibinge & 2 others vs Match Electricals Limited** where the Court held that, “...it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”*

16. There are two areas of arguments, in support of the Defendant’s application, that I need to consider. The first is whether the Plaintiff was obligated to serve a Notice of entry of judgment, on the Defendant. The second is whether the defence raises reasonable defence on merit to the Plaintiff’s case.

17. **Order 22 Rule 6** provides that a party may apply to execute a decree. In its provision, that Rule provides:

*“provided that, where judgment in default of appearance or defence has been entered against a Defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”*

18. Although the Plaintiff did not respond to the allegation that the Notice, as required under **Order 22 Rule 6 of the Rules**, was not served, on my perusal of the Court file there is a Notice of the judgment dated **25<sup>th</sup> April 2018** which was served upon **Father Nelson** on the same date. It would therefore follow that the Defendant was served with the Notice, as required.

19. **Is there a defence on merit?** Although the Defendant, through its defence admitted having partly paid the Plaintiff ksh 4 million, it however denied owing the Plaintiff the amount of Ksh 32,210,500 the balance of the contract amount. The Defendant further denied that a letter admitting the debt was written by the Defendant’s Vicar General. In making that defence there is no allegation of forgery of that letter.

20. Amongst the Plaintiff’s documents, in this matter, is the letter dated **24<sup>th</sup> October 2017** written by **Fr. Fredrick Otieno** the Vicar General of the Defendant. The letter is addressed to the Plaintiff. In part the Defendant by that letter stated:

*“...we are grateful to Jericho Furniture who soon after contracting with us worked so hard to supply and deliver all most (**sic**) all the furniture worth Ksh 36,210,500.00. Our delay to complete payment to Jericho Furniture has been partly due to complexity of the entire project but also due to complications in transferring funds from our bankers in USA. We have taken the necessary steps to rectify this situation as soon as possible and hope that this will be through before mid next month, November.*

*It is therefore my humble request that you allow us a grace period to enable us normalize the payment proceedings (**sic**) with a commitment and promise to remit the payment to Jericho Furniture as soon as possible.”*

21. It would seem that the Defendant, through that letter reproduced, in part, above committed itself to settle the Plaintiff’s debt as per contract.

22. The Defendant, through the affidavit of **Father Fredrick Otieno**, dated **6<sup>th</sup> November 2018**, deponed that the Plaintiff had failed to comply with the provision of Article 4 of the contract, which Article provided that payment for the furniture would be made, by the Defendant, on “**execution, completion and commission**” of the supplied furniture. According to **Father Fredrick Otieno** the furniture had not been commissioned.

23. In the first instance that deposition was not pleaded in the Defendant’s defence. Secondly the Defendant in its correspondence with the Plaintiff, when it undertook to settle the debt, did not state that the contractual amount was not payable because the furniture was not commissioned. The issue of commissioning of the furniture was first raised in affidavit evidence of **Father Fredrick Otieno** dated **6<sup>th</sup> November, 2018**.

24. In my view and bearing in mind the evidence before me the issue of non commissioning of the furniture is a red herring. It will not therefore be considered.

25. The upshot is that the application dated **30<sup>th</sup> August, 2018**, for the reasons set above, is dismissed.

26. It would follow that there was no basis, in view of my above finding, of granting interim stay of execution of the decree. Accordingly the Plaintiff is entitled to costs to the application dated **12<sup>th</sup> October 2018**, whereby the Plaintiff sought to have the stay of execution set aside.

27. In the end the orders of the Court are as follows:

- a. *The Notice of Motion dated **30<sup>th</sup> August, 2018** is dismissed with costs to the Plaintiff.*
- b. *The Plaintiff is awarded costs of the Notice of Motion dated **12<sup>th</sup> October 2018**. That Notice of Motion is spent.*
- c. *For the avoidance of doubt the stay of execution issue herein is hereby set aside.*

*Orders accordingly.*

**DATED, SIGNED and DELIVERED** at **NAIROBI** this **5<sup>th</sup>** day of **March**, 2019.

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open Court in the presence of:**

Court Assistant..... Sophie

..... For the Plaintiff

..... For the Defendant