



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION- MILIMANI**

**HC COMM NO. 52 OF 2018**

**M/S JONDU ENTERPRISES LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SPECTRE INTERNATIONAL.....RESPONDENT/APPLICANT**

**RULING**

**BACKGROUND OF THE APPLICATION**

By a Notice of Motion dated 4<sup>th</sup> April 2018 the Applicant approached the court seeking orders that default judgment entered against the Defendant/ Applicant be set aside. This application was on the basis that after filing memorandum of appearance on 19<sup>th</sup> February 2018, **Mr Awele** resigned from the partnership of **Murumba & Awele Co. Advocates**, which led to a disruption of a number of its internal administrative processes due to the reorganization and transfer of this matter to a new firm on record that led to a delay in filing of the defence dated 29<sup>th</sup> March 2018. The Application is supported by the sworn affidavit of Mr. Awele Jackson an Advocate of the High Court, Kenya filed on the same 4<sup>th</sup> April 2018.

**PLAINTIFF'S SUBMISSIONS**

The Plaintiff submitted its written submissions in court dated 3rd July 2018 asserting the following;

The Respondent filed their pleadings (Plaint) dated 5<sup>th</sup> February 2018 and served the Defendant on the 8<sup>th</sup> of February 2018. The Defendant then entered appearance on the 19<sup>th</sup> of February 2018. After a lapse of 14 days from the date of service, the Plaintiff filed a memorandum of appearance to the Defendant. Acknowledging that there was no response, the Plaintiff filed a request for judgment in default that was entered on the 13<sup>th</sup> of March 2018. They then wrote a letter to the Defendant on 27<sup>th</sup> March 2018 demanding the settlement of **Kshs.35, 556,088/-**.

The Plaintiff also claims that the Defendant did not state that there had been any fraudulent claim after they received and acknowledged the demand letter. Furthermore, the Plaintiff submits that there was no evidence that Mr Awele was ever a partner, neither is there evidence showing the partnership's dissolution.

The Plaintiff's prayers were that the application be dismissed and the costs bore by the Defendant.

The issues as brought out in the written submissions were as follows;

1. Whether the Application for stay of execution/setting aside of the default Judgment Was/Is Merited.

In The case of ***Shanzu Investment Ltd v Commissioner of Lands [1993]eKLR***, the learned judge stated that;

***“Now, in this instance, the judgment was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there must be a “triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication (see Patel’s case Ibid). Mr Oyalo, for the respondent, had submitted in the Superior Court as well as in this court that the respondent did not deny liability for the principal sum and that the only issue in contention was with regard to the rate of interest applicable.***

***In our view, no useful purpose could be served by setting aside the judgment as there was no possible defence to the action. We agree with Mr Kariuki that the learned Judge acted in error in setting aside the said judgment.”***

The Plaintiff relied on the case above in support of the claim that there was no defence and/or triable issue on record.

In sustenance of the Plaintiff's claim that the judgment should be upheld since the default judgment was entered regularly, they relied on the case of **Kenya Commercial Bank vs Suntra Investments Bank Ltd [2015]** where the court held that;

***“I have looked at the Defence and I have carefully considered all the averments therein. It is in plain eye-sight that it is an assembly of mere denials. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out. Accordingly, I strike out the defence and enter judgment for the Plaintiff and against the Defendant as prayed for in the plaint. It is so ordered.”***

### **DEFENDANT'S SUBMISSIONS**

In the Defendants application (notice of motion) dated 4<sup>th</sup> April 2018, the defendant sought to set aside a default judgment entered on 13<sup>th</sup> March 2018. Through the Defendants submissions dated 28<sup>th</sup> May 2018, they claimed that appearance was entered 16<sup>th</sup> February 2018 and served on the Plaintiffs on 19<sup>th</sup> February 2018 through Murumba & Awele Co. Advocates by Mr Awele. About the same time, Mr Awele resigned from the partnership which consequently led to the disruption of a number of its internal administrative processes due to the reorganization and transfer of the matter that led to the delay in filing of the defence dated 29<sup>th</sup> March 2018. The Defendants, however, do not dispute that there was indeed a delay of 30 days which was as a result of the unnoticed period to file the defence.

They relied on **Order 10 rule 11** of the Civil Procedure Rules to reiterate the courts powers to set aside default judgment on just grounds which provides;

#### ***“Setting aside judgment***

***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.”***

**Order 50 rule 6** of the Civil Procedure Rules states that;

#### ***“Power to enlarge time***

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”***

The Defendants further claimed that service was within the prescribed time but Mr Awele's resolution from the partnership disrupted a number of internal administrative processes that led to the 30 days delay to file the defence which they eventually managed to serve the Plaintiff.

The Defendants also relied on the principles used to set aside ex parte judgments as set out in the case of **PITHON WAWERU MAINA VS THUKA MUGIRIA [1983] EKLR**. They further submitted that the defence discloses triable issues of law and fact relying on the case of **BERNADETTE CANUTE VS HERBET SORE MAKATIANI [2016]EKLR** which reiterated that the court should look at the draft defence to see if it contains a valid and reasonable defence.

The Defendant's prayers were that the court grants them leave to file the defence out of time and consequently, the matter to be set down for hearing.

### **DETERMINATION**

The court has carefully considered the Notice of Motion dated the 4th of April 2018 and the issues to determined are;

1. Whether the default judgment that had been entered was on merit/regular
2. Whether the court should set aside the default judgment

**Order 10, rule 3 and 4** of the Civil Procedure Rules provides for;

#### ***“3. Failure to serve***

***Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.***

#### 4. Judgment upon a liquidated demand

*(1) 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 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 claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."*

The court was therefore justified to enter default judgment against the Defendant upon application by the Plaintiff since a defence had not been filed within the reasonable time period.

However, the case of *GULF BADR GROUP (K) V MORE THAN CONQUERORS CO. LTD [2018] EKL* reiterated the principles set out in the case of *PITHON WAWERU MAINA V THUKAMUGIRIA [1983] EKL* that guide the courts in its discretion on determining whether or not to set aside judgment as follows:-

*i) The court has a very wide and unfettered discretion to set aside with clear intent and purpose to do justice even where the judgment is regularly entered (Maina vs Mugina [1982-88] 2 KAR 171.*

*ii) Where the judgment is irregularly entered, the court has no discretion not to set aside [Kanji vs Velji[1954] 21 EACA 20.*

*iii) The discretion is geared and aimed at doing justice between the parties and intended to remedy lapses and avoid injustice or hardship resulting out of genuine and excusable mistake or inadvertence but never intended to assist a party who has by design, evasion or deliberate default set out to delay or derail the course of justice[Shah vs Mbogo [1968] EA 93.*

*iv) The discretion, like other judicial discretions is due for judicious exercise in a selective and discriminatory manner, not arbitrarily, whimsically or idiosyncratically [Pithon Waweru vs Thugu Mugira[1982-99] 1 KAR 171.*

*v) Some of the considerations that go into the matter include the conduct the parties and the circumstances prior to and after the entry of judgment [Jeuse Kimani vs Mcconnel [1966] EA 547.*

*vi) Mistake is a mistake and should not be a basis to eject a litigant from seat of justice [Chemwolo vs Kubebez).*

In the case of *PATEL V EA CARGO HANDLING SERVICES LTD [1974] EA 75 AT 76 C* the court stated that;

*"there are no limits or restrictions on the judge's discretion 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."*

The court must then be guided by the above principles when determining whether to set aside a default judgment as it ought to consider whether the applicant will suffer any prejudice if denied the opportunity to be heard which would be against *Article 159 of the Constitution* where every party/persons has a right to be heard before a just and competent court.

*Order 12 Rule 7 of the Civil Procedure Rules 2010* also provides that:

*"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."*

The court must also determine whether the defence has triable issues. In *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."*

In *Shah vs Mbogo[1968] EA 93* it was held that:

*"...Secondly, this discretion is intended so 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 course of justice."*

It is not disputed that the Applicants/Defendants entered appearance within the stipulated time but their defense was filed out of time. The

Defendant /Applicant filed memorandum of appearance on 19<sup>th</sup> February 2018 under Muruba & Awele Advocate. Thereafter as deponed and explained that he resigned from the said firm and this led to disruption of a number of internal administrative processes owing to reorganization within the firm and transfer of this matter hence the delay of filing defence.

I note that the instant application is by Counsel now under the banner of the new outfit Awele & Bashir Advocates LLP and the memorandum of appearance was under Murumba & Awele Co. Advocates which confirms that reorganization of law firms occurred and contributed to the delay.

Secondly, it is after service of default judgment on 27<sup>th</sup> March 2018 that the instant application was filed on 4<sup>th</sup> April 2018 a short time later. Therefore from the facts the delay was inadvertent.

The 2<sup>nd</sup> issue is with the defence whether there are triable issues, although the Plaintiff/Respondent attached invoices of goods ordered by the defendant, that constitute the debt the defence raises triable issues of pricing of goods, delivery of goods and calculation of the total sum due and owing by the Defendant to the Plaintiff .It is important to iron out all legal issues regarding the sale delivery of goods and payment for the goods once and for all during the hearing of the suit. In the interest of justice, the triable issues ought to be heard and determined. It therefore would be a miscarriage of justice not to offer the Defendant an opportunity to be heard in court.

#### **DISPOSITION**

- 1. The court therefore orders that the application of 4<sup>th</sup> April 2018 upheld and the default judgment be set aside on condition the defendant deposits Ksh 3million in Court within 90 days from today and pay costs to the Plaintiff.**
- 2. The defence filed on 4<sup>th</sup> April 2018 be deemed as duly filed and served within the requisite period.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 11<sup>th</sup> MARCH 2019.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR MWESIGHA FOR PLAINTIFF**

**MR AKELE FOR DEFENDANT**

**COURT ASISSTANT JASMIN**