REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 505 OF 2017

MONIKS AGENCIES LIMITED...................................APPLICANT

-VERSUS-

KENYA AIRPORTS AUTHORITY (KAA)...............RESPONDENT

RULING

PLEADINGS

The Defendant/Applicant filed Notice of Motion Application dated 31st August 2018 and filed on 3rd September 2018, pursuant to **Order 21 Rule 22, Order 10 Rule 11 of the Civil Procedure Rules, Section 3 of the Judicature Act, Section 3A of the Civil Procedure Act** and all other enabling provisions of the law. The Applicant sought orders:-

> **a) That the interlocutory judgment entered as against the defendant on 4th July 2018 and all consequential orders and decree be set aside unconditionally and the defence on record be deemed as duly filed and served on time;**
>
> **b) That pending the hearing and final determination of the instant application, there be an order of stay of execution of the judgment and/or Decree herein;**
>
> **c) That pending the *interpartes* hearing of the instant application there be an interim ex-parte order of stay in terms of prayer (b) herein above.**

The Application was/is premised on the following grounds;

> **a) On 30th August 2018, the Defendant/Applicant's goods were proclaimed in an apparent execution of an interlocutory judgment entered herein on 4th July 2018;**
>
> **b) The attachment is unlawful and bad in law as the judgment and subsequent decree being executed were unprocedurally, unlawfully and irregularly obtained and the whole execution process is legally flawed and untenable in law;**
>
> **c) By the time the alleged interlocutory judgment was entered on 4th July 2018, the time for filing of a defense had not lapsed taking into account that memorandum of appearance had been filed on 25th June 2018 and the Defendant consequently had 14 days thereafter to file its defense as per the provisions of Order 7 Rule 1 of the Civil Procedure Rules;**
>
> **d) An interlocutory judgment is incapable of execution as it is not a final judgment and the matter should have therefore gone for formal proof hearing before execution;**
>
> **e) The interlocutory judgment on record and subsequent decree are therefore premature, irregular and bad in law and the same ought be set aside *ex-dabito justitiae*;**
>
> **f) The interests of justice dictate that the orders sought be granted as the Defendant/Applicant otherwise stands greatly prejudiced.**

The Plaintiff/Respondent opposed the application vide a Replying Affidavit dated 5th September 2018 and filed the same date sworn by **Wainaina Nganga** director of the Plaintiff. He stated that the application was incompetent and fatally defective since the same was

supported by affidavit sworn by the Advocate on record for the Defendant/Applicant who had deponed on facts that were hotly contested. The Application and the entire application ought to be struck out with costs.

That summons to enter appearance and the pleadings herein were served on the Defendant on 28th May 2018, as shown in annexed copies of the summons to enter appearance and the plaint duly stamped and signed by the Defendant.

That under **Order 6 rule 1 CPR 2010**, the Defendant had 14 days to enter appearance as indicated on the summons to enter appearance.

That at the expiry of the prescribed 14 days the Defendant had not entered appearance and therefore the Plaintiff's procedurally requested for judgment on 14th June 2018 as provided under **Order 10 Rule 4 CPR 2010**

That on 4th July 2018 judgment was entered as per their request. On 11th July 2018 the Respondent's advocates on record gave notice of entry of judgment to the Defendant which notice was received by Defendant's Advocates on 11th July 2018 and by the Defendant on 12th July 2018 as shown by the annexed marked copy marked **WN- 3.**

On 18th July 2018, the Applicant's advocates wrote to their Advocates disputing the Interlocutory judgment on record.

That on 19th July 2018 their advocates on record in a bid to ensure that the file and specifically the order for entry of judgment had not been interfered with wrote to the Deputy Registrar requesting for the extracted order of entry of judgment which order was issued on 24th July 2018.This is confirmed by copies of letter dated 19th July 2018, payment receipt for the order, order made on 4th July 2018 and issued on 24th July 2018.

That it was clear that by making an assertion that there was no judgment on record when in fact the judgment had already been entered on 4th July 2018, the Defendant was trying to unfairly scandalize the Deputy Registrar and the Court as a whole.

On 25th July 2018, in good faith and without obligation, the Respondent's advocates wrote to Defendant's /Applicant's advocates forwarding Court order on entry of judgment. The Applicant through Advocate wrote vide letter of 27th July 2018 and contested the regularity of the judgment. Copies of Letters of 25th July 2018 and 27th July 2018 are annexed to the Replying Affidavit.

APPLICANT'S SUBMISSIONS

The Defendant /Applicant served Memorandum of appearance on 28th May 2018. On 14th June 2018 despite the Respondent requesting for both liquidated and general damages, sought Interlocutory judgment and not final judgment under **Order 10 Rule 4 (2) (cap 21).**

The Interlocutory judgment was entered on 4th July 2018 and confirmed by Court Order on 14th June 2018. In spite of filing memorandum of appearance on 28th June 2018, the Respondent sought Interlocutory judgment in default of memorandum of appearance/ defense.

At the time the memorandum of appearance was filed Interlocutory judgment was not granted yet, so it cannot be said that it was inconsequential and **15 days** of filing defense had not lapsed.

The Defendant/Applicant submitted that there is no legal requirement that to file memorandum of appearance and/or defense outside the statutory period leave of Court is required.

When the Defense was filed on 12th July 2018, Interlocutory judgment had been entered on 4th July 2018. This was irregular as the Applicant filed memorandum of appearance on 28th June 2018 and statutory period for filing Defense had not lapsed.

The Interlocutory judgment as defined by **Black's Law Dictionary** is provisional, temporary not final Judgment. Hence, such judgment was incapable of execution. It was subject to formal proof proceedings before final judgment was granted.

On the law of setting aside *ex parte* judgments under **Order 10 Rule 11CPR 2010**, the Applicant made reference to the following cases;

1) Phillip Kiptoo Chemwolo & Mumias Sugar Company vs Augustine Kubede (1982-1988) KAR

2) Jomo Kenyatta University of Agriculture & Technology vs Musa Ezekiel Oebal (2014) eKLR

3) ***Patel vs EA Cargo Handling Services Ltd (1974) EA 75***

That indicates the court's discretion to set aside or vary a judgment in default of appearance upon such terms as are just and to avoid injustice. Where there is a defence on merit with triable issues it should go for trial.

The 2nd issue raised by the Defendant/Applicant is that the envisaged process of execution was/is not the legal, regular and valid process provided by law against/towards State Corporations which are considered part of Government and subject to Government Proceedings Act. **Section 21(4) GPA** prohibits execution against Government and/or State Corporation. The Defendant/Applicant is a State Corporation established by **Section 3 of Act No 3 of 1991** and operates at the behest of the relevant Government Ministry as provided by **Section 4 of the said Act**. The certificate or any order for payment ought to be to the Accounting Officer of the Government Department who shall pay the

person entitled or to his advocate the amount appearing in the certificate.

The Applicant relied on the following cases with regard to setting aside a regular exparte/default judgment;

HCCC152 of 2013- Prime Bank Ltd vs Paul Nyamodi;

HCCC144 of 2014- James Wanyoike & 2 Others vs CMC Motors & 4 Others; and

Hccc 209/15- Kenya Broadcasting Corporation vs Nacada & Anor to buttress the point that the Court has jurisdiction to set aside a regular default/ interlocutory/exparte judgment as it would be fair equitable and just for the defendant to be given an opportunity to present his case and to deny the subject a hearing should be as a last result of a Court.

The Defendant/Applicant submitted that the Defence raises reasonable defence to the Plaintiff's claim and it is only fair and just that parties are heard on merit of the case rather than the matter determined on technicality of Default judgment.

RESPONDENT'S SUBMISSIONS

The Respondent objected to reliance of Supplementary Affidavit filed on 12th November 2018 and Supporting Affidavit of 31st August 2018 as the Applicant was granted leave to file Supplementary Affidavit based on the Consent of 6th September 2018. The same was to be filed with Written Submissions within 14 days but they filed the affidavit after 2 months and 7 days later contrary to condition for leave to file the Supplementary Affidavit.

The Respondent relied on the case of ***Nevin Jiwani Vs Going Out Magazine & Anor Hccc 336 Of 2002*** where the Court noted;

> ***"However, since the order limiting time within which the affidavit was to be filed was made by consent, I apprehend the law to be that only a subsequent consent by the parties could enlarge the time."***

Secondly, that the impugned affidavits were /are deposed by Counsel for the Defendant and not by the Defendant. Further that the Deponent failed to disclose his capacity in the Corporation enabling him to swear affidavit on behalf of the Corporation which is contrary to **Order 4 Rule 1(4) CPR 2010.** This position is reinforced by the **case of *Microsoft Corporation vs Mitsumi Computer Garage Ltd & Mitsuminet (Ky) Ltd*.** The Respondent submitted that on the above grounds the affidavits ought to be struck off.

Thirdly, the Affidavits are defective as the deponent did not disclose the authority granted/given to swear the affidavits. Reference was made to the case of **Microsoft Corporation** *supra* where the Judge stated in relation to swearing affidavits;

> ***"However, while she may indeed be authorized to make the affidavit she does not depone to the fact. This is a substancial defect in her affidavit."***

Fourthly, the Respondent submitted that the impugned affidavits should be struck off because the deponent is an Advocate on record of the matter. Where the issues are hotly contested, it is not enough that the matters are within the deponent's knowledge, the advocate on record is not competent to swear affidavits on matters contested instead it ought to be the Defendant who contests the regularity of the judgment and execution.

The Respondent relied on the case of**; *East African Foundry Works (K) Ltd vs Kenya Commercial Bank HCCC 1077 of 2002*;** it was observed**;**

> ***"I accept the further submission ...that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits and applications they canvass before Courts and I have no hesitation in striking out such depositions as a matter of good practice in our Courts. The unseemly prospect of Counsel being called upon to be cross examined in matters in which they appear as Counsel must be avoided by striking out such affidavits as a matter of good practice."***

Fifthly, the Supplementary Affidavit should be struck off because the deponent at paragraph 14 stated the said affidavit was sworn based on information, belief and sources whereof have been disclosed. Nowhere in the affidavit were the sources disclosed. In the case of **East Africa Foundry Works (K) Ltd *supra*** the Court held that statements of fact which the deponent deposed statements based on information the source whereof he/she has not disclosed offend **Order 19 Rule 3 (1) CPR 2010.**

The respondent submitted that the memorandum of appearance and Defence were not filed within the prescribed period under **Order 6 rule 1 CPR 2010.** The filing of memorandum of appearance on 28th June 2018 was 27 days after the service of summons to enter appearance. The Applicant failed to explain mistake and/or delay and as such a delay that is not explained is not excusable.

The Respondent contended that the Defendant/Applicant was duly served with summons to enter appearance and therefore in the absence of filing memorandum of appearance within the prescribed period a regular default judgment was entered for the Plaintiff/Respondent. It is settled law that a regular default judgment may be set aside taking into consideration the Draft Defence. The Plaintiff/Respondent submitted that the said Defence lacks triable issues for trial and is a mere, bare and general denial.

With regard to extraction of decree and execution process; the execution was not defective as the Defendant/Applicant would be part of Government if they are represented by the **Attorney General's Office** and not Counsel on record.

Secondly, **Section 3 (2) of Act No3 of 1991** defines the Defendant as a body corporate with perpetual succession and a common seal and shall have capacity in its corporate name to sue and be sued and to hold, acquire and dispose movable and immovable property. In the Statement of Defence at paragraph 1 thereof admits the description by the Plaintiff in paragraph 2 of the Plaint. Indeed execution can issue against such entity.

DETERMINATION

A perusal of the Court record, pleadings and oral and written submissions discloses the following issues for determination;

a) **Was the Plaint and summons to enter appearance served on/to the Defendant and/or Counsel?**

b) **Did the Defendant file and serve the memorandum of appearance and Defence within the prescribed timelines?**

c) **Was a valid regular and lawful Interlocutory judgment entered?**

d) **Are the pleadings filed by the Defendant /Applicant defective/**

e) **Is the execution proper?**

The Court record specifically the Pleadings disclose the following**;**

The Plaint was filed on 21st December 2017. The Plaint and summons to enter appearance were served on/to the Defendant on 28th May 2018 as evidenced by the Kenya Airports Authority Stamp inscribed 'received', signed and recorded time 2.30 pm.

There is an Affidavit of Service filed on 14th June 2018 by Process Server **Paul Biage Motanya** confirming effect of service of Plaint and Summons to enter appearance from the Plaintiff to the Defendant.

As per **Order 6 rule 1 and Order 7 Rule 1 of CPR 2010**, the Defendant had 14 days to enter appearance from 28th May 2018 and then thereafter another 14 days to file and serve Statement of Defence.

The Memorandum of Appearance was filed by Counsel for Defendant on record on 26th June 2018 after the statutory 14 days period elapsed.

By end of 14 day period the Plaintiff/Respondent wrote to the Court on 14th June 2018 and sought entry of Interlocutory judgment. The Deputy Registrar entered Interlocutory judgment on 4th July 2018. If the Defendant filed and served the memorandum of Appearance; it was not within the stipulated statutory period and hence a default judgment was merited. The Applicant contended that since the memorandum of appearance was filed on 26th June 2018 and judgment was entered on 4th July 2018, the default/Interlocutory judgment was irregular, invalid and unlawful.

In spite of the Court stamp, there is nothing to show from any Court personnel that the memorandum of appearance was filed and placed in the Court file before the Deputy Registrar who had sight of it before entering judgment in default of filing memorandum of appearance. There is no Affidavit of Service to confirm who served the memorandum of appearance to the Plaintiff and the Court which would assist to find out what exactly transpired.

Be that as it may, there is proof of service by Plaintiff to the Defendant of Plaint and summons to enter Appearance. There is ample evidence to confirm that the Defendant did not enter appearance within the requisite statutory period of 14 days from 28th May 2018. By virtue of **Order 10 Rule 4(1) CPR 2010** which provides;

> ***"(1) Where the plaint 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.***

The Plaintiff rightfully applied to Court and was granted Interlocutory judgment on 4th July 2018. The order extracted on 24th July 2018. On 25th July 2018 the Plaintiff/Respondent notified the Defendant/Applicant of the entry of Interlocutory judgment as per the legal Notice prescribed by **Order 22 Rule 6 CPR 2010 which provides;**

> ***"Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:***

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."

The totality of the above sequence of events confirm that a regular default judgment was entered because in spite of the Defendant being duly served with summons to enter appearance and Plaint for one reason or another he failed to enter appearance or to file defence [within requisite statutory period] Refer ***James Kanyiita Nderitu & Anor Vsmarios Philotas Ghikas & Anor [2016] eKLR*** on definition and consequences of regular default judgment and irregular default judgment.

To set aside a regular default judgment the Court has jurisdiction to consider such application on the following grounds;

a) **The Defendant /Applicant ought to offer reasonable explanation why the memorandum of appearance and/or Defense were not filed within the prescribed period**.

Prime Bank Ltd vs Paul Otieno Nyamodi [2014]eKLR

"Ordinarily, the Court will not set aside or vary Interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case causing it to suffer prejudice. The Court must therefore be satisfied that the Defendant offered a very plausible explanation as to why he failed to file his memorandum of appearance and Defence within the prescribed period under CPR 2010 before such judgment can be set aside and/or varied."

b) ***Kingsway Tyres & Automart Ltd vs Rafiki Enterprises Ltd. Civil Appeal 220 of 1995;***

"***Notwithstanding the regularity of an exparte judgment, a Court may set aside the same if a Defendant shows he has reasonable defence on its merits".***

c) ***Pithon Waweru Maina vs Thuku Muguria [1983] eKLR***;

"The principles that govern exercise of judicial discretion to set aside an exparte judgment obtained in the absence of an appearance or defence by Defendant are outlined".

d) ***Patel vs Ea Cargo Handling Services [1974] EA 75.***

"The Court will not impose conditions on itself to fetter wide discretion given by the Rules".

e) ***Shah vs Mbogo [1967] EA 116***

"The discretion is intended 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".

f) ***Jamnadas vs Sodha Gordandas Hemraj (1952)7 ULR7***

"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 be reasonably be compensated by Costs for any delay occasioned should be considered and finally it should be remembered that to deny the subject a hearing should be the last resort of a court".

In the instant case, the Defendant/Applicant did not contest that the Respondent served them on 28th May 2018 and 14 days elapsed on 14th June 2018. The reason, circumstances or explanation of why the memorandum of appearance was filed on 28th June 2018 was not advanced to this Court to consider. The only explanation gleaned from the Defendant's application as deponed by Counsel is that Counsel was instructed on 21st June 2019 and filed the memorandum of appearance on 25th June 2018. This means the unexplained delay was by the Defendant who has remained absolutely silent on why after service, delayed to enter appearance or instruct Counsel.

With regard to the Statement of Defence filed on 12th July 2018 there are denials of the Plaintiff's statement of Claim as to all allegations save the Defendant's description. The Defendant claims that the Plaint is bad in law and ought to be struck out. There is no list of Witnesses or Documents attached but it is deposed that the Defendant reserves the right to amend the Defence and to provide lists of witnesses and documents before Pre- Trial Directions are given.

As against the statement of Defence, the Plaintiff sets out in a bundle of documents, some of which have the Defendant's letterheads confirming instructions after award of tender. It was awarded to the Plaintiff on 8th May 2014 to clear goods as appeared in the Defendant's Tender Document for the purpose of constructing **Terminal 4** at **JKIA** following a fire inferno.

It was one of the terms of the tender that it would be valid for 60 days, but as pleaded by the Plaintiff, the Defendant failed to provide all relevant documents to facilitate clearance and instead asked the Plaintiff to procure and process the documents as extra work outside the

tender. The tender scope of work was completed in 2015 way after the contract period due to the Defendant's breach in not providing all relevant documentation to aid completion. When the Plaintiff raised invoices, the Defendant paid only less than **10%** of the figure. The balance is due and owing.

Although, the Defence is mostly a mere denial, there are at least 2 triable issues; what were the terms of the tender in terms of scope of work and cost. Secondly, were there extra works, if so who authorised them and what did extra works entail and cost. These 2 pertinent issues naturally impact on the sums sought in relief by the Plaintiff. This Court shall exercise discretion by setting aside the regular default judgment to facilitate the hearing and determination of the triable issues to ascertain if the claim is valid and to what extend in terms of what is due and owing.

The Applicant challenged the Interlocutory judgment on the basis of lack of legal notice of execution. The Respondent provided the requisite notice vide letter of 25th July 2018 to Applicant of the Interlocutory judgment and onset of execution process.

Secondly, the Applicant contended that Interlocutory judgment meant temporary judgment and it would only be a final judgment after Formal Proof proceedings. In the case of ***Paul Muiyoro T/A Spotted Zebra vs Bulent Gulbahar Remaxrealtors [2016] Court of Appeal No 20 of 2014*** held;

> ***"The formal proof entailed that taking of evidence in order to demonstrate the loss arising from the Respondents' alleged breach of agreement and the justification for the reliefs sought by the Appellant. The Court at this stage of formal proof is only concerned with the extent of the loss and appropriateness of the relief sought.***

So, the formal proof proceedings are for unliquidated amount or assessment of damages pleaded and to be proved. The Respondent herein wrote to Deputy Registrar and waived the general damages claim and proceeded with extraction of amended decree and execution. The execution proceeded on the basis of interlocutory judgment under **Order 10 Rule4 (1) CPR 2010.**

Thirdly, the Applicant claimed that Government Proceedings Act governs execution against the Defendant State Corporation and hence proclamation, attachment and sale of the Corporation's assets is irregular and unlawful. With respect, whether the corporation is part of Government or not it is not dependant mainly on legal representation but its constitution, operations and structures. I find that the Defendant is a State Corporation under Ministry of Transport and hence by extension part and parcel of Government and execution ought to be as per the **Government Proceedings Act**.

Finally, with regard to the Applicants pleadings and the fact that the Supplementary Affidavit was based on Consent of 6th September 2018 which provided for filing of the same within 14 from date of Consent. It was filed on 13th November 2018 contrary to time limit set by Consent. In line with the **Nevin Jiwani** case ***supra*** it is hereby expunged as it offends **Order 19 Rule 3(1) CPR 2010**.

With regard to the Supporting Affidavit, the Applicant alleged that it is not deponed the authority granted to the deponent to swear the Affidavit on behalf of the Corporation and capacity of the Deponent. With respect, this Court finds that the memorandum of appearance filed on 25th June 2018 albeit late is explicit and self explanatory that Counsel is representing the Defendant in the matter. Secondly, in paragraph 2 of the Supporting Affidavit, Counsel stated that they were instructed to represent the Defendant/Applicant to act for it in the subject matter on 21st June 2018. This explains the authority of Counsel to represent Defendant. From the litany of correspondence between the Plaintiff /Respondent's Advocate and the Defendant/Applicant's advocate, it is clear that the Counsel for the Defendant was seized of the facts regarding service and/or orders issued from Court and was right to depone and swear the affidavit.

This Court is alive to the possible conflict of interest where Counsel on record depones facts and swears affidavit and then represents the client in Court. With respect, it solely depends on the matter at hand. In this case it is about entering appearance and filing Defence which were done by Law firm on record. The Counsel highlighting submissions in Court was another lawyer and not the deponent of the Affidavit. I find Supporting Affidavit proper before Court in this instance.

DISPOSITION

1. **This Court considered the parties' respective pleadings and written and oral submissions and legal provisions and case-law cited in support of rival positions and find that the Interlocutory judgment of 4th July 2018 was a regular default and Interlocutory judgment;**

2. **The default was/is that despite uncontested service of Plaint and Summons to enter appearance by Plaintiff/Respondent on 28th May 2018 on/to the Defendant/Applicant the memorandum of appearance and defence were filed after the statutory period;**

3. **The Court considered the Statement of Defence and finds whereas broadly is a mere bare denial 2 pertinent issues are for determination that inform the cost/fees sought and hence there are triable issues for hearing and determination;**

4. **Therefore this Court grants conditional setting aside of the regular default judgment on the following terms;**

    a) **The Defendant/Applicant to deposit/ obtain and provide bank guarantee of Ksh 10 million in Court within 60 days from date of Ruling as guarantee of part payment to Plaintiff if and when the matter is heard and determined and claim is proved;**

    b) **The Statement of Defence is deemed as filed and served;**

c) The matter to proceed for case management before DR Commercial and Tax Division on 10th July 2019;

d) The Defendant/Applicant to pay throwaway costs of Ksh 30,000/- to the Plaintiff/Respondent;

e) The Defendant/Applicant to pay Auctioneers Fees/Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH JUNE 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. NGUGI KARIUKI FOR THE PLAINTIFF/RESPONDENT

MR. OKEYO FOR THE RESPONDENT/APPLICANT

COURT ASSISTANT - JASMINE