



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E118 OF 2018

PROTEA CHEMICALS KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

GENERAL PLASTICS LIMITED.....DEFENDANT/APPLICANT

RULING

(1) Before this Court is the Notice of Motion dated **21st February 2019** in which **GENERAL PLASTICS LIMITED** (the Defendant/Applicant) seek for orders:-

“1. SPENT

2. SPENT

3. THAT the judgment and decree of the Honourable court of 24th January 2019 be set aside and unconditional leave be granted to the Defendant to defend this suit.

4. THAT the Memorandum of Appearance and Notice of Appointment of even date filed herein be deemed to be properly on the Court record.

5. THAT costs of this Application be in the cause.”

The application which was premised upon **Order 10 Rule 11** and **Order 51 of the Civil Procedure Rules, 2010**, was supported by the affidavit of even date sworn by **RASHIK SHAH** the Managing Director of the Defendant Company.

(2) The Plaintiff/Respondent **PROTEA CHEMICALS KENYA LIMITED**, opposed the application through the Replying Affidavit dated **25th February 2019** sworn by **JOSEPH MURIITHI**, the Finance Manager of the Plaintiff Company. Pursuant to directions made by the court, the application was canvassed by way of written submissions. The Defendant/Applicant filed their written submissions on **12th March 2018**, while the Plaintiff/Respondent filed their submissions on **22nd March 2019**.

BACKGROUND

(3) On **12th October 2019**, the Plaintiff/Respondent filed in the High Court the Plaint dated **7th September 2018**, seeking judgment against the Defendant/ Applicant for:-

“(a) USD 292,720.90

(b) Interest on (a) and (b) above at Court rates from the date of filing the suit until payment in full.

(c) Costs of the suit.”

(4) Summons to enter appearance were duly served upon the Plaintiff/Respondent on **1st November 2018**. The Plaintiff failed to enter appearance and/or file defence within the stipulated period of 15 days. On **22nd January 2019**, the Plaintiff/ Respondent filed a Request for Judgment. Judgment in default was entered on **24th January 2019** and a decree was issued by the Court on **30th January 2019**. On **18th**

February 2019, the Defendant/Applicant was served with a notice of Entry of Judgment. This moved the Defendant to file the present application.

(5) The Defendant/Applicant explains its omission to file appearance or defence by stating that the Summons to Enter Appearance was served on one **“Dickson Chahenza”** their former Human Resource Manager who at the time was not on duty as he was on suspension pending termination of his contract, and the said **Mr Chahenza** had no instructions or authority to receive process on behalf of the Company. It was further averred that **Mr Rashik Shah** the Managing Director of the Defendant Company, was out of the country for medical issues and therefore was not aware of the summons and could not instruct Counsel to act.

(6) The Defendant/Respondent avers that it has not been able to draft and/or file a Defence to the suit as they do not have the pleadings given that the person served left their employment. The Defendant submits that their failure to act on the summons was occasioned by an administrative lapse and that they only managed to instruct counsel after receiving the Notice of Entry of Judgment. The Defendant/Applicant pleads that the Ex parte judgment be set aside and they be accorded an opportunity to file their defence to the suit.

(7) As stated earlier the application was opposed. The Plaintiff/Respondent submits that no good reason has been advanced for the Defendant’s failure to act upon the summons. It is averred that the Ex parte judgment was regular as the Defendant was properly served and had notice of the suit against it. The Plaintiff/Respondent submits that the Defendant is not deserving of the exercise of the courts discretion in its favour and urges the court to dismiss the application with costs.

Analysis and Determination

(8) I have carefully considered the submissions filed by both parties as well as the applicable statute and case law. There are two (2) issues requiring determination in this application:-

(i) Was the Exparte judgment entered on **24th January 2019** Regular or Irregular?

(ii) Should the Court set aside that Ex parte judgment?

Order 4 Rule 4(1) of the **Civil Procedure Rules 2010** provides as follows:-

“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.”

(9) In this case the Plaintiff/Respondent had in their suit made a liquidated demand. Summons to enter appearance was extracted and was served upon the Defendant on **1st November 2018**.

In the case of **SHADRACK ARAP BAIYWO –VS- BODI BACH [1987] eKLR** the Court held thus:-

“There is a presumption of service as stated in the process servers report and the burden lies on the party questioning it, to show that the return is incorrect.”

In **SOUTHERN CREDIT BANKING CORPORATION LTD –VS- JONAH STEPHEN NGANGA [2006]eKLR** it was held that:-

“Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is irregular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If the judgment entered is found to be irregular it ought to be set aside ex debito justitiae.”

(10) The Defendant/Respondent does not deny the fact that the summons were served. They also do not deny the fact that service was effected at their registered offices. However the Defendant claims that the summons were served upon an officer who was not authorized to receive process on behalf of the Company as he had been sacked from employment. Annexed to the Supporting Affidavit dated **21st February 2019** is a letter dated **18th October 2018 (“RS1”)** written to one **Dickson Chahenza Adeya**, the officer who received and signed for the summons. Contrary to the Deponents allegation that this officer was at the material time on suspension, the said letter merely directs the said **Mr. Chahenza** to proceed on leave in order to offset his accrued leave and report back on duty on **6th November 2011**. Therefore the assertion by the Defendant/applicant that the officer who received the summons had been suspended is not true.

(11) Moreover the process-server had no obligation to enquire into the status of employment of the officer whom he served with the summons nor was it the duty of the process-server to enquire as to whether the officer was on leave or not. The Affidavit of Service dated **4th December 2018** clearly states that the summons were served at the offices of the Company. The summons were received and acknowledged by an employee of the Company. In that regard I find that service was proper.

(12) Following service of summons the Defendant had 14 days to enter appearance. They failed to do so. Again this fact is not denied by the Defendant/Applicant.

(13) Following the failure by the Defendant to enter appearance or file a defence as required the Plaintiff/Respondent applied for default judgment in terms of **Order 10 Rule 4(1)**. The Court did enter judgment in default on **24th January 2019**. My finding is that the judgment

in default was proper and valid and I find that the same was regular.

Should the Ex parte Judgment entered on 24th January 2019 be set aside?

(14) As has been stated earlier the ex parte judgment in this matter was entered regularly. The Defendant/Applicant pleads that the same be set aside and they be allowed to file their defence to the suit. It is a fact that the power granted to the court under **Order 10 Rule 11** is discretionary. In exercising this discretion the court will be guided by certain considerations.

(15) In the case of **JAMES KANYIITA NDERITU & ANOTHER –Vs- MARIOS PHILOTAS GHIKA & ANOTHER [2016]eKLR**, the Court of Appeal held as follows:-

“In a regular default judgment the defendant will have been duly served with summons to enter appearance but for one reason or the other, he had failed to enter appearance to file defence, resulting in default judgment. Such a defendant is entitled, under O10 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 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 a whole it is in the interest of justice to set aside the default judgment.” [own emphasis]

(16) In **JAMES WANYOIKE & 2 Others –Vs- CMC MOTORS GROUP LTD & 4 others [2015]eKLR**, Hon Justice C Kariuki summarized the principles and tests for setting aside ex-parte judgment as follows:-

“(a) Whether there is a defence on the merits.

(b) Whether there would be any prejudice to the Plaintiff.

(c) What is the explanation for the defence.”

(17) In this case the Defendant/Applicant did not annex a draft defence to the Notice of Motion dated **21st February 2019**. Thus the court was not provided with any defence to look at in order to assess whether or not it raised triable issues. In **PATEL –VS- EAST AFRICA CARGO HANDLING SERVICES LTD 1974 E.A 75**, the Court held that:-

“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 to it by the rules. I agree 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 an issue which raises a prima facie defence which should go to trial for adjudication.”[own emphasis]

(18) The Defendant/Applicant while conceding that they had not filed even a draft defence sought to explain this by stating that they could not file any defence as they had not seen the pleadings. This explanation is lame at best. Firstly the Plaintiff and other documents were delivered at the Defendant’s office and left there. The Defendant obviously would have had a chance to peruse those documents. Secondly the claim by the Defendants Managing Director that he was away in India for medical reasons is also not persuasive. A Company does not stop operating because the Managing Director is away on medical leave.

(19) Thirdly and most importantly the Plaintiff was in the court file. The Managing Director in his supporting affidavit at Clause 4 avers that upon receiving the Notice of entry of Judgment, he caused the perusal of the court file. Therefore the Defendant saw and had every opportunity to peruse the Plaintiff and became aware of the claim against it. Nothing would have been easier than to take a copy of the Plaintiff so as to instruct his lawyer on preparing a Defence. The Defendant did not bother to do this. It is manifest that the Defendant/Applicant approached this entire issue in a very casual manner.

(20) Moreover I am persuaded that the reason why no draft defence has been filed is because the Defendant/ Applicant had no real defence to the suit. In the e-mail annexed to the Replying Affidavit dated **22nd January 2018** the Defendant asks for time to present a payment proposal. At no time did the Defendant/Applicant deny the debt or seek any other type of clarification.

(21) In order to get the Court to exercise its discretion in its favour, the Defendant/applicant must persuade the court that it is deserving of such orders by showing that cogent reasons exist for the failure to enter appearance or file defence. The Defendant/Applicant in this matter has fallen woefully short of meeting this standard. The Defendant sought to rely on an alleged suspension of the officer who received the summons, the absence of their Managing Director for some unclear reasons, alleged administrative lapses and their own failure to peruse the plaintiff. None of the above reasons satisfactorily explained the failure of the Defendant to enter Appearance or file a defence.

(22) I am guided by the case of **KILONZO & CO. ADVOCATES –VS- JOHN NJENGA MUTUTHO [2012]eKLR** in which Hon. Justice Odunga held:-

“I have considered all the foregoing, I have taken into account the fact that the defendant has not been vigilant in protecting his interests. He has not taken the necessary steps when they ought to be taken and in cases where steps have been taken they have left a lot to be desired. I have also taken into account the fact that the mere fact that there is dearth of plausible reasons for failure to take the necessary steps does not necessarily deprive the court of the wide discretion to set aside an ex

parte judgement. It is not lost to me that if the application is dismissed and eventually the defendant's objection proceedings are successful, the avenue for review is still open to the defendant. Taking into account all the foregoing relevant factors, it is my view and I so find that the defendant's conduct in this matter coupled with lack of a prima facie arguable defence disentitles me to exercise my discretion in favour of the defendant." [own emphasis]

(23) Similarly I find that the Defendant/Applicant have not been vigilant and have failed to exercise due diligence in this matter. Instead they have put forward untruths and half-baked explanations which will not suffice. No persuasive and/or convincing reasons have been advanced to set aside the ex parte judgment and accordingly I decline to do so. The Notice of Motion dated **21st February 2019** is dismissed in its entirety.

Costs in the cause.

Dated in Nairobi this 5th day of July 2019.

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Justice Maureen A. Odero