



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 323 OF 2018

VAKKEP BUILDING CONTRACTORS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

RAVASAM DEVELOPMENT COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

Before this Court is the Notice of Motion dated **9th November 2018** in which **RAVASAM DEVELOPMENT COMPANY LIMITED** (the Defendant/Applicant) seeks the following Orders:-

“1. SPENT

2. SPENT

3. THAT this Honourable Court be pleased to set aside the interlocutory Judgment entered on the 13th of September 2018 upon such terms as are just.

4. THAT the Defendant/Applicant be granted leave to defend this suit and the draft Defence annexed be deemed as duly filed upon payment of the requisite fees.

5. THAT the costs of this motion be provided for.”

The Application which was premised upon **Order 10 Rule 11 & Order 15 Rule 15 of the Civil Procedure Rules 2010** and **Section 1A, 1B and 3A of the Civil Procedure Act** and all enabling laws was supported by the Affidavit sworn on even date by **ERIC AGBEKO** the Director of the Defendant/Applicant.

The Plaintiff/Respondent **VAKKEP BUILDING CONTRACTORS LIMITED** filed the Replying Affidavit sworn on **11th December 2018** by **VISHRAM RAVJI HALAI**, the Managing Director of the Plaintiff/Respondent, in which they opposed the application.

The application was canvassed by way of written submissions. The Defendant/Applicants filed their written submissions on **3rd December 2018**, whilst the Plaintiff/Respondent filed their submissions on **31st January 2018**.

BACKGROUND

The Plaintiff/Respondent filed in the High Court its Plaint dated **6th November 2018** seeking judgment in its favour against the Defendant/Applicant in the amount of **Kshs.200,000,000/=** plus interest thereon at commercial rates from the date the suit was filed until payment in full. The Plaintiff/Respondent also prayed to be awarded the costs of the suit.

On **16th August 2018**, a copy of the Plaint as well as a summons to Enter Appearance was duly served upon one **Mr. PHILIP NYAMBOK** said to be a legal officer of the Defendant/applicant. The Defendant did not file any defence and on **3rd September 2018**, judgment in default of Defence was entered against the Defendant.

Thereafter Plaintiff/Respondent extracted a decree and on **17th September 2018** served the Defendant with Notice of Entry of Judgment and Intended Execution. On **30th October 2018** **WORLDWIDE GALLANT AUCTIONEERS**, proclaimed the Defendants property. The Defendant then filed the present application.

ANALYSIS AND DETERMINATION

The Defendant/Applicant submits that its failure to enter appearance and file a defence was not a deliberate act. It is averred that the summons were served upon a person who was not recognized in law to receive summons on behalf of the Company. That **Mr. PHILIP NYAMBOKE** who was served with the summons is **not** the legal officer of the Defendant/Applicant but is merely a business friend of Mr. **“Eric Agbeko”** the Director of the Defendant.

It was further averred that at the time the summons were served the said **Mr. Eric Agbeko** was out of the country. Upon being made aware of the summons he called the Defendant’s Director a **“Mr. Patel”** who assured him that they were willing to negotiate in order to settle the matter and would await the return of the Defendant’s Director to the Country. The Defendant/Applicant therefore hesitated to instruct counsel in the matter on the understanding that an amicable solution would be reached. The Defendant submits that plausible reasons have been advanced for the failure to file their defence within the stipulated period.

The Defendant/Applicant further submits that it has a triable defence which ought to be heard and determined on its merits. That the Plaintiff/Respondent will not suffer any prejudice if their defence is admitted and the suit determined on its merits.

The Plaintiff/Respondent submits that the summons were properly served and were stamped by the Defendant company. They submit that the fact that the Defendant’s Director was out of the country is not an excuse for failure to file defence on time. It is denied that the Defendant’s Director ever spoke to a Director of the Plaintiff and it is denied that any agreement was ever reached that the matter would be settled amicably.

The Plaintiff/Respondent further submits that no triable issues have been raised in the Draft defence given that the Defendant has admitted the debt of **Kshs.200,000,000/=**. The Plaintiff submits that the Defendant has been evading the debt for a longtime and is now abusing the Court process to continue to avoid paying the debt in question. The Plaintiff contends that even after being served with Notice of Entry of Judgment as required by law the Defendant still took no action to set aside the same. They were only galvanized into action when Auctioneers moved to proclaim their goods. The Plaintiff/Respondent urges the court to dismiss this application as lacking in merit.

I have considered the submissions of both parties as well by the relevant statute and case law. The following issues arise for determination:-

1. Was summons properly served?
2. Does the Draft Defence raise triable issues?

SERVICE OF SUMMONS

The Plaintiff’s Complaint makes a liquidated demand for **Kshs.200,000,000/=** therefore **Order 10 Rule 4(1)** of the Civil Procedure Rules is applicable. The Defendants contend that the summons to Enter Appearance was not properly served and argue that service was effected on the wrong party. I have perused the Affidavit of Service dated **16th August 2018**, sworn by **ROBERT K. MUTUKU**, an authorized Court Process Server. He states that upon arrival at the Defendants offices located on the **7th Floor of Post Bank House along Banda Street in Nairobi** he met a **Mr Phillip Nyambok** whom he served with the documents. That gentleman accepted service and stamped the documents. The question of whether or not this **Mr. Phillip Nyambok** was the legal officer of the Defendant Company is neither here nor there. The fact is that the Summons do bear the stamp of the Defendant Company which is sufficient proof that the Summons was received by the Company. The Defendant has not denied the authenticity of that stamp.

In any event the purpose of summons is to alert a party of the existence of a suit against it. In his Supporting Affidavit the Defendant’s Director admits to being aware of the existence of the suit filed against them by the Plaintiff, even while he was still out of the Country. A company does not cease to operate just because a Director is out of the Country. His absence notwithstanding the Director could have contacted his Advocate by phone or e-mail and given instructions for filing of the defence. The reasons given by the Defendant herein for failure to file a defence are not persuasive at all. Even if the Defendant anticipated that negotiations would lead to an amicable solution that was not bar to their filing a defence to the Plaintiff. I find that summons were properly served on the Defendant and find that they had notice proper of the suit against them.

DEFENCE

Notwithstanding the finding above the court has discretion to set aside or vary an *ex parte* judgment where justice so demands. In **PATEL – VS- E.A CARGO HANDLING SERVICES LTD [1974] E.A 75**, the Court held thus:-

“There are no limits or restrictions on the Judges’ discretion to set aside or vary an *ex parte* judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern 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.”

This discretion like any other given to the court must be exercised judiciously with the sole intention of dispensing justice to the parties. Each case must be evaluated on its own unique facts. In this case the summons was served on **16th August 2018** while the present application was not filed until **9th November 2018**. Counsel for the Defendant/Applicant also entered appearance on **9th November 2018**.

In my view this is not an inordinate delay as it is only three (3) months.

I have carefully perused the Draft Defence dated **9th November 2018** annexed to this Notice of Motion. In my view the same does raise pertinent and triable issues. In **KENYA TRAPE COMBINE LTD –VS- SHAH Civil Appeal No.193 of 1991** it was held

“.....all a Defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed....”

The Plaintiffs have not demonstrated what prejudice they stand to suffer if the said Defence is admitted. Any inconvenience can be compensated by an award of costs. In **SEBET DISTRICT ADMINISTRATION –VS- GANYALI & Others [1968] E.A 300** the Court observed that:-

“...the Court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing defence within the prescribed time. 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 reasonably be compensated by costs for any delay occasioned, should be considered, and finally I think it should always be remembered that to deny the subject of a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend...”[own emphasis]

I have taken into account the nature of the suit and I also take note of the fact that the Plaintiff’s claim is for a colossal amount. The Defendant/Applicant ought not be condemned to pay this sum without their defence being heard and considered.

Finally I do allow this present application in terms of prayer (3) and (4) direct that:-

- i. The Defendant/Applicant to file and serve its statement of Defence upon the Plaintiff/Respondent within 7 days hereof.
- ii. The Applicant shall pay to the Plaintiff/Respondent throw away costs amounting to **Kshs.20,000/=**
- iii. Costs of this application to be met by the Applicant.

Dated in Nairobi this 15th day of July 2019.

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Justice Maureen A. Odero