REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E099 OF 2018

ATLANTIC PICTURES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

INSIGHT KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 26th November 2018, brought under the provisions of; Sections 1A, 3A and 63(c) of the Civil Procedure Act, (Cap 21) Laws of Kenya, Order 22, Rule 22, and Order 10 Rule 11 of the Civil Procedure Rules 2010 and all enabling provisions of the law.

2. The applicant is seeking for orders that the court be pleased to set aside the ex parte judgment in default, entered against it on 14th November 2018 and be allowed to file its defence out of the prescribed time. The costs of the application be provided for.

3. The application is premised on the grounds on the face of it and an affidavit of, sworn by Peter Omingo, an advocate of the High Court of Kenya, practicing as such in the firm of; Omingo & Associates, who appear for the applicant. He averred that, he was served with the summons to enter appearance, and duly entered appearance on behalf of the applicant.

4. However, subsequently he tried severally to file the defence and counter claim without success, as he learnt from the court registry that, the file was unavailable and/or missing. As a result he had to wait until it was traced. Even then, he continued to follow up on the availability of the file including making formal requests for the same. Finally it was availed on 11th November 2018 and he filed a defence and counter claim on the same day.

5. Thereafter, after paying filing fees, the file went missing again and was allegedly taken to chambers for directions. The applicant argues that is and has always been ready and willing to litigate this matter to conclusion. That the suit raises very weighty issues and involves large amounts of money. Therefore it will be in the interest of justice that the matters be litigated exhaustively and determined conclusively. That the court exercises its discretion and set aside judgment to avoid injustice. The failure to file a defence in good time was not occasioned by its fault.

6. However the application was opposed by the respondent who relied on a replying affidavit dated 18th January 2019, sworn by Victor Muthuri, an advocate of the High Court of Kenya practicing as such in the firm of; Muthaura Mugambi Ayugi & Njonjo Advocates which appear for the Respondent. He termed the application as frivolous, vexatious and an abuse of the court process and one that does not disclose any plausible reason for impeaching, setting aside or preventing enforcement of a foreign judgment in Kenya, from a non-designated country.

7. It was averred that the applicant freely submitted to the jurisdiction and competence of the courts of; Mauritius and the Laws of Mauritius by dint of; clause 23 of the Distribution Agreement (herein “the agreement”), made between the parties on 12th January 2015. Therefore the High Court of Kenya should not re-examine the merits of the Judgment by the Supreme Court of Mauritius in the circumstances of this case. The judgment of the Supreme Court of Mauritius has not been set aside, reviewed or appealed against by the applicant. Further the applicant has not made any payments whatsoever towards settlement of the judgment sum, which remains outstanding to date.

8. The respondent argued that the enforcement of the foreign judgment proceedings herein was commenced by filing a plaint and supporting documents on 2nd October 2018. The summons to enter appearance were issued on 16th October 2018 and served on the applicant on 18th October 2018.The applicant entered appearance and a memorandum of appearance duly filed by the firm of; Omingo & Associates advocates on 23rd October 2018.

9. However, no defence was filed within the specified time whereupon, the respondent filed a request for judgment with respect to the liquidated judgment amount of; USD 300,000.00 on 7th November 2018. The judgment in default of defence was entered by the deputy registrar on 14th November 2018.

10. The respondent avers that the copy of the request for the file annexed to the affidavit supporting this application, indicates that, the applicant made the request for the file on 7th November 2018, which is the same date that the respondent filed a request for judgment in default of defence. It was two (2) days after the expiry of the period within which the applicant should have filed its defence.

11. That in further demonstration of abuse of the court process and in a bid to frustrate the respondent from enjoying the fruit of its judgment, the applicant states that he paid the filing fees and filed the defence and counter-claim on the 11th of November 2018, yet the receipt annexed and marked as exhibit "P.O 22" clearly indicates that, the same was paid on the 14th of November 2018, following assessment of the court filing fees on 13th November 2018. This was nine (9) days past the prescribed time limit for filing the defence.

12. Furthermore, upon institution of the main suit in Mauritius court, the applicant was on 20th June 2017, personally served at its official residence in Kenya, with a notice of denunciation and of trial, but failed to enter appearance and the suit; Supreme Court of Mauritius in; Case No. CN SC/COM/PWS/00201/2017, proceeded for hearing in default of appearance, by himself or his duly appointed legal representative.

13. The respondent submitted that the court should not delve into the merits of the draft defence and counterclaim attached to the application and marked as exhibit "P.O 3" as the same ought to have been adjudicated before the Supreme Court of Mauritius, which has the jurisdiction and competence to hear and determine any dispute arising out of and in connection to the agreement. That none the less, the attached draft defence and counterclaim is devoid of merit, is frivolous and vexatious, consists of mere denials and falsehoods.

14. As such it ought to be disregarded and stuck out for the following reasons:-

a) There is no basis for the claim of; USD 150,000.00 as the same is merely labelled as the principal sum yet it is not specifically pleaded or computed as by law required;

b) Clause 8 of part 1 of the distribution agreement dated 12th January 2015 explicitly outlines the terms of revenue sharing under the agreement and it was therefore not a matter of conjecture; and

c) Contrary to the assertion made in paragraph 1 of the Defendant's draft counterclaim, the agreement was entered into on the 12th of January 2015 and not July 2015. Once the agreement was executed, the plaintiff promoted the program to the majority of its clients during visits to their premises put the content ahead during the international fairs, where billboards were created, printed out flyers and engaged in online advertisements.

15. Further the respondent supplied the applicant with share revenue reports on a quarterly basis and its share of revenue as stipulated in the agreement. It was the applicant who was in blatant breach of the agreement, and particularly clause 10 thereof, in as much the materials was delivered substantially later than agreed by the parties, thereby causing considerable prejudice to the Respondent. The amount due and owing to the applicant and withheld by the respondent at present is; USD 7,479.00 which the respondent is ready and willing to offset from the judgment sum owed.

16. The respondent however conceded that the matter indeed raise weighty issues and involves large amounts of money, but argued that for that reason, the applicant should have been diligent enough to litigate the matter in the competent courts having been granted ample opportunity to do the same and even appeal the decision.

17. That, it will be unfair and unjustified for the court were to allow the applicant to file the defence and counterclaim after it acquiesced on its rights, for so long by not entering appearance or filing a defence in the main suit in Mauritius and/or filing a defence and counter-claim in this matter after the expiry of time. As result of the applicant's failure and lethargy with which it has conducted himself in this matter, the respondent has been put in great jeopardy, unwarranted wastage of resources and precious judicial time without justifiable cause. The law of equity cannot be invoked to aid it since equity does not aid the indolent..

18. Thus the applicant is not entitled to any reliefs sought in the application and in the unlikely event that any order is granted, it ought to be ordered to deposit the entire decretal amount as security to ensure that the court process is not abused.

19. The parties disposed of the application by filing submissions. The applicant invited the court to determine whether the default judgment was properly entered and whether justice will be served by upholding or by setting aside it aside. The applicant reiterated that, the defence and the counter claim is reasonable and raises weighty triable issues, inter alia;-

a) whether parties performed their parts of the contract;

b) which party owes the other what amounts of money;

c) whether the foreign judgment alluded to was properly entered;

d) whether this suit seeks enforcement or otherwise, in that, the prayers as prayed do not seek enforcement but rather a principal sum.

20. The case of; *Tom Odhiambo Achillah t/a Achillah T.O. & Co. Advocates vs Kenneth Wabwire Akida t/a Akida & Co. Advocates & 3 Others (2015) EKLR*, was referred to, where the court observed that, "no suit ought to be summarily dismissed unless it appears so hopeless, that it is plainly and obviously discloses no reasonable cause of action and it is so weak to be beyond redemption and incurable by amendment, it ought to be allowed to go forward, for a court of justice not to act in darkness without the full facts of the case before it."

21. It was submitted that apart from mere allegations, the respondent has not demonstrated how the draft defence and counterclaim has no substance, is fanciful, incapable or reasoned argument, or has been brought for purposes of annoyance or leads to no possible good. Further the discretion of the court is not limited in any way in setting aside a judgment, so that justice between the parties may be done as held in the cases of; *Maina vs Muriuki (1984) KLR 407*; and *Pravinchandra Jamnadas* Kakad *v Lucas Oluoch* Mumia [2015] Ekl. The main concern of the court is to do justice to the parties and the court will not impose conditions or fetter the wide discretion given to it by the rules. Thus the court should uphold substantive justice pursuant to; Article 159 of the Constitution of Kenya

22. That in any event, the application has been brought without delay, is not malicious and is not in any way intended to delay or defeat justice. Further there is no ground as to why the court should order that the deposits the sums in question.

23. However, the Respondent filed response submissions and invited the court to consider; whether the Applicant has proved the grounds for setting aside judgment in default of defence and/or demonstrated sufficient grounds for the court to bar enforcement of the foreign judgment herein.

24. The Respondent submitted that, Mauritius is not one of the countries with a reciprocating agreement with Kenya and therefore not a "designated court" within the meaning of Kenya's Foreign Judgment (Reciprocal Enforcement) Act, and the Act does not apply to the enforcement of the current judgment. In that case the foreign judgment is enforceable under the common law, as enunciated in the case of; *Mohamedal Mulia Ebramji v Alibhai Jivanji Mamuji (1917) Vol. VII EALR 89*, where the court s held inter alia that; "under English Common Law, which is the applicable law in Kenya, a judgment of a competent foreign court condemning a party to pay a certain sum constitutes a good cause of action and is regarded as creating a debt in respect of which a suit may be filed."

25. Further, the procedure for enforcement of a foreign judgment from a non-designated country was laid down by the Court of Appeal in the case of; *Jayesh Hasmukh Shah v Navin Haria & another (2016) eKLR* that " a party must file a plaint at the High Court providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a verifying affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the foreign judgment should be exhibited to the Plaint."

26. Similarly in the persuasive authority of; *Hilton v Guyot 159 US 113* quoted with approval by the High Court of Uganda in the case of; *Christopher Salves & Another v the Attorney General, Uganda HCCC No. 91 of 2011* the Ccurt held that:

> *"….where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."*

27. That position was upheld in the case of; *Jayesh Hasmukh Shah v Navin Haria & another (2016) eKLR* to the effect that; "mere procedural irregularity, on the part of the foreign court, according to its own rules, is not a ground for defence to enforcement of the foreign judgment."

28. Finally reference was made to the case of; *Adams & Others v Cape Industrials PLC [1991] 1 All ER* which set down principles to guide the enforcement of foreign judgments from non-designated countries, and states that "where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained". In the same vein, the Court of Appeal in the case of; *Keshavji Ramji Ladha v Bank of Credit and Commerce International – SA (BCCI), (In Compulsory Liquidation) [2015] eKLR* held that; "it is now trite in civil litigation in this jurisdiction that a judgment of whatever nature, whether foreign or otherwise, is good until otherwise declared. But it is not in its form as a judgment per se that it is capable of being enforced. It has to take the shape of another procedural document before it can reach any execution stage."

29. I have considered the application in total and I find that there is no dispute the Plaintiff/Respondent filed a suit against the Defendant/Applicant before the Supreme Court of Mauritius, for of breach of agreement made between the parties on 12th January 2015. It is averred that the Applicant was personally served accordingly and failed to enter appearance. The suit proceeded for hearing ex parte before Honourable Mrs. R. Mungly – Gulbul, Judge of the Supreme Court of Mauritius and judgment delivered on 27th July 2017 in the following terms: -

a) *The Defendant to deliver to the Plaintiff Seasons three and four of the Program forthwith;*

b) *The Defendant to pay to the Plaintiff the sum of 300,000 US Dollars as damages actually suffered;*

c) *The Defendant is prohibited from approaching any other Plaintiff's clients to market and sell the T.V. Program and*

d) *The Plaintiff is awarded interest and costs.*

30. The Respondent argues that the Applicant only complied with order (a) of the Judgment and neglected, failed and/ or refused to comply with the rest, and neither did it appeal the judgment nor seek to review it within the prescribed time. The Applicant is not denying that there is a valid judgment from the Supreme Court of Mauritius.

31. As properly stated by the parties and supported by the authorities cited, the court herein can only deal with the suit for enforcement of that judgment. It cannot and does not have jurisdiction to delve into either the dispute between the parties or the merit of that decision. In that case, all arguments advanced in relation to the same cannot be considered herein.

32. Be that as it were, the enforcement of foreign judgments in Kenya is governed by; The Foreign Judgments (Reciprocal Enforcement) Act, (cap 43) of the Laws of Kenya which states in its preamble that; it is "An Act of Parliament to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya, which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith"

33. Pursuant to these provisions and in particular, Section 13, thereof; the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 [L.N. 135/1984, L.N. 301/1991.], cited as; the Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984, came into force and specifies under the Schedule thereto the countries declared to be reciprocating countries for the purposes of the Act with respect to judgments given by superior courts of those countries. The countries recognized are; Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the Unite d Kingdom and Republic of Rwanda. As can be noted evidently Mauritius is not among them.

34. Therefore to enforce a judgment from the superior courts of Mauritius the Plaintiff/Respondent had to file the suit herein. It is not in dispute that indeed after filing the suit, the Defendant/Applicant was served and did not enter appearance or file a defence within the stipulated time. The simple reason advanced is unavailability of the court file. In that regard, I have considered the court record and I find that, the plaint herein was filed on 2nd October, 2018. The memorandum of appearance was filed on behalf of the Applicant on 23rd October, 2018. The request for judgment was made on 7th November, 2018 and judgment entered on 14th November, 2018. This application was filed 29th November, 2018.

35. It suffices to note that, the only document annexed to the affidavit in support of this application relevant to the reason advanced of the absence of the file, is a single letter dated 25th October 2018, but filed in court on 20th November 2018. It cannot have taken the applicant almost one month to file a letter that was so urgent in court. However, what is clear from its content is that, it was filed after the applicant learnt that the respondent had requested for judgment. Indeed by the time the letter was written the period within which the applicant should have filed the defence had lapsed. It is therefore clear that the applicant did not write to the court over the lack of the file before that period lapsed.

36. It is noteworthy that the Applicant avers that the file was missing for three weeks and the clerks at the registry informed him that the same was being traced. With utmost respect, the Applicant knew the period within which it had to file the defence and the consequences of default. Why didn't the Applicant move the court accordingly for directions as did with the letter of 20th November 2018, before the relevant time lines expired? Even then, it is interesting to note that the same letter states that the file resurfaced on 15th November, 2018 and after the Applicant paid for the filing fees it disappeared again.

37. There are several issues that arise; by the time the fees was paid the defence was already time barred, and the Respondent was seeking for the entry of judgment. The Applicant does not even indicate it had the defence and counter claim on the 15th November 2018, and only writes over lack of the file on 20th November, 2018. Based on the above record I find that the reasons advanced by the Applicant for failure to file the defence herein and/or a counter claim has no merit and I dismiss the same.

38. Furthermore as stated herein, the court cannot descent onto the arena of determining the dispute relating to the agreement. The issues raised in relation to the same should have been addressed in the court in Mauritius. It is averred and not disputed that the Applicant did not defend that suit. That conduct does not avail the courts discretion to tilt in favour of the Applicant to set aside the judgment herein.

39. However, to allow the Applicant an opportunity to be heard, I shall set aside the judgment on condition the Applicant deposits the entire decretal sum in an interest earning account in a reputable bank, in the names of the parties' counsels within fifteen (15) days of the date of this order. Failure of which the order setting aside the judgment shall stand automatically revoked and/or vacated. The costs of the application shall be borne by the Applicant. Upon the deposit being made a defence must be filed within two (2) days thereof.

40. It is so ordered.

Dated, signed and delivered on this 11th day of November, 2019.

GRACE L NZIOKA

JUDGE

<u>In the presence of;</u>

Mr. Muthuri for the Plaintiff/Respondent

Mr. Kihoro for Omingo for the Defendant/Applicant

Dennis ----------court Assistant