REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.383 OF 2018

ISEME KAMAU & MAEMA ADVOCATES (A FIRM).....PLAINTIFF/RESPONDENT

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT/APPLICANT

RULING

(1) Before this Court the Notice of Motion dated **13th December 2018** by which **the Defendant/Respondent, KENYA AIRPORTS AUTHORITY** seeks the following Orders:-

> **"1. SPENT**
>
> **2. THAT the ex-parte default judgment entered against the Defendant on 8th November 2018 and all consequential orders be set aside and the Defendant be granted leave to file a defence to the Plaintiff's claim.**
>
> **3. SPENT**
>
> **4. THAT the costs of this application be provided for."**

(2) The application which was premised upon **Order 10 Rule 11, Order 22 Rule 22, Order 150 Rule 1 of the Civil Procedure Rules 2010 Section 3A of the Civil Procedure Act**, and all other enabling provisions of the law was supported by the Affidavit of even date sworn by **KATHERINE KISILA**, the Corporation Secretary of the Respondent Company.

(3) The Plaintiff/Respondent **ISEME KAMAU & MAEMA ADVOCATES** opposed the application and relied upon the Replying Affidavit dated **18th January 2019** sworn by **MARTIN MUNYU** a partner in the Plaintiff firm. Pursuant to directions made by the Court the application was canvassed by way of written submissions. The Applicants filed their written submissions on **14th June 2019**, whilst the Respondent filed their submissions on **28th May 2019**.

BACKGROUND

(4) On **8th October 2018** the Plaintiff/Respondent filed a suit against the Defendant/Applicant seeking judgment on its favour against the Applicant in the sum of **Kshs.36,000,000/=** with interest at 14% per annum plus costs and interest. Summons to enter appearance were properly served upon the Defendant on **15th October 2018**. However the Defendant/Applicant failed to enter appearance in the said suit within the required time. On **8th November 2018** judgment in default of appearance was entered against the Defendant/Applicants, who then filed this present application seeking to set aside the default judgment?

(5) The Plaintiff/Respondent opposed the application arguing that the default judgment was properly recorded and that the Applicants have not advanced any valid and/or convincing reason for their failure to enter appearance as required by law. The Respondent further submits that the Applicants have admitted to owing the debt in question.

ANALYSIS AND DETERMINATION

(6) I have considered the submissions filed by both parties in this matter as well as the relevant law. **Order 10 Rule 11 of the Civil Procedure Rules, 2010** provides:-

> **"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."**

(7) A distinction must be drawn between an interlocutory judgment that is regular as opposed to one which is irregular. In **James Kanyiita Nderitu & another Vs Marios Philotas Ghikas & Another [2016]eKLR,** the Court of Appeal restated the distinction between the two and held that:

> **"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 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 the 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 the whole it is in the interest of justice to set aside the default judgment, among others.** [own emphasis]

(8) Both parties concede that the interlocutory judgment in this matter was regularly entered. In deciding whether or not to exercise its discretion as favour of allowing this application the court needs to consider the following factors:-

(i) The reason advanced for failure to file defence in time.

(ii) Whether there is a valid defence on record.

(i) REASONS FOR DEFAULT

(9) The Applicant states that the cause for their delay in entering appearance was **"bureaucratic procedural delay"** due to the fact that being a state corporation they had to await communication from the Solicitor General regarding legal representation. By the time the Solicitor General acted through the Hon attorney General, default judgment had already been entered in the matter.

(10) In my mind the excuse given for delay in filing appearance is not persuasive at all. Even if the Applicant needed to await full instruction from the Solicitor General, there was nothing preventing them from instructing counsel to enter appearance as they waited for those instructions. As pointed out by the Respondents the Applicant is a state corporation which undoubtedly has in-house lawyers. These lawyers must have been aware of the timeline within which appearance was to be entered. I am not persuaded that sufficient and excusable cause has been shown for the Applicants failure to enter appearance within the time prescribed by law.

(ii) DEFENCE

(11) The Applicants urge that they have an arguable defence which ought to be heard on merit. They submit that there exists no evidence of any agreement between the parties respecting the amount payable to the Plaintiff Advocates as legal fees. They further submit that these are matters which can only be determined upon a full hearing of the suit.

(12) On their part the Advocate/Respondent contends that the defence raised is frivolous and amounts to a mere denial and that the same does not raise any triable issues and is merely intended to delay the conclusion of this matter. The Respondent submits that the Applicant had severally admitted the debt through various e-mails and communications to the Respondent. I have perused the said communications which are annexed to the Plaint dated **2nd October 2018**.

(13) On **2nd July 2018** at **6.44p.m** one **Jonny Andersen** the Managing Director/CEO of the Defendant sent an e-mail to **Martin Munyu** a partner in the Plaintiff firm of Advocates stating inter alia that:-

> **"What I agreed to today was a 40% reduction of your latest total and that gives us a fee of kshs.36 Million including VAT – not kshs.36 Million exclusive of VAT."**
>
> The amounts to a clear agreement by the **CEO** to pay the Advocates an amount of **Kshs.36 Million "inclusive of VAT."** The Defendant/Applicant cannot now claim that there was no agreement on the amount payable.

(14) Further on **22nd August 2018** the **CEO** of the Defendant again sent an e-mail to the Plaintiff/Respondent apologizing for the delay in settling the fee note and promising to follow up with their Finance Department. If the amount being claimed was denied or was in dispute, the **CEO** would hardly be apologizing for their failure to pay and would not be promising to follow up the payment with their Finance Department.

(15) Again by an e-mail sent on **3rd August 2018** and on **15th August 2018** at **2.18 p.m** the Defendant's **CEO** promised to follow up to ensure that the amount due to the Plaintiff was paid. None of these e-mails were sent on a **"without prejudice"** basis. They all amount to an admission by the Defendant/Applicant of the amount due and indicate the willingness of the **CEO** to follow up and facilitate the payments due. At no time did the **CEO** deny the amount claimed, indeed by his e-mail of **2nd July 2018** he confirmed the sum of **Kshs.36 Million** as due and owing to the Plaintiffs.

(16) For an admission to be accepted by the court it must be unequivocal. I find that there has been a clear and unequivocal admission by the Defendant through its **CEO** of the amount claimed as due and owing to the Plaintiffs.

(17) Relying on these admissions the Defendant acknowledged the fee note and processed the same by deducting withholding tax through the **KRA (i) Tax System**. Kenya Revenue Authority proceeded to issue the requisite withholding certificate dated **18th August 2018**.

(18) In **KENYA ORIENT INSURANCE LIMITED –VS- CARGO STARS LIMITED & 2 OTHERS [2017] eKLR** the Court held as follows:

> **"In the premises, it is my considered finding that service was duly effected and that the Default Judgment was regularly entered; and that no explanation was proffered as to why the Defendants did not file a Defence herein. It is further my view that the draft Defence raises no triable issues and therefore that no useful purpose would be served by setting aside the otherwise regular judgment. In the result, I would dismiss the Notice of Motion dated 4th May 2016 with costs**."[own emphasis]

(19) Similarly I find no valid grounds have been advanced to warrant the setting aside of the regular default judgment entered in this case, in view of the clear admission by the Defendant/Respondent of the amount of **36 Million** "**inclusive of VAT"** due and owing to the Plaintiffs. Accordingly I find no merit in this application. The Notice of Motion dated **13th December 2018** is hereby dismissed with costs to the Plaintiff/Respondent.

Dated in **Nairobi** this **29th** day of **November, 2019.**

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Justice Maureen A. Odero