



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.E104 OF 2019

TATA AFRICA HOLDINGS (K) LIMITED.....PLAINTIFF

VERSUS

BERLIN EQUIPMENT LIMITED.....1ST DEFENDANT

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....2ND DEFENDANT

RULING

1. Through the application dated 8th July 2019, the applicants/defendants herein seeks orders to stay execution and set aside the exparte judgment and decree entered on 17th June 2019. The applicant also seeks prays that the defence and counterclaim filed on 21st June 2019 be deemed as duly filed.
2. The application is supported by the affidavit of the 2nd applicant's Operations Manager **Paul Mureithi** and the further affidavit of **James Mungai**. It is premised on the grounds that the auctioneers have already proclaimed the 2nd defendants business assets valued at approximately Kshs 50,000,000/- pursuant to the impugned exparte judgment.
3. The applicants contend that they filed a defence and counterclaim on 21st June 2019 and that they were not served with the 10 days notice of entry of judgment as is contemplated by the law. It is their case that they have a good and arguable defence against the plaintiff's claim which contains a counterclaim for a substantial amount of money.
4. The plaintiff opposed the application through the replying affidavit of its accountant **Mr. Edwin Too** who avers that the default judgment was duly entered after the expiry of the 14 days period after service as is provided for under the Civil Procedure Rules (CPR). He further states that Notice of Entry of judgment was duly served on the defendants on 20th June 2019 and that it is only after such service that the defendants' counsel filed the statement of defence and counterclaim without the leave of the court.
5. The plaintiff's case is that the defendants have not advanced any reason for the delay in filing the defence so as to entitle this court to exercise its discretionary powers in their favour. It contends that the draft defence does not disclose any triable issues as the applicants admit delivery of equipment by the plaintiff.
6. The plaintiff further states that it has had numerous correspondence with the defendants over the outstanding debt and that at no time have the defendants raised the issue of their counterclaim.
7. Parties canvassed the application through oral submissions which I have carefully considered. I find that the main issue for determination is whether the applicants have made out a case for the setting aside of the default judgments.
8. The provisions dealing with the setting aside of a default judgment are set out under Order 10 Rule 4(1) of the Civil Procedure Rules(CPR) which stipulates as follows:

“4. (1) Where the plaintiff 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 the instant case, I note that the suit was filed on 26th April 2019 and service of summons effected on the defendants on 30th April 2019. The defendants entered appearance on 14th May 2019 but did not file the defence in time. On 4th June 2019, the plaintiff made a request for judgment in default of defence which judgment was entered on 17th June 2019.

10. The court record shows that the notice of entry of judgment was served upon the defendants on 20th June 2019 and that the defendants filed their defence and counterclaim on 21st June 2019.

11. From the overview of the sequence of events that preceded the entry of the default judgment, it is clear that upon proper service with the summons to enter appearance and the plaintiff the defendants entered appearance on 14th May 2019 and went to sleep till 20th July 2019 when they were served with the Notice of Entry of Judgment.

12. This court is not persuaded by the defendants' averment that they did not know that default judgment had been recorded in the matter on 17th June 2019 as at the time that they filed their defence and counter claim in court since the court record is clear on when the judgment was entered. Furthermore, the defendants did not explain the reason for their delay in filing the defence. This court is of the humble view that even though it has wide powers in exercising its discretion to set aside ex parte or default judgment, such discretion must be exercised judiciously and only in the most deserving cases with the sole intention of dispensing justice to both or all the parties. Each case must however be evaluated on its unique facts and circumstances. Among the factors to consider is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the Applicant's case as to whether it raises any triable issues.

13. In *Patel v E.A. Cargo Handling Services Ltd* (1974) EA 75 the Court held that:-

“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 on issue which raises a prima facie defence which should go to trial for adjudication.”

14. Similarly in *Tree Shade Motors Ltd v D.T. Dobie & Another* (1995-1998) IEA 324, it was held that:-

“Even if service of summons in valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

15. In the instant case, I find that it is not enough for the defendants to merely state that the delay in filing the defence was not inordinate as they were required to explain the reasons for such delay. My take is that failure to state the reasons for the delay can be interpreted to mean that the defendants are taking the discretion of the court for granted which really amounts to an abuse of court process.

16. The Court's power in considering an application to set aside an interlocutory judgment is discretionary. In *Patel v E.A. Cargo Handling Services Ltd* (1974) EA 75 it was held:-

“There are no limits or restrictions on the judge's 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 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 it by the rules.”

17. Similarly, in *Shah v Mbogo* (1967) EA 166, it was held that:-

“this discretion to set aside an ex-parte judgment 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 cause of justice.”

18. It is trite law that in an application to set aside default judgment the court is required to peruse the draft defence in order to confirm if it raises triable issues. I have considered the defendants' defence, filed on 21st June 2019 and I note that the defendants admit having had a long standing working relationship with the plaintiff and that the plaintiff supplied 1st defendant with machinery valued a USD 5,000,000 even though they deny being indebted to the plaintiff. Having regard to the averments contained in the plaint, one cannot say that the plaintiff's claim is far-fetched and similarly, the defence and counterclaim cannot be said to be frivolous. I find that there are triable issues between the parties that this court will be required to interrogate by hearing the main suit.

19. Having regard to the findings and observations that I have made in this ruling I am of the view that it would be just and fair to grant the orders sought in the application dated 8th July 2019 but on certain conditions that will ensure that both parties exhibit commitment to the speedy conclusion of the dispute.

20. Consequently, I allow the application dated 8th July 2019 and set aside the default judgment entered herein on the following terms:

i. That the defendants shall within 30 days from today's date deposit the decretal sum of Kshs 22,396,115.22 in the joint interest earning account to be held in a reputable bank in the names of counsel for the plaintiff and defendants.

ii. That the defence and counterclaim filed on 21st June 2019 be deemed as duly filed.

iii. That the event of failure, by the defendants to comply with Order No.(i) herein above, the parties shall revert to their position before this ruling, which means, the default judgment shall be reinstated so that plaintiff can proceed with the execution.

iv. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 21st day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Njoki for Njora for respondents

Mr. Wanda for Mumma for plaintiff

Court Assistant – Sylvia