



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.144 OF 2016

EAST AFRICA CABLES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

CENTRAL CABLES LIMITED.....DEFENDANT/APPLICANT

RULING

1. By a notice of motion dated 3rd July 2019, the defendant applicant seeks orders that :

1. Spent.

2. That the summary judgment entered against the defendant/applicant and all consequential orders be set aside.

3. That leave be granted to the defendant/applicant to file a statement of defence and the suit be heard on merit.

4. That the costs of the application be provided for.

2. The application is brought under Order 36 Rule 10 of the Civil Procedure Rules and is supported by the affidavits of the applicant's director **Mr. Githinji Njocora**. The application is premised on the grounds that even though the defendant was duly served with summons to enter appearance and plead, it instructed its previous advocates on record who entered appearance but did not file a defence thereby leading to the entry of judgment against them for Kshs 33,784,104 together with costs and interest.

3. The applicant contends that the case was subsequently listed for hearing on cross examination of the defendant's directors without being heard on merit. It maintains that it deserves to be accorded a chance to be heard as it has an arguable defence. The applicant attributes the failure to file the defence to the mistake of its previous advocates on record.

4. At the hearing of the application, **Mr. Chege**, learned counsel for the applicant, submitted that the applicant was not aware that judgment had been entered against it in 2016 and argued that even when the applicant's directors attended court, they all along believed that the attendance was in the ordinary course of the hearing.

5. Counsel cited the case of Gideon **Sitelu Konchella v Daima Bank Ltd** [2013] eKLR in advancing the principles governing the setting aside of summary judgments. It was the applicant's case that its draft defence raises triable issues and that it should be granted an opportunity to be heard.

6. The respondent/plaintiff opposed the application through the Grounds of Opposition dated 9th July 2019 and the replying affidavit of its Finance Director, **Joseph Kinyua**, who avers that there was no mistake on the part of the applicant's counsel as the applicant was always aware of these proceedings and even made offers to settle the decretal sum.

7. He further states that there has been an inordinate delay in filing the instant application and further, that the defendant has no reasonable defence having admitted the debt by issuing cheques which were later returned to the plaintiff unpaid.

8. At the hearing of the application, **Mr. Luseno**, learned counsel for the respondent submitted that having been served with the Summons to Enter Appearance and plead and having failed to file a defence thereby leading to the entry of judgment, and further, having fully participated in the execution proceedings, the applicant cannot turn around and claim that there was mistake by counsel after changing advocates. It was submitted that the change of advocates does not connote change of laws.

9. Counsel submitted that the applicant admitted the debt as shown in the bad cheques that the applicant sent to the respondent and added that the applicant is not entitled to the discretionary orders sought.

10. I have carefully considered the application, the respondent's response and the parties' submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for setting aside of the summary judgment entered against it in 2016.

11. Order 36 Rule 10 of the Civil Procedure Rule stipulates as follows:-

“Setting aside of judgment.

10. Any judgment, given against any party who did not attend at the hearing of an application under this Order, may, on application be set aside or varied on such terms as are just.”

12. In *James Kanyिता Nderitu & Another [2016] eKLR*, the Court of Appeal stated thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.*

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

13. In the present case, I find that default judgment was regularly entered in view of the following undisputed facts:

a) That the applicant was served with Summons to Enter Appearance and plaint on 10th May 2016.

b) That the applicant, through its previous advocates on record, entered appearance on 30th May 2016 but did not file a defence.

c) That judgment was entered against the applicant on 16th December 2016 after which the respondent applied for execution through the cross examination of the applicant's directors.

d) That the matter thereafter came up for cross-examination of the applicant's directors on at least 7 occasions when the applicant's directors appeared in court together with their advocates on record including the court appearance of 24th April 2019 when the applicant was represented by its current advocates on record.

e) That on 7th March 2019, the applicant's counsel intimated to the court that the parties were exploring a settlement as shown in annexure “JK1” to the replying affidavit.

f) That the defendant issued the plaintiff with post-dated cheques towards the settlement of the debt which cheques were dishonoured.

14. As was stated in the above cited cases, the discretion to set aside default judgment should be exercised judiciously and only in the most deserving cases and in the interest of justice. In the present case, I note that the defendant did not advance any reasons for its failure to file its defence on time or at all leading to the entry of the summary judgment. I further note that the said judgment was not entered secretly as the defendant's advocates were on 14th June 2016 duly served with the application dated 13th June 2016 seeking orders to enter summary judgment. The said application was not opposed by the defendant, and as I have already stated in this ruling, summary judgment was entered much later on 16th December 2016.

15. The applicant and his advocates on record subsequently attended court for the execution proceedings on several occasions before filing this current application on 4th July 2019, almost 3 years after the entry of summary judgment. I find that the delay in filing the present application is not only inordinate but was also not explained.

16. Having regard to the undisputed facts, findings and observations that I have already highlighted in this ruling, I am not satisfied that applicant deserves the discretionary orders sought in the application. I say so because the applicant was, from the very inception of this case, represented by advocates of repute who must have informed it of every step made in the proceedings. I therefore find that in the circumstances of this case, the applicant cannot turn around and claim that it was not aware of the summary judgment entered against it.

17. In a nutshell, I find that the applicant is not entitled to the orders sought in the application dated 3rd July 2019 which I hereby dismiss with costs to the plaintiff/respondent.

Dated, signed and delivered in open court at Nairobi this 5th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Mwangi for Chege for the applicant.

Miss M. Mwangi for plaintiff.

Court Assistant – Sylvia