



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 289 OF 2015

PARAGON ELECTRONICS LIMITED.....PLAINTIFF

- V E R S U S -

VELOS ENTERPRISES LIMITED.....1ST DEFENDANT

JOPSEPH MWAURA NDEGWA

AUCTIONEER T/A J. K NDEGWA

AUCTIONEERS LIMITED.....2ND DEFENDANT

RULING

1) The subject matter of this ruling is the motion dated 31.7.2017 taken out by Velos Enterprises Ltd, the 1st defendant herein, in which it sought for *inter alia* **the setting aside of the exparte judgment entered against it on 26.10.2015**. The motion is supported by the affidavit of Rameshchandra Jayantilal Sheth. When served with the motion, Paragon Electronics Ltd, the plaintiff herein, filed the replying affidavit of Bulent Gulbahar to oppose the motion. In response to the aforesaid replying affidavit, the 1st defendant filed a supplementary affidavit of Rameshchandra Jayantilal Sheth.

2) When the application came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have equally considered the rival written submissions. It is the submission of the 1st defendant that when it was served with the summons to enter appearance together with the plaint it on 23.10.2015 filed and served an appearance plus a defence through its advocates M/s Oraro & Co. Advocates. The 1st defendant further argued that despite entering an appearance and filing a defence the court irregularly proceeded to enter a default judgment and awarded the plaintiff a sum of ksh.55,365,644/73 without any formal proof.

3) The 1st defendant stated that it only learned of the judgment when on 27.7.2017 its advocates were served with a notice of motion seeking garnishee orders against its bank account held at KCB and I & M bank Ltd. This court was asked to set aside the exparte judgement ex debito justitae to enable the 1st defendant defend itself.

4) The plaintiff/decree holder, strenuously opposed the 1st defendant's motion. The plaintiff pointed out that summary judgement was entered against the 1st defendant by Justice Muga Apondi in H.C.C.C. no. 289 of 2009 as consolidated with H.C.C.C no. 285 of 2010 therefore the allegations that a default judgment was entered is false. It was pointed out that the 1st defendant is guilty of material non-disclosure.

5) In response to the averments contained in the replying affidavit the 1st defendant filed the supplementary affidavit of Rameshchandra Jayantilal Sheth in which it averred that the exparte judgement in default of appearance was entered by the Deputy Registrar of this court some three days after the 1st defendant had filed and served a statement of defence. The 1st defendant further admitted that it initially instructed the firm of Sichangi & Co. Advocates to represent it and that a memorandum of appearance was filed. However the 1st defendant decided to instruct the firm of Oraro & Co. Advocates to represent it. The firm of Oraro & Co. Advocate filed an appearance together with a defence while it was not aware that the firm of Sichangi & Co. had already filed an appearance.

6) The 1st defendant urged this court not to punish it for causing confusion by instructing two law firms. This court was further beseeched not to allow the mistake of its first advocate of failing to file a defence to be visited upon it. The 1st defendant further argued that the plaintiff's

claim for loss and or damages was not a liquidated demand therefore the court should have assessed damages.

7) It is now clear from the material placed before this court that this suit was filed on 21.8.2015. The 1st defendant was served with the summons to enter appearance plus the plaint on 23rd September 2015. The firm of Sichangi & Co. Advocates entered appearance on behalf of the plaintiff on 28.9.2015. The plaintiff and its counsel failed to file a defence within 14 days as required by law. The plaintiff filed a request for judgment in default of defence on 14.10.2015. The record shows that the firm of Oraro & Co. Advocates filed a memorandum of appearance on 6.10.2015 which was served upon the plaintiff's counsel on 23.10.2015. It is also apparent from the record that the firm of Oraro & Co. Advocates filed and served a defence on behalf of the 1st defendant on 23.10.2015. The record indicates that judgment in default of defence was obtained by the plaintiff against the 1st defendant on 26.10.2015. This court has been beseeched to find that the firm of Oraro & Co. Advocates was improperly on record having failed to file a notice of change of advocates to come in place of the firm of Sichangi & Co. Advocates. With respect, I agree with the submissions of the plaintiff, therefore whatever pleadings which that firm filed are treated as incompetently on record hence they are hereby ordered struck out.

8) I have already stated that the firm of Sichangi & Co. filed a memorandum of appearance but failed to file a defence within 14 days. Therefore, the plaintiff properly applied for entry of judgment in default of a defence as against the 1st defendant.

9) Even assuming that the firm of Oraro & Co. Advocates was properly on record, it is in my humble opinion that the defence the law firm filed was filed out of time, hence there was need to seek for leave to extend time to file a defence out of time pursuant to the provisions of Order 7 rule 1 of the Civil Procedure Rules. The firm of Oraro & Co. filed the memorandum of appearance on 6.10.2015 and the defence ought to have been filed on 20.10.2015 but the same was filed on 23.10.2015, therefore the defence was filed out of time. I am satisfied that the default judgment was properly obtained. The 1st defendant has complained that since the claim was for loss and or damages, there was need for the court to assess damages.

10) With respect, I do not agree with that submission. The plaint is specific on what the plaintiff sought. The plaintiff asked to be paid ksh.27,309,907 for the goods carted away and ksh.17,011,202/94 representing the value of damages for the property destroyed. The aforesaid sums represented a liquidated claim pursuant to the provisions of Order 10 rule 4 of the Civil Procedure Rules. In the circumstance therefore, there was no need to undertake an assessment to ascertain the claim.

11) The 1st defendant has argued that it should not be let to suffer for the mistakes of its counsel. It is admitted by the 1st defendant that it initially instructed the firm of Sichangi & Co. Advocates to defend it. The 1st defendant has not offered any explanation as to why their erstwhile advocate did not file a defence. It was incumbent upon the 1st defendant to secure an explanation from its erstwhile advocate. In the circumstances of this case, the client will be let to suffer for the mistakes, if any, of its advocates.

12) In the end, I find no merit in the motion dated 31.7.2017. The same is dismissed with costs to the plaintiff.

Dated, Signed and Delivered in open court this 11th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant