



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO.4 OF 2017

BAYLEM LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF HOMA BAY.....DEFENDANT

RULING

1. This suit was filed in court on or about the 24th July 2017 seeking judgment against the **COUNTY GOVERNMENT OF HOMA BAY**(Defendant) for the sum of Kshs.17,880,751/23 together with interest thereof at court rate from 15th February, 2017 until payment is full.

The Plaintiff, **BAYLEM LIMITED** also seeks interest at court rate on the sum of Kshs.26,415,233/98 from 27th October 2016 to 1st December 2016 and on the sum of Kshs.21,673,854/68 from 1st December 2016 to 15th February 2017.

2. Pursuant to the summons to enter appearance served upon the defendant, a memorandum of appearance dated 4th August 2017 was filed on 8th August 2017 by the firm of **NYAUKE & CO. ADVOCATES**, acting on behalf of the defendant. This was, however, not followed by a statement of defence and therefore a request for judgment in default of defence was filed by the Plaintiff on the 21st August, 2017.

Accordingly, judgment was entered ex-parte against the defendant on the same date and this gave rise to the present application dated 21st November, 2017

3. The application is made by the plaintiff County Government seeking basic orders that there be a stay of execution of the ex-parte judgment pending inter parties hearing of the application and that the ex-parte judgment entered on 21st August 2017 be set aside and the matter be heard on merit. Costs of the application are also sought by the plaintiff/applicant.

The grounds for the application are at the face of the appropriate notice of motion and are fortified by the facts contained in the supporting affidavit dated 21st November 2017 deposed by the applicant's principal legal secretary, **GEORGE ILLAH**.

4. The respondent opposes the application on the basis of the grounds contained in a replying affidavit dated 3rd April 2018, deposed by the Managing Director, **JOHN FREDRICK OGUMBO**.

Both the grounds in support of the application and those in opposition thereto have been given due consideration by this court despite the rival submissions by **MR. NYAUKE**, learned counsel for the applicant and **M/S ONYANGO**, learned counsel for the respondent.

5. With regard to prayer (1) of the motion, this determined would invariably render it spent. In any event, the decree for necessary execution is yet to issue. It would appear that the prayer was herein included as a precautionary measure.

Be that as it may, and with regard to prayer (2) of the application, the request for judgment in default of filing of defence was made pursuant to the provisions of **Order 10** of the **Civil Procedure Rules (CPR)**.

Rule 11 of the said **Order** provides for the setting aside of such judgment and any consequential decree or order arising therefrom.

6. In this court's view, the only cogent ground in support of this application is ground one i.e. that applicant has a good defence with triable issues and should be given an opportunity to defend the suit. With the exception of ground five i.e. no prejudice would be suffered by the respondent if the orders sought are granted, the rest of this grounds are basically pedestrian.

7. In the draft statement of defence annexed to the supporting affidavit, the applicant denies the existence of any contract between itself and

the respondent.

The basis of the respondent's claim is the contract alluded to in paragraph 3 (three) of the plaint. It is that contract which the applicant disputes and implies that it ought not be made to pay for a non-existent contract.

In an application such as the present one, the court is required to consider the reasons for failure to file defence and whether an applicant has a reasonable defence which raises triable issues. **(See, Shah –vs- Mbogo & another [1967] EA 116).**

8. Apparently, the applicant has not offered any plausible explanation for its failure to file its statement of defence.

However, the existence or non-existence of the alleged contract is an issue which is pertinent and highly triable. It is for that reason that a full hearing of this suit is called for.

9. In that regard, the application is granted to the extent that the ex-parte judgment entered herein against the applicant be and is hereby set aside on condition that the annexed draft defence be deemed as duly filed upon payment of the requisite court fees and that the suit be fixed for hearing in the next thirty (30) days from this date hereof. In default, the application shall stand dismissed forthwith and the respondent be at liberty to proceed with necessary execution.

Each party shall bear own costs of the application. Ordered accordingly.

J.R. KARANJAH

JUDGE

[Read and dated this 12th day of June 2018]

In the presence of MR. NYAUKE for applicant and MR. OSORO holding brief for M/S ONYANGO for respondent.