



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE 237 OF 2018**

**Y H WHOLESALLERS LIMITED.....PLAINTIFF**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....DEFENDANT**

**RULING**

1. Tusker Mattresses limited (the Defendant) entered appearance herein on 26<sup>th</sup> July 2018 but failed to file its Defence on time. The consequence of which Judgement was entered against it on 29<sup>th</sup> August 2018.

2. A few days later, on 14<sup>th</sup> September 2018, the Defendant has sought to set aside the Default Judgement. This is in Application of 14<sup>th</sup> September 2018. The Defendant advances two reasons for failing to act on time. Mr. Daniel Ndirangu, the Chief Finance Officer of the Defendant depones that the Cause of action relates to invoices that are as far back as 2011 and 2012 which needed retrieval. This took some time. Secondly that he was informed by its Advocates that the Plaintiff's Advocate had expressed a willingness to negotiate and settle the matter out of Court.

3. The Application is opposed on the strength of 6 Grounds set out below:-

1. The Defendant has not demonstrated a defence on merit, attached is a copy of Magunga General Stores – vs. Pepco Distributors Ltd (1987) eKLR.
2. The Defendant has not exhibited copies of cheques or the RTGS Forms in favour of the Plaintiff in proof of part payment of Khs.7,931,000.00.
3. The Defendant's documents attached to the Replying Affidavit are its own generated statements without any supporting documentation in proof of which account and payee the said remittance were made.
4. On 13.3.2018 the Defendant requested for 7 days to reconcile their accounts after being supplied with documents in support of the claim. The reconciliation was never done until 11.6.2018 when this suit was filed.
5. The Defendant is simply trying to postpone the date of payment.
6. The Defendant ought to deposit the entire sum in a joint account pending either reconciliation of account or hearing of this suit on merit.

4. The substantial resistance to the Application is that the Defendant does not have any good Defence to the Claim and since the exparte Judgement is regular it should not be allowed to contest the Claim. Counsel for the Plaintiff then submitted that if the Court was minded to grant the Order, then it should be on condition that the disputed sum be deposited in Court.

5. The Plaintiff choose to challenge the Application through grounds of Opposition and so the Deposition made in the Affidavit in Support of the Motion are uncontroverted. So the Deposition that the Parties had expressed a willingness to negotiate is not contested and I have no reason to doubt it. It does seem to be a plausible reason for the Defendant not acting with vigilance.

6. Secondly, attached to that affidavit are the Defendant's Statements displayed to demonstrate that a substantial part of the Claim was paid. This is in consonance with the Draft Defence shown to Court. The Plaintiffs argue that the invoices are the Defendant's internal Documents which proves nothing. It may well be that the Documents are internal to the Defendant. It may also be that the Defendants have not given

proof of the payments allegedly made. However the statements and their contents have not been countered by evidence to the contrary. I have to find that, in their challenged form, the Statements demonstrate to this Court that the intended Defence raises triable issues.

7. The Application of 14<sup>th</sup> September 2018 is allowed. Each Party shall bear its own costs. Unconditional Leave is granted to the Defendant to file and serve its Defence within 14 days hereof.

**Dated, delivered and signed in open Court at Nairobi this 2<sup>nd</sup> day of November, 2018.**

**F. TUIYOTT**

**JUDGE**

Present:-

Shimenje for Plaintiff

Kochere for Defendant

Fred - Court Assistant