



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 64 OF 2012

TKM MAESTRO LIMITED.....APPELLANT

VERSUS

EQUIPMENT MASTERS E.A LIMITED.....RESPONDENT

Being an appeal against the judgment of Honourable T. W.C. Wamae (Mrs) Chief Magistrate delivered on 17th February, 2012 at Milimani commercial Courts

JUDGMENT

The appellant herein was the defendant in the lower court while the respondent was the plaintiff. The appellant had been sued by the respondent for the recovery of some money due and payable for services rendered.

Upon service of summons to enter appearance, the appellant failed to comply and an ex parte judgment was entered in favour of the respondent. The appellant filed an application to set aside the said ex parte judgment but the application was dismissed by the lower court.

Aggrieved by the said dismissal the appellant filed this appeal. I have perused the pleadings, application and the ruling which is the subject of this appeal. The reasons advanced by the appellant in its application to set aside the ex-parte judgment included, inter alia, that the court file was unavailable at the registry and that the failure to enter appearance within the stipulated time was not deliberate.

The appellant also contended it had a good defence by way of set off and counter claim to the respondent's claim with a high probability of success at the hearing. It was also placed on record that the appellant did not dispute the whole of the plaintiff's claim and offered to pay the undisputed sum by instalments as a show of good faith.

In dismissing the application lodged by the appellant, the trial court reviewed the contents of the affidavits and concluded that it would be futile to grant the applicant orders to defend this suit.

In the said ruling the trial court said in part as follows,

“It is apparent that the defendant admits its indebtedness to the plaintiff except the sum of Kshs. 302,463.84/=. The respondent claims that the amount arises out of the respondent's failure to issue the applicant with ETR receipts rendering the amount to be unclaimable from KRA.

ANNEXURE CMM6 (n) is a letter by which the applicant lists invoices upon which claim for Kshs. 302,463.84/= arises. It is therefore apparent that no receipts have been issued and that the provision for payment of VAT has therefore not arisen. In any case VAT is payable not to the

applicant but to KRA.

From the foregoing I find that applicant has failed to establish that he has a good defence and counterclaim which have probability of success.”

My first observation is that the trial court did not address the issue advanced by the appellant that the court file was not available to enable the filing of the of appearance. The subject of missing files is not unique to this particular matter and is a systematic challenge that I take judicial notice of.

My second observation is that the statement by the trial court relating to the issuance of receipts to facilitate the payment of VAT is clearly a triable issue, which should have been given consideration. I further observe that the offer to liquidate the undisputed sum by monthly instalments was made in good faith and it was not enough for the trial court to give it a casual consideration.

The civil procedure rules which confer upon the court a wide discretion are intended to facilitate the resolution of disputes in a just and propionate manner. By denying the appellant the opportunity to canvass its intended defence and counterclaim, the trial court drove the appellant out of the seat of judgment without a hearing.

I have considered the submissions by counsel and authorities cited. I am persuaded that the appeal should be and is hereby allowed. I accordingly make the following orders, the ruling of the lower court made on 17th February, 2012 is hereby set aside in its entirety and the application dated 1st February, 2012 allowed .

The warrants of attachment issued in this suit shall now be recalled. The appellant shall file an appearance within 7 days from the date of this ruling followed by the filing of the defence and counter claim within 14 days thereafter. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 23rd day of January, 2017

A. MBOGHOLI MSAGHA

JUDGE