REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 265 OF 2015

GEORGE MASINDE.....PLAINTIFF/RESPONDENT

VERSUS

ULRICH ANASS BONGO NGONYI.....DEFENDANT/APPLICANT

RULING

1. The defendant herein by a notice of motion dated 7th October, 2015 seeks the following orders:

(i) That the consent dated 5th October, 2015 be adopted as an order of the court and the firm of J.W. Kiniti & Company Advocates be allowed to come on record for the defendant in place of Kago Muthama & Company Advocates.

(ii) That pending the hearing and final determination of the application herein, the court be pleased to grant a temporary stay of execution of the interlocutory judgment entered against the defendant on 21st September, 2015 together with all other consequential orders arising there from.

(iii) That the court be pleased to set aside the interlocutory judgment entered against the defendant on 21st September, 2015 together with all the consequential orders.

(iv) That the defendant be granted leave to file and serve his defence and or the annexed defence be deemed as properly filed and served.

2. The motion is supported by the grounds on the body of the application and the supporting affidavit of the defendant. He alleges that he instructed the firm of Kago Muthama & Company advocates to defend the suit but that the said advocates only filed a memorandum of appearance but failed to file the defence. He stated that upon discovery that the defence had not been filed as per his instructions, he secured the services of J. W. Kiniti & Co. Advocates to take over the matter from his previous advocates. That the latter firm confirmed that a defence had not been filed and that the plaintiff had filed a request for judgment and that a default judgment had been entered on 21st September, 2015. He stated that he has a good and arguable defence. That in the event this motion is disallowed, he shall suffer prejudice since he has never received any money from the plaintiff as alleged.

3. The motion was opposed by a replying affidavit sworn on 14th October, 2015. It was contended that although the defendant alleges that a memorandum of appearance was filed, the same was not served upon his advocates. That in any event a mistake by an advocate does not give a leeway to overrun the court and that under such circumstances; a litigant has recourse for professional negligence. That the ex

parte judgment in place is regular; that the draft defence does not raise triable issues since the defendant neither denies the existence of the agreement nor its validity, that the defendant does not deny that the parties executed the agreement, that whereas the defendant claims that no money was advanced to him by the plaintiff, the same agreement indicates that the defendant confirmed receipt in Nairobi on 28th November,2011, that the defendant who is the borrower would not have meant anything different of "I received" other than the funds, that the plaintiff and the defendant voluntarily entered into an agreement but the defendant is attempting to avoid his obligations by asking the court to interpret the agreement and/or import non-existent terms and that the agreement speaks for itself. It was contended that the defendant's assertion on the lack of an acknowledgement or documentary evidence to prove the plaintiff advanced money to the defendant flies in the face of the agreement which demonstrates that the defendant received the money.

4. In his submissions, the defendant argued that his advocate's mistake should not be visited on him. Several cases were cited to support that argument i.e. **Jackson Kiprotich Arap Korir v. Agricultural Finance Corporation [2015] eKLR** and **Silas Mugendi Nguru (suing as the legal representative of the estate of Lucy Njoki Kithaka) v. Nairobi Women's Hospital [2015] eKLR**. On the issue of delay, it was submitted that the judgment was entered on 21st September, 2015 while the motion was filed on 7th October, 2015. It was further submitted that the draft defence raises triable issues. That though the defendant signed the agreement dated 28th November, 2011, he never received any money. That there is no documentary evidence that the plaintiff gave the claimed monies as per the agreement and that the plaintiff has not disclosed anywhere the mode he used to pay the defendant. To support his argument the defendant cited **Civil Appeal No. 2 of 1974 Patel Vs. East Africa Cargo Handling Services Limited**.

5. The plaintiff on the other hand submitted that the defendant has not met the threshold set out in **Patel v. East Africa Cargo Handling Services Ltd (1974) EA 75** for granting the orders sought. On the regularity or otherwise of the judgment, the plaintiff submitted that the ex parte judgment entered against the defendant was proper and has not been challenged by the defendant and that service of court process has not also been challenged. That the reason for failure to file defence within stipulated time was due to mistake of counsel does not suffice since a mistake by an advocate does not necessarily give a litigant leeway to overrun court orders. That the defendant has failed to give reasons why the firm of Kago Muthama failed to file defence even after filing a memorandum of appearance. On whether the defence raises triable issues, it was submitted that the defendant does not deny the existence of the agreement in his draft defence rather he invites the court to tread the path of acknowledgments, bank transfers and deposit slips.

6. I have considered the parties' dispositions and submissions. The first issue to consider is whether or not the failure to file a defence was deliberate and whether or not it should be visited upon the defendant. The defendant avers that upon service of summons he instructed his advocates to file a defence. The advocate filed a memorandum of appearance a few days before the defendant could leave the country. Having been away from the country he left his spouse to follow up on the case only to discover that the defence had not been filed and an ex parte judgment had been entered against him. In my view there is no doubt that upon giving his advocates instructions, the defendant was sure that the advocates being the professionals would act accordingly. In the circumstances I find that the defendant ought not to be burdened by the advocates' mistake. See **Philip Chemwolo & Another v. Augustine Kubende (1982 – 88) KAR 103** where Apaloo, Judge rendered himself thus,

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits …I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".***

7. In the case of **Shah v. Mbogo & Another (1967) EA 116 i**t was held,

> ***"the discretion to set aside an exparte Judgment is intended to be exercised to avoid injustice or***

hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

8. To this stage the defendant has in my view demonstrated that the failure to file defence was no deliberate and ought to be given a chance. However, for the defendant to be granted leave to file his defence, he has to demonstrate that he has a defence that raises triable issues. See **Thayu Kamau Mukigi v. Francis Kibaru Karanja (2013) e KLR** where the court held that:

"On second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Motor Limited v. D.T. Dobie Co. Ltd CA 38/98 where the court held that even when ex parte judgment was lawfully entered, the court should look at the draft defence to see if it contained a valid or reasonable defence."

9. In his defence, the defendant stated that although he entered into an agreement that he be advanced 68,181 Euros, the plaintiff never gave him the said money. In my view, this is not a mere denial since the defendant does not admit to having received the money. These issues can only be canvassed at the full hearing and after considering the evidence tendered before court. I further note that a defence that raises a trial issue is not necessarily that which must succeed but one which raises doubt in the eyes of court to necessitate the need for proof by way of evidence at trial.

I therefore find merit in the application dated 7th October, 2015 and order that the same be and is hereby allowed as prayed. The defendant to file and serve a statement of defence within 14 days from the date of this ruling.

The defendant will pay thrown-away costs of Kshs. 15,000/= to the plaintiff.

Dated, Signed and Delivered at Nairobi this 9th Day of February,2017.

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L. NJUGUNA

JUDGE

In the Presence of

……. for the Plaintiff/Respondent

……. for the Defendant/Applicant