REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 391 OF 2014

B E T W E E N:

INESA LIMITED ……..... PLAINTIFF

VERSUS

KAREN COUNTRY LODGE LIMITED ……..…DEFENDANT

R U L I N G

Introduction

1. This Matter was previously before the Court in early 2016 on the application of the Defendant. On that occasion, the Defendant's application filed on 24th June 2015 was seeking a stay of proceedings and a referral to arbitration. The Court dismissed that Application on the basis of there being no dispute upon the Architect's Final Certificate to refer to arbitration. The Ruling was delivered on 18th May 2016. The earlier application was made in the face of a judgment in default of defence entered on 12th January 2015 pursuant to an application made on 9th January of that year. That had the effect that the Judgment was entered on the very same day as the Respondent filed the Application for a Stay pending the Application for referral to Arbitration. The Defendant's wrote to the DR asking her to withhold signing the default judgment until the application for stay of proceedings is heard. That letter (Exhibit JK IV) was neither responded to, nor taken into account by the Registry in its further actions.

2. Now before the Court are two Applications. Both are filed by the Defendant. The First was filed under a certificate of urgency on 31st May 2016. It seeks the following orders:

> 1. That the Defendant be granted leave to file its Defence out of time or the time for filing the Defence be extended for such period as this Honurable court deems just
>
> 2. That the Defence attached to this application be deemed as duly filed and served upon payment of the requisite court fees
>
> 3. That the costs of this application be provided for.

4. The Application, although filed on 31st May 2016 (a Tuesday) was not placed before a Judge until 3rd June 2016 (a Friday). Lady Justice Sewe ordered the Defendant/Applicant to serve the Application. On

the return date 6th June 2016 (the following Monday) Hon Sewe J made an order for stay in the following terms. "Accordingly I would grand stay only until 14/6/2016 when Justice Farah will have resumed duty from her annual leave, to enable her to give further directions in the matter.". On 14th June 2016 (a Tuesday) the Matter was not listed. The following day, it came before the Deputy Registrar (Hon Wattimah) and she gave a date during the vacation under the ***High Court Organisation and Administration Act***. The Parties asked for a date and the matter was listed for six weeks later. The suggestion being that this Court would resume on that date. In fact this Court resumed on 13th June 2016.

5. In the meantime there was other movement on the file. On 10th June 2016, the Plaintiff filed Grounds of Opposition opposing the Application made on 31st May 2016. Ground 4, surprisingly, states "That therefore the ruling issued on 18th May, 2016 was overtaken by events…". On 22nd July 2016 the same DR Wattimah issued a Decree for the Sum of Kshs.10,299,783.73 together with costs and interest and further interest upon the interest and costs. The Deed purports that it was made on 12th January 2015. It was issued on 22nd July 2016. By that date the stay ordered by Hon Sewe J had lapsed and the file was not placed before any Judge to consider extension. The time lapse between the Judgment and the Decree was more than 19 months.

6. Having obtained the Decree on 22nd July, the Plaintiff sought to enforce it. On 22nd August 2016, the Plaintiff served the Defendant with a notice of its intention to execute the decree within (10) days. The Applicant/Defendant feels that was in disregard of the order of Hon Sewe J issued pending hearing of the Application. That precipitated the filing of a second application by the Defendant on 25th August 2016 under a Certificate of Urgency. That Certificate was filed on Thursday 25th August 2016, although the Court was not sitting in Nairobi due to the Annual Judges' Conference/Colluquium, the file was not placed before any Judge of the Division until 1st September 2016, the following Thursday. On that date the following Order was made:

> (1) The Execution of the Decree is stayed pending Hearing and determination of the Defendant's Application dated 31st May 2016. The Court went on to states its Reasons, namely that the stay had been necessitated due to the DR's failure to consider all the circumstances of the case before issuing the decree. Further, that it appeared that the DR had ignored the Order of Hon Lady Justice Sewe made on 8th June 2016." The matter was listed for Directions on 21st September 2016.

7. The Second Application seeks the following Orders:

> *1. THAT this application be certified as urgent and be heard during the current court vacation (in fact the vacation had ended the previous week)*
>
> *2. THAT the execution of the Decree made by the Honourable Deputy Registrar on 12th January 2015 and issued on 22nd July 2016 be stayed pending the hearing and determination of this Application.*
>
> *3. THAT the Judgment Decree of this Honourable Court made by the Honourable Deputy Registrar on 12th January 2015 and issued on 22nd July 2016 be set aside*
>
> *4. THAT this Honourable Court do make such other Orders as it may deem just and expedient pending the hearing and determination of this Application*
>
> *5. THAT the costs of this Application be provided for."*

8. The First Application was supported by the Affidavit of James Karuga. He describes himself at Paragraph 1 as "a Director of the Defendant/Applicant herein and I am duly authorised by the Defendant/Applicant's Board of directors to swear this affidavit on its behalf.". In his affidavit the Deponent explains the history of the proceedings, which to a limited extent were set out in the previous

Ruling of this Court. However, it assists analysis to repeat them.

9. The Deponent of the Supporting Affidavit states that the suit was instituted by filing a Plaint on 10th September 2014. The Defendant was served a Summons to Enter Appearance by Registered Post in November 2014. The Defendant instructed Advocates who entered an Appearance on 5th November 2014. Any defence should have been filed 14 days later. The Defendant did not do that. The reason was that the Defendant was arguing that the matter should be referred to Arbitration and not heard by the Court. The Defendant then filed an Application for stay and referral to arbitration. That Application dated 9th January 2015 was filed on 12 January 2015. The Defendant sets out ***Section 6(1) of the Arbitration Act*** which provides that a party who wishes to stay proceedings and seek referral to arbitration, must do so BEFORE it takes any other steps in the proceeding. The upshot of that is, if the Defendant had filed a Defence, it would have been precluded from making the application for stay and referral to which it felt it was entitled. It is stated that the Application was dismissed on the basis that the arbitration clause of the said contract was inoperable as neither party had served a notice of dispute and not on the merits of the case. It is correct that the application was dismissed. The reason did not go to the merits of the case but to the procedure for referral. The Deponent states that the Defendant has a valid Defence and a copy of the Draft Defence is exhibited to the Affidavit marked "**JK-1**". The Application is made on the Grounds set out therein. They are, in summary that, the Defendant's failure to file a Defence and the operation of ***Section 6*** of the ***Arbitration Act 1995***.

10. The Second Application seeks similar orders as set out above. It is also supported by an Affidavit of Mr Karuga, the Director of the Defendant. He sets out what transpired after service of the Summons and Plaint served in November 2014. At Paragraph 4 of the Affidavit filed on 25th August 2016 he sets out what happened. He says, "*that by its advocates letter dated 6th November 2014 addressed to the Plaintiff's Advocates, M/s Bali Sharma & Bali Sharma advocates, the defendant duly notified the Plaintiff that appearance had been filed, and that the dispute should be referred to arbitration, and that the proceedings filed should be stayed pending arbitration. A copy of the letter dated 6th November 2014 is now produced and shown to me marked "**JKI**" the Plaintiff's Advocates did not respond to this letter at all.* He then goes on to say "*5. That on 4th December 2014, the Defendants advocates wrote to the plaintiff's advocates reminding them of their letter of 6th November 2014. They also pointed out that they had difficulties reaching the Plaintiffs advocates on phone, and via email and their physical address was not on their pleadings but they finally got it from a Mr Nderi and practicing in Nyeri. The letter of 4th December was delivered by recorded courier service to the Plaintiffs advocates on 5th December 2014 in Nyeri. A copy of the letter together with the waybill from Wells Cargo Courier Service are now produced and shown to me marked JKI-III"*

11. It is suggested that there was equally no response to that letter and the Defendant drafted its Notice of Motion on 9th January 2015. The Plaintiff at the same time, being in receipt of the two letters drafted and filed an application for judgment in default. The Defendant's Notice of Motion was filed on 12th January 2015. It was then the Defendant learnt of the Application for Judgment in Default of Defence. The next day the Defendants wrote to the Deputy Registrar. That is the letter which, as stated above, appears to have been <u>completely ignored</u> by the Registry.

12. The Second Application sets out detailed Grounds. They are that:

> *"1. The object of the Application will be defeated and the Application rendered nugatory if the Plaintiff/Respondent should proceed with the execution of the Decree of this Honourable Court given on 12th January 2015 and issued on 22nd July 2016 by the Honourable Deputy Registrar. The said decree stems from Judgment entered for the Plaintiff/Respondent in default of defence by the Defendant/Applicant.*
>
> *2. That failure to file defence within the prescribed time was not as result of any indolence on the Defendant's part as they could not do so without compromising the Defendant's application for reference to arbitration which was heard and dismissed by Honourable Lady Justice Amin Farah*

on 18th May 2016.

3. Subsequently, the Defendant/Applicant filed an application dated 31st May 2016 and filed on the same day, seeking leave to file its defence out of time and the same was mentioned before Hon. Lady Justice Sewe on 3rd June 23016, who certified the application as urgent and ordered that there be a stay of execution pending the hearing of the application by Hon.Lady Justice Farah Amin once she resumes from her annual leave.

4. The Application dated 31st May 2016 was further mentioned by the Hon. Caroline Wattimah Deputy Registrar on 14th June 2016 who maintained and directed that the matter be mentioned before Hon. Lady Justice Farah Amin on 13th September 2016, at which time she will have resumed from her annual leave.

5. The Plaintiff/Respondent has gone ahead and extracted a decree and issued to the Defendant/Applicant a notice of its intention to execute the decree within ten (10) days from the date of 22nd August 2016 in total disregard of the orders of this Honourable Court issued on 3rd June 2016 and pending the hearing of the Defendant/Applicant's application dated 31st May 2016.

6. Should the matter not be heard urgently or at least an Order of stay of execution pending the hearing of this Application be granted, the Plaintiff will proceed to execute the decree to the Defendant's utter prejudice and loss, hence the urgency of this application.".

13. The Supporting Affidavit provides much more detail relating to the factual background. It sets out and exhibits the correspondence the Defendant sent to the Plaintiff prior to the Application for judgment in default. It sets out that the Defendant was not served with the suit until November 2014. It sets out that it clearly raised the issue of referral to arbitration and the Plaintiff did not respond. It sets out that the Plaint and Summons did not include an address for service for the Plaintiff and the Defendant's lawyers experience difficulties and delay making contact. It explains that as soon as the Defendant discovered that judgment in default had been entered it wrote to the DR, a copy is exhibited marked **JKI- IV**. At paragraph 8 it states categorically that "despite the defendant's efforts to have the application for default judgment stayed, the Hon. Deputy Registrar entered judgment for the Plaintiff against the Defendant on 12th January 2016. The Deponent states that he had received legal advice against filing a defence at that stage due to the Defendant's position that the matter be referred to arbitration. That Application was heard and dismissed on 18th May 2016 and the Defendant then filed an application seeking leave to file its defence out of time.

14. The Deponent at paragraph 13 explains that notwithstanding that the Application was certified as urgent, and a stay granted byHon. Lady Justice Sewe, the Application was not placed before the Judge handling the file for a further two and a half months. In the meantime the Plaintiff wrote a letter asking for the Decree to be extracted and the Plaintiff stated that it intended to execute. The Deponent sets out at paragraph 15 the consequences of those actions for the Defendant. He says, "That as a result of the Plaintiff's actions in paragraph 13 and 14, the defendant risks being condemned unheard and denied justice despite having a valid defence against the Plaintiff's claim and is justifiably apprehensive that the Plaintiff will seek to execute the aforesaid decree before this Application is heard and determined and therefore seek that the execution of the said Decree be stayed pending the hearing and determination of this Application.

15. In response to the First Application, the Plaintiff filed Grounds of Opposition. In summary they are that the Application is frivilous vexatious and otherwise an abuse of the Court and that it has been superseded by events. In response to the Second Application, the Plaintiff filed a Replying Affidavit on 21st September 2016. The Affidavit itself is undated in the jurat. The Affidavit is sworn by Mr Mahesh K Mahan, the Advocate with conduct. In the Affidavit, he sets out his version of the sequence of events as follows:

a. That on 11th July 2014 he sent a demand letter for "the same amount and it was acknowledged by the Defendant" (the specific amount is not mentioned and the demand letter is not exhibited.

b. That I filed a suit on behalf of the Plaintiff company on 10th September 2014 against the Defendant and the Defendant entered appearance on 5th November 2014, the defence was due on 20th November 2014". There is no mention of the date on which the Defendant was served)

c. The Defendant did not file any written statement of defence within the stipulated time and the alleged Letters sent to our offices cannot be used as a reason for failing to enter appearance.

d. That the Application for judgment was applied for on 9th January 2015 by our office and judgment was entered on 12th January 2015.

e. The defendant is guilty of latches and has been indolent as they only filed their application upon learning that we had made an application for judgment in default

f. That the letter dated 13th January 2015 was overtaken by events as the Deputy Registrar had already entered judgment in our favour and the Deputy Registrar is not mandated to act on the letter and has no authority to make a judicial decision.

g. That the letter written to the Deputy registrar could not have been termed as an application to have our application for judgement stayed.

h. That the Defendant filed a Notice of Motion dated 31st May 2016 and the same came up for hearing on 8th June, 2016 before Justice Sewe for directions who directed that the file be placed before Justice Amin for further directions on 14th June, 2016 whereupon she went on to issue interim stay orders, for further steps to be taken by the plaintiff on its application for execution.

i. That on the above mentioned day, the court was not sitting and as such we took another date of 1st August 2016.

j. On 1st August, 2016, the court was on vacation and as a result, the file was placed before the Deputy Registrar, who directed the matter be heard on 13th September, 2016

k. Further to that, the Defendant never made any application for the extension of the interim orders and therefore the decree extracted was not in disregards of any court orders in place.

l. I verily believe to be so that the Defendant is now employing further delay tactics to avoid paying its debt to the Plaintiff Company.

m. The Application is a sham and without merit and ought to be dismissed.

n. That the contents of this Affidavit are true to the best of my knowledge and belief.

16. The two Applications and the responses to them raise a number of issues for resolution by this Court. However, it makes logical sense to deal with the Second Application. The Issues are:

(1) How should the Court deal with the Judgment in Default?

(2) Is a stay the appropriate order in these circumstances?

(3) Has the Defendant caused delay and/or been indolent?

(4) Should the Defendant be granted leave to Defend and as a consequence to file a defence in the

terms indicated.

Judgment in Default

17. Starting with the Judgment in Default of a Defence. The Plaint was filed on 10th September 2014 and the Summons to Enter an Appearance is dated 18th September 2014. The Defendant states that it was not served until November 2014. The Plaintiff's Replying Affidavit does not deal with the issue of service at all. In any event the Memorandum of Appearance was filed on 5th November 2014. The Defendant then wrote to the Plaintiff's Advocates informing them that the Defendant wishes to refer the matter to arbitration. The Letter dated 4th December 2014 was sent to Messrs Bali Sharma and Bali Sharma Advocates by courier. Therefore, it is clear that the Plaintiff and its Advocates knew that the Defendant wished to invoke the Arbitration Clauses of their contract. For a reason that is not clear the Defendant did not then immediately take steps to institute an arbitration. The Letter also states that in the absence of agreement, an application would be made. The Plaintiff did not ask for judgment in default immediately thereafter. A month later and during the Court vacation, the Defendant filed an application for a stay and referral to arbitration. Whether by coincidence or otherwise, the Plaintiff on the same day manages to file a "Request for Judgment". It is dated 9th January 2015 and is date stamped 9th January 2015 attached to it is a receipt for registered post. The date is illegible and it is addressed to the Defendant – and not its Advocates on record. Its purpose is unclear. Maybe it was intended to suggest that the Request had been served on the Defendant. The Court record shows that on 12th January 2015, the Defendant filed its Application. Later the same day the DR dealt with the Plaintiff's request. The request was not accompanied by an Affidavit of service. The Defendant's Notice of Motion sets out clearly that the application was premised on the Arbitration Act 1995. On the following day, the Defendant wrote to the DR. The Letter is not on the file. The next day 14th January 2015 There is an entry saying put the stamp on the page following the events of 12th January 2015. That suggests the decision on the Judgment in default was actually taken on 14th January 2015 and not 9th or even 12th January. In any event the record shows that when the DR made the decision to enter judgment in default he or she was aware that there was an application for stay on the file, relying on the Arbitration Act 1995. There may also have been the Letter of 13th January 2015, but Mr Mahan says in his affidavit the DR is not obliged to act on a letter. That may be a reflection of what, in fact, happened.

18. The Defendant's prayer is that the judgment in default be stayed pending the outcome of the First Application for leave to defend. The Court can either stay the judgment in default or set it aside. **Article 159(2) of the Constitution** provides:

"*In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) ***Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

(d) ***Justice shall be administered without undue regard to procedural technicalities; and***

(e) The purpose and principles of this Constitution shall be protected and promoted.

It is clauses(c) and (d) that are particularly relevant to these circumstances. The Defendant has invoked an alternative dispute procedure. The DR is aware of that. The Plaintiff is also aware of that. Nevertheless, one grants and the other obtains a judgment in the full sum of the claim (without any requirement for formal proof) as a final judgment. That action cannot be said to be within the terms or spirit of ***Article 159(2)(c***). The question then arises of whether the remedy is a stay or setting aside of that judgment? The Application itself seeks setting aside of the Decree.

19. The Decree was issued more that 12 months after the judgment in default. There is no evidence on the Court file to show that Hon Deputy Registrar Watimmah gave any consideration whatsoever to that issue. Moving on to the next issue in the Second Application, should the stay be "pending hearing" of the First Application (31 May 2016). At the Hearing on 21 September 2016, the Parties it was resolved that both Applications could be dealt with together and that is how matters have proceeded. If the Judgment is stayed rather than struck out what is the status of the decree. ***The Civil Procedure Rules 2010, Order 21 Rule 8(2***) provides: *(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment,or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.*

In this case the Defendant's Advocates were not asked to approve the decree. As a consequence they were not aware it was being sought. ***CPR Order 22 Rule 6*** provides:

Application for execution.

> 6. Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:
>
> **Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.** (emphasis added).

20. On 21st September 2016, this Court set aside the Decree of DR Watimmah for the reason that the Hon DR had misdirected herself in issuing that decree. Although it is correct there was no subsisting stay at the time of making issuing the decree, it is clear that there was inconsistency of treatment between the Parties. This is demonstrated by the Court Record. The Defendant filed an application on 31st May 2016. That Application was not placed before any Judge of the Division until 3rd June 2016. That is three working days later. There seems to be no explanation on the Court Record for that delay. The Application came before the Court again on 8th June 2016. When a stay was granted up to 14th June 2016. It is unclear why it was listed on 14th June 2016 when it was a well known practice of the Division that this Court was not sitting on Tuesdays. The Court did sit on the previous Monday (13th June) and all the other days of that week. Instead it was listed on a date which was vacation under the ***High Court Organisation and Administration Act***. Again, that is inexplicable. By contrast, the Plaintiff made an application for a decree. That was done without seeking any input from the Defendant on the words of the decree. It was also done without prior notice to the Defendant of an intention to execute. However, the Plaintiff's request for a decree, in the form of a Letter received by the Registry on exactly the same day as the Defendant's Application. One was acted upon immediately, the other was not. Both matters were handled by the same Deputy Registrar. There is no explanation for the inconsistency. However, it does raise concerns above access to justice and fair administration both of which are enshrined in the ***Constitution of Kenya 2010 (Article 50 and 47***). In the circumstances, the continuing existence of the decree is unsustainable. The same must also apply to the judgment in default. It was entered with the full knowledge that there was an application made under the ***Arbitration Act 1995***. It goes without saying that there is an expectation that the judicial officers exercising judicial functions in the Registry have a knowledge of law and in particular knowledge of the area of law they are called upon the apply. It cannot have gone unnoticed that a default judgment would predetermine the application for stay on file at the same time. If it was unnoticed, that is something to be addressed in a different venue under Article ***47 CoK*** and the ***Fair Administrative Action Act 2015***. That applies if the issuing of a decree is administrative. In the event that it is a judicial act, it is equally subject to the rules of fairness and natural justice. In the circumstances, the Decree was set aside on 21 September 2016 for the reasons set out in

this Ruling. By analogy the same criteria of fairness and due process applies to the judgment in default. It is also hereby set aside. The Plaintiff objects on the basis that the application is intended to deny it the fruits of its judgment. However, if the Plaintiff's claim is as strong as suggested in the pleadings, that outcome is a possibility. The Plaintiff will have another opportunity to put its case. If the judgment in default is not set aside, it is the Defendant that suffers from the lack of an opportunity to have its side heard.

21. Moving onto the Second Application, filed on 31st May 2016 and certified as Urgent by Hon Sewe J. It was heard by this Court on 21st September 2016 and again for Highlighting of Submissions on 17th November 2016 after the Parties had filed their written submissions. The Court has considered those Written Submissions in the light of both Applications and the documents appearing on the Court File. The Applicant/Defendant argues that it has a good defence. It states that the claim for Kshs10, 299,783.76 was never demanded from the Defendant. The Plaintiff states that it served a Demand dated 14th July 2014. A copy of that Demand is not included in the Plaintiff's Bundle, nor exhibited to the Replying Affidavit. If it exists, the Plaintiff can rely upon it. If not, the Defendant must be afforded the opportunity to argue that point. The Application exhibits a copy of the Draft Defence. The Defendant raises the defence of accord and satisfaction, namely that it has paid the Plaintiff all that is owed. Given the issues between the Parties resolve around sums due and paid and/or outstanding, these are best resolved by taking an account of what was in fact payable and paid after hearing all the evidence. The entry of a judgment without the essential step of formal proof, denies both Parties that right. In circumstances the Judgment in Default of a Defence is set aside.

22. The Defendant seeks a consequential prayer that the Defence be deemed to be duly filed and served. In order to be duly filed and served the Defendant must pay a fee and also serve the Plaintiff on a specific date for time to run for a Reply. In the circumstances that prayer is not granted.

23. The Defendant's Applications are granted with costs. The Court makes the following Orders:

(1) Decree dated 22 July 2016 is set aside

(2) Judgment in Default dated 12 January 2015 is set aside

(3) Defendant granted leave to file and serve a Defence within 7 days

(4) Plaintiff to pay the Defendant's costs of the Applications, taxed if not agreed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed And Delivered at Nairobi this 8th day of February 2017

In the Presence of:

Clerk: Mr Kaplelach

Applicant: Mr Saluni holding brief for Mr Kamar

Respondent: Ms Mwathi