



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY COURT**

**CIVIL CASE NO 376 OF 2013**

**DCF ENGINEERING COMPANY LTD.....PLAINTIFF**

**VERSUS**

**JOHARI VENTURES LTD.....1<sup>ST</sup> DEFENDANT**

**MARYANNE NJERI NJOROGE T/A NJOROGE**

**NYAGA & CO ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. For the determination of the Court was the application by the Defendants dated 5<sup>th</sup> March 2015. The application was brought pursuant to the provisions of Order 9B (sic) Rule 8, Order 40 Rules 1 & 2, Order 21 Rule 22, Order 51 Rules 1 & 3 of the Civil Procedure Act, Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.
2. The Defendants sought for order for stay of execution of the judgment entered against them on 24<sup>th</sup> November 2014 and the subsequent decree issued on 19<sup>th</sup> February 2015. The Defendants further prayed for the setting aside of the said judgment as entered and allowed to Defend the suit, and for the Court to make further orders as it deemed fit in the interest of the suit.
3. The Defendants' application was predicated upon the grounds that the Defendants duly appointed advocates had entered appearance on their behalf and filed their Defence on 13<sup>th</sup> September 2013. It was averred that the Plaintiff filed but did not serve upon the Defendants, the Amended Plaint dated 26<sup>th</sup> February 2014, which application allowing for the amendment had not been opposed by the Defendants.
4. Further, it was contended that the judgment entered irregularly as there was a proper and duly filed Defence on record, and that, no notice of judgment was served upon the Defendant. It was for these reasons that the Defendants sought for the judgment and subsequent decree be set aside and/or stayed, and the Defence allowed unconditionally for the Defendants to defend the suit. The application was further supported by the supporting affidavit and supplementary affidavits sworn on 4<sup>th</sup> March 2015 and 20<sup>th</sup> March 2015 respectively.
5. The application was opposed, with the Plaintiff a replying affidavit and further affidavit sworn on 17<sup>th</sup> March 2015 and 1<sup>st</sup> April 2015. It was contended that during the pre-trial hearing that had been scheduled for 31<sup>st</sup> October 2015 before Gikonyo, J there had been no defence on the record or that had been put

before the Court.

6. Further, it was averred that the Defendants had been served with the Amended Plaintiff, and that the Defendants had deliberately chosen not to file their defence of the suit. It was contended that the Defendant had neither filed their Defence, nor shown an affidavit of service stating that they had indeed served upon the Plaintiff the said Defence, and that therefore, the judgment entered was as per rules on action taken in default of filing the Defence.

7. On 20<sup>th</sup> July 2015, Gikonyo, J had issued orders to the Deputy Registrar to file a report from the relevant office that dealt with payment of Court fees, to establish amongst other issues, the authenticity of the receipt issued before the Court dated 13<sup>th</sup> September 2013, and the date thereof. This, according to the learned Judge, was to enable the Court to deal with the issue of possible impropriety or abuse of process or malice, which had been alleged by the Defendants.

8. Further, the learned Judge had stated that the said report would enable the Court to deal with the issue of the question of irregularity of the interlocutory judgment, and further enable it to pronounce itself on the other grounds of the application.

9. In a letter dated 22<sup>nd</sup> January 2016, the Deputy Registrar wrote to the office of the Senior Accountant of the Milimani Commercial Court, requesting for the office to authenticate the receipt that the Defendants had presented before the Court dated 13<sup>th</sup> September 2013.

10. In response to the letter, the Senior Accountant responded on 1<sup>st</sup> February 2016, confirming that the receipt was genuine. Following this confirmation, the Deputy Registrar wrote a report dated 24<sup>th</sup> February 2016 to the Court, stating that upon confirmation by the Senior Accountant, the receipt dated 13<sup>th</sup> September 2013 was indeed genuine. This therefore, would vindicate the Defendants, and put to rest the issue as to whether they had filed their Defence as reiterated on 13<sup>th</sup> September 2013.

11. On the issue of service, Order 5 Rule 15(1) and Order 7 Rule 1 of the Civil Procedure Rules are applicable. Both the Plaintiff and the Defendants are required to file an affidavit of service, ostensibly to show that they had effected service of the documents to the intended parties. Both the Plaintiff and the Defendants deny that the other party served them with the stated documents, viz, the Amended Plaintiff and the Statement of Defence.

12. The Defendants do not deny that they were served with the Plaintiff on 2<sup>nd</sup> September 2013. They admit as much, and further reiterate that they entered appearance and filed their statement of Defence on 13<sup>th</sup> September 2013. What they do not admit was the service of the Amended Plaintiff dated 26<sup>th</sup> February 2014.

13. They contended that the same was not served upon them, but state further, that they had no reservations against the amendment of the Plaintiff, and had stated as such at paras. 8 and 9 of the Supporting Affidavit. The supposed letter written to the Plaintiff's advocate on record has not been adduced in Court. But that is not the issue to be dealt with. What the Court needs to determine is whether there was impropriety on the part of either parties to the suit, or with the Court's registry, in order to determine whether or not there was an irregular judgment entered against the Defendants on 24<sup>th</sup> November 2014.

14. Both parties did not file their respective affidavits of service in accordance with the provisions of Order 5 Rule 15(1) and Order 7 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks to execute the judgment whilst there is no affidavit of service deponing that the Defendant had been served with the Amended Plaintiff. There is no evidence on record that they had served the Defendants with the Amended Plaintiff as at the time they filed the Request for Judgment on 5<sup>th</sup> November 2014.

15. The Defendants' position that they had filed their respective Defence was further supported by the

Deputy Registrar's report dated 24<sup>th</sup> February 2016. It was indicated that the receipt that the Defendants presented before the Court was genuine, indicative that they had indeed filed and paid for the Defence dated 13<sup>th</sup> September 2013.

16. Although no such Defence has been found to be on record, the Court would deemed the same as filed given that there was a receipt showing that the same was paid for and should therefore be on the record. As to whether the same was misplaced, it is for the Deputy Registrar to make such report as to the whereabouts of the document that has been filed.

17. Such as may be, the judgment as entered is irregular for the following reasons; (1) there is on record a receipt dated 13<sup>th</sup> September 2013 which has been confirmed as genuine for the payment of the Defendants' Defence dated 13<sup>th</sup> September 2013; (2) there is no affidavit of service by either the Plaintiff or Defendants evidencing service of the Amended Plaintiff and Defence respectively and (3) no party should be allowed to unfairly derive benefits from another from action or inaction that was not occasioned of their own volition.

18. In **Civil Suit No 152 of 2013 Prime Bank Ltd v Paul OtienoNyamodi; (2014) eKLR**, it was held *inter alia*;

*“Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back the Plaintiff’s progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that the defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and Defence within the prescribed period under the Civil Procedure Rules, 2010 before such judgment can be set aside and/or varied... In arriving at the said conclusion, the court has had due regard to the cases of Civil Case No 3399 of 1992 Fredrick ChegeKamenwavsAron K. Kandie where the Court of Appeal held that “...notwithstanding the regularity of an *ex parte* judgment, a court may set aside the same if he has reasonable defence on the merits” and Civil Case No 222 of 2010 Winnie WambuiKibinge& 2 others vs Match Electricals Limited where the court held that, “... it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”*”

19. The Defendants believed that the Defence that they had filed and paid for on 13<sup>th</sup> September 2013 was on record, and as such, there was no reason for them to have judgment entered against them, purportedly and ostensibly for the reason that they had failed to enter appearance or file a Defence.

20. In cognizance of the foregoing reasons, the Court hereby allows the Defendants' application and issues orders as prayed for in the application, and hereby stay the execution of and set aside the interlocutory judgment in default dated 24<sup>th</sup> November 2014.

21. The Plaintiff is to serve the Defendants with the Amended Plaintiff and comply with the provisions of Order 5 Rule 15(1).

22. The Defendants are to serve the Plaintiff with the Defence, and or Amended Defence as the case may be, and further comply with the provisions of Order 7 Rule 1 within seven (7) days of receipt of the Amended Plaintiff. The timelines for filing subsequent pleadings shall be as set out in the Civil Procedure Rules. There shall be no orders as to costs.

Written, dated and signed at Nairobi this 5<sup>th</sup> day of May 2016.

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**C. KARIUKI**

**JUDGE**

**Dated, signed and delivered in court at Nairobi this 6<sup>th</sup> day of May, 2016.**

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**O. SEWE**

**JUDGE**