



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 73 OF 2016

ABDULHAKIM ABDULLA MOHAMED1ST PLAINTIFF

MUSKYS IMPORTERS LIMITED.....2ND PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD..... DEFENDANT

R U L I N G

1. Before the court for determination is the Notice of Motion dated 19/9/2016 and praying for order that:-

- 1. The Application be certified urgent and service be dispensed with at the 1st instance.**
- 2. There be a stay of further steps/proceedings herein pending hearing and determination of the present application.**
- 3. The *ex parte* judgement entered/or endorsed on 25/08/2016 be set aside and the Defendant allowed to file its statement of defence with leave of the court.**

It is evident that only Prayer 3 remained outstanding for this determination as the first two remained spent.

2. The grounds founding the application, the affidavit in support of that application and the oral submissions offered in court by Mr. Mogaka on behalf of the defendant do not dispute service but contends that the lapse was by an inadvertent mistake of one PETER OHANYA, the Chief Officer, Risk Management and Integrity Services Department of defendant who received the summons to enter appearance but instead of forwarding same to the legal department so as to engage the defendants insurers, instead filed the papers away only to discover same later. The mistake is acknowledged and the defendant pleads that it has a defence that raises triable issues. From my perusal of that defence there is an allegations that there was never a fault on the defendants transformer nor apparatus supplying electric power to the burnt premises. It is pleaded in the draft defence in that; -

The installed secondary distribution equipment and switch gear serving the suit premises and the neighborhood was found intact after the fire.

That the secondary distribution live was never affected at all by the alleged over voltage.

None of the neighborhood premises drawing power from the same transformer were never affected and the transformer continued to serve the area even after the fire.

All the transformer fuses installed to protect the transformer and customer from forward and or backward faults were all intact after the incident of fire.

4. On those grounds the defendant contend that there are triable issues disclosed and therefore the court should exercise its wide and unfettered discretion to set aside the default judgment dated 25/8/2016. It is additionally contended by the defendant applicant that judgment has only been entered for partial claim for the plaintiff hence it shall be desirable and inevitable to conduct a formal proof before a final judgment is entered and therefore the plaintiff stands to suffer no prejudice irreparable of compensation by an award of thrown away costs and on terms deemed just and expedient by the court.

5. The application was opposed by the plaintiffs who filed a replying affidavit by the 1st plaintiff in which affidavit the plaintiff accused the defendant for an unexplained delay of some 4 weeks which the plaintiff terms unreasonable hence no reasons have been advanced to warrant setting aside a regularly entered judgment.

6. On the defence filed and if it raises any triable issues the plaintiffs contend that, they took the trouble to procure the services of a professional assessor to come up with the cause of fire but the defendant has not made any attempt towards showing a technical report on the cause of fire. The plaintiff agree that there would indeed be need to conduct a formal proof but insist that during such time the Defendant will have the opportunity to challenge the plaintiff on the quantum payable. The plaintiff then add that the defence exhibited is a bare denial and that the affidavit admits the claim but prefers that it be handled by its insurers and lastly that should the court be inclined to set aside, then the liquidated sum on which judgement has been entered need to be deposited into an escrow account.

7. Those facts formed the basis of the submissions by Mr. Abed at the hearing of the application with an addition that where the judgment is regularly entered the applicant is at the mercy of the court and the court must exercise the discretion to set aside judiciously.

Analysis and determination

8. Whether or not a court sets aside a default judgement, the primary consideration is the need to do justice between the parties. That determination is governed by set principles which I understand to be settled and ought to be considered in the following order:-

i. Whether or not there is a defence on record, however irregularly exhibited, that raises a triable issue.

ii. The reasons for delay leading to default.

iii. The length of time taken to take remedial steps.

iv. Evidence of attempt to delay the court process.

9. In the matter before me, it cannot be denied that the sum claimed is colossal. That alone was to this court enough reason for MR. PETER OHANYA to give it the weight of attention it deserved. To this court, it is contradiction in stand points for MR. OHANYA to have misfiled the summons and the plaint claiming against his employer the colossal sum only to come later and make very heavy whether of the sum claimed as the basis of pleading for setting aside. I just hope that there is a procedure within the establishment of the Defendant to remedy such dereliction of duty on the part of an employee.

10. However, mistakes, as they say, are to man. Mistakes occur all the time. They have occurred in the past, continue to occur now and even in the future they will occur. That a mistake has occurred should not be an excuse for the court to abrogate from its duty to try as much as possible to ensure that the

dispute a party has brought to will is heard on merits.

11. Indeed where a party, a corporate personality like the defendant, is sued and knowing that it is dependent upon its servants like the deponent of the affidavit in support of the instant application, to accept summons on its behalf, the court should exercise some leniency noting that any penalty imposed for the misstep of such an agent, will invariably be met by the corporate and not the agent or servant. **See Essanji & Anor -vs- Sulanke [1968] EA 224.**

12. That leniency with which a court treats a defaulting defendant is the image mirror of the vigour with which the court seeks to protect the right of a party to be heard. The words of Apaloo JA, in PHILLIP CHEMWOLO & ANOR -vs- AUGUSTINE KUBEKE, have been quoted, and I think for a long time to come will always be quoted, as a guide in circumstances where a default is attributed to inadvertence or mistake. The judge said:-

“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”.

13. I understand the judge to say that the court will not shut its doors and ran away from its duty to hear the parties before it purely on account of a mistake. Such a mistake may not be condoned or encouraged by free and unchecked setting aside but the court will strive to do whatever it is that is necessary to correct the mistake and achieve the dictates of justice in the case.

14. In this matter, I am, just now, unable to term the draft defence a sham. I thank the dispute as to the causation of the fire in a triable issue. I am equally persuaded and I am ready to accept it that albeit the conduct of Peter Ohanya may not have been that which was expected in the person of his standing and responsibility, the same might as well have been a mistake and a mistake that should not disentitle the defendant to its day in court.

15. Indeed four (4) weeks or thereabouts is not a short duration but at the same if mistake can be excused and remedied by an award of thrown away costs then it ought not to remain the bottleneck to the defendant's right to present its case in court. I have not been convinced that there was any intention on the defendant or indeed its employee Mr. Peter Ohanya to deliberate delay, obstruct or defeat the court process.

16. All in all I have come to the conclusion that the Defendant/applicant ought to be allowed to put forth its defence before this court at least to enable it prove its allegations that the fire was caused by factors other than the defect on its equipment and transmission line and also to prove the allegations that the value of the damage is not as pleaded by the plaintiff. That shall however not be on no terms at all. There ought to be imposed terms not only to assuage the defendant for the dissipated vested rights but also to enable expeditious disposal of the matter. I therefore allow the application, set aside the default judgment entered on the 25/8/2016 but on terms that:-

1. The defendant shall file and serve the statement of defence, witness statements and copies documents within 15 days from today.

2. The defendant shall equally within 21 days from today deposit into an interest earning account in the names of the advocates for the parties the sum of Kshs.522,713,576/- pending the hearing and determination of the suit.

3. Upon compliance with the two conditions foregoing and subject to filing of any subsequent pleadings, the parties shall agree and settle on a list of agreed issues within 21 days after close of pleadings.

- 4. This matter be listed for pretrial conference within 60 days after close of pleading(s).**
- 5. Should there be a default to compliance with orders (i) & (ii) above, the judgment now set aside shall revert and the application dated shall stand dismissed.**
- 6. Thrown away costs assessed at Kshs.100,000 is awarded to the defendant to be paid within 21 days from today.**

It is so ordered.

Dated and delivered at Mombasa this **07th** day of **December 2016**.

HON. P.J.O. OTIENO

JUDGE