REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 501 OF 2013

ATLAS COPCO CUSTOMER FINANCE AB……..PLAINTIFF

-VERSUS -

KUNDAN SINGH CONSTRUCTION LIMITED.....DEFENDANT

RULING

1. On 9th July 2014 the court granted interlocutory judgment in favour of the plaintiff, pursuant to an application which disclosed to the court that the defendant had failed to Enter Appearance and also to file a Defence.

2. On 14th July 2014 the defendant entered appearance and also filed a Defence. Of course, that meant that the defendant had taken action a little bit too late in the day.

3. On 11th November 2014, the defendant filed the current application, seeking orders to set aside the judgment which had been entered against it.

4. The application was supported by the affidavit of **RIPTHUMAN SINGH UBHI,** a Director of the defendant, **KUNDAN SINGH CONSTRUCTION LIMITED.** The deponent explained that the defendant's failure to enter appearance and also to file a Defence within time, was attributable to the defendant's receptionist who was served with the summons to Enter Appearance.

5. According to Singh Ubhi, the receptionist inadvertently kept the summons in her drawer and she thereafter proceeded on leave without informing the defendant about the summons.

6. According to the defendant, its failure to enter appearance and to file a defence on time was due to an honest mistake which was beyond the applicant's control.

7. The defendant also emphasized that it remedied the situation expeditiously, soon after it became aware about the situation.

8. The court was requested to bear in mind the Overriding Objective of the Civil Procedure Act, which was to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by that statute.

9. The defendant lay emphasis on Section 1B (1) (a) of the Civil Procedure Act which enjoined the courts to aim towards achieving the just determination of the proceedings before it.

10. In order to make it possible for the courts to take appropriate steps to secure the ends of justice whilst preventing the abuse of the process of the court, Section 3A of the Civil Procedure Act boldly proclaimed that nothing in that statute could be allowed to limit or otherwise affect the court's inherent power to make appropriate orders.

11. Even prior to the enactment of those new provisions of the Civil Procedure Act, the Courts had declared that;

> "*There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment, he does so on terms that are just …*
>
> *The main concern of the Court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules". – per* William Duffus P. in **PATEL VS E.A. CARGO HANDLING SERVICES LIMITED [1974] E.A. 74**, at page 76.

12. Both the plaintiff and the defendant have quoted the decision of Harris J. in **SHAH VS MBOGO & ANOTHER [1967] E.A. 116,** at page 123, to explain the reasons why the court's discretion should be used when setting aside *exparte* judgments. This is what the learned Judge said;

> *"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".*

13. In effect, the parties are at par as regards the law that is applicable when one seeks the setting aside of an *exparte* judgment.

14. Thereafter, the defendant sought to portray itself as a victim of the inadvertent action of its secretary. It was said that the said secretary received the summons but she failed to inform the defendant about the same. The secretary then proceeded on leave.

15. The defendant did not suggest that the secretary lacked the requisite authority to accept service on its behalf. Therefore, it is to be presumed that the defendant was duly served.

16. In the circumstances, as the defendant did not enter appearance or file its Defence within the prescribed time, I find that the court was right to have entered judgment against the defendant. The said judgment is thus lawful.

17. Notwithstanding that fact, it was still open to the defendant, in principle, to seek to set aside the judgment.

18. In the case of **PATEL VS E.A. CARGO HANDLING SERVICES LIMITED [1974] E.A 75,** at page 76, the court said;

> "*I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence which must succeed, it means as* ***SHERIDAN J.*** *put it "a triable issue", that is an issue which raises a prima facie defence and which should go to trial for adjudication".*

19. It is thus evident that if the defence on record is not arguable, there would be no need to set aside the regular judgment because such an action would not serve any useful purpose.

20. In the case of **SHANZU INVESTMENTS LIMITED VS COMMISSIONER OF LANDS, CIVIL APPEAL NO. 100 OF 1993** the Court of Appeal said;

"In our view, no useful purpose could be served by setting aside the judgment as there was no possible defence to the action".

21. In this case the plaintiff has submitted that the defendant was not candid. The reason for that contention is that whereas the defendant blamed the delay in entering appearance upon the secretary who had been allegedly served, the records showed that it was a Director of the defendant who was served.

22. In my considered view, there appears to be merit in the plaintiff's said submission.

23. But then again, I fail to discern any benefit which the defendant would have derived from delaying to enter appearance or to file their defence. In other words, whether it was the Managing Director or his secretary who was served, there would have been little or no difference to the subsequent oversight in taking appropriate action within the prescribed time.

24. A Managing Director could make the same mistake as that which his secretary could make. Even the advocate representing a party can make a mistake.

25. A mistake may explain a failure to take appropriate action, regardless of the person who made it. The important issue to be considered is whether or not the said error or mistake was designed to assist the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

26. In this instance, I find nothing to indicate any deliberate effort by the defendant to obstruct or delay the course of justice.

27. If anything, the delay in taking action to enter appearance or to file a defence could only have worked to the detriment of the defendant.

28. The next question is whether or not the defence put forward by the defendant raised any triable issues.

29. In essence, the defendant asserted that the goods sold to it by the plaintiff were not of merchantable quality, and that they were therefore unfit for the intended purpose.

30. Secondly, the defendant asserted that it had not fallen into arrears.

31. On the other hand, the plaintiff insists that there cannot be any plausible defence from the defendant because there had already been two (2) letters containing admissions of liability.

32. In determining whether or not the statement of defence raised any triable issue the court must take cognizance of the letters which, allegedly, contained admissions. If the said admissions were plain, obvious and unequivocal, then the court may well decide that the defence did not raise any triable issue, when the admissions were borne in mind. I so find because if there had been an admission by the defendant, a subsequent denial may be perceived as a deliberate attempt to either delay or to obstruct the course of justice unless the defendant tendered a convincing explanation for his change of mind.

33. In the letter dated 22nd July 2012 the defendant made reference to the outstanding sum of USD 161,619.99. However, the defendant went on to say that that sum had been paid on 6th July 2012.

34. Therefore, that letter cannot be said to constitute an admission of liability.

35. Meanwhile in the email dated 17th April 2013, Mr. K.V. Lakshminarayan (Raghu) made reference to a meeting he had had with the plaintiff's representative, Jerry Muchiri.

36. Raghu went on to propose a re-scheduling of the outstanding amount as follows;

"*1. The outstanding as per the statement is USD 360,266.67. The interest on the above from August 2012 to 30/4/2013 is USD 25,218.67. We request you to add the same to the principal outstanding, which adds the total amount to USD 385,485.43. We now repay the same in the next 17 months equal installments.*

2. We will pay the first installment of USD 22,588+ interest on or before the 30th April 2013. Then every month we will continue to pay installments before the end of each month.

Kindly discuss and get us the reschedulement done.

Thanks .

Regards

K.V. Lakshminarayan (Raghu)

Group Finance Controller".

37. A look at the plaint reveals that at paragraph 9 (b) the plaintiff cited the sum of USD 385,485, which is the exact sum quoted by the defendant in the email dated 17th April 2013.

38. The plaintiff thereafter explained that its claim for the sum of USD 440,485.65 was made up of the sum cited by the defendant (being USD 385,485) plus interest at the rate of 2% per month and fixed interest of 10.5% from 31st July 2013, until payment in full.

39. A comparison between the sum claimed and the figures in the defendant's email shows that the plaintiff's claim is constituted of a debt which the defendant had admitted owing. The defendant's said admission was in very clear terms and it was unequivocal.

40. Furthermore, the defendant has not tendered any plausible explanation to justify its change of mind, from the admission contained in the email dated 17th April 2013, to the defence dated 7th July 2014.

41. In conclusion, I find that no useful purpose would be served by an order setting aside the *exparte* judgment, as the Defence does not give rise to any triable issue.

42. Accordingly, the defendant's application dated 11th November 2014 is dismissed with costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **9th** day of **March** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Odhiambo for Githii for the Plaintiff

Nyaribu for Nyachoti for the Defendant.

Collins Odhiambo – Court clerk.