



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COURTS
COMMERCIAL, TAX & ADMIRALTY DIVISION
CIVIL CASE NO 376 OF 2013

DCF ENGINEERING COMPANY LIMITED.....
.....PLAINTIFF

Versus

JOHARI VENTURES LIMITED.....
.....1ST DEFENDANT

MARYANNE NJERINJOROGE T/A NJOROGENYAGAH & CO ADVOCATES.....2ND
DEFENDANT

RULING

Setting aside of interlocutory judgement

[1] The application before me is dated 5th March 2015 and is seeking for the following orders:-

- a) **Setting aside of the interlocutory judgment entered herein on 24TH November 2014 and the decree thereto. Consequently, the court should allow the Defendants to defend the suit.**
- b) **A temporary injunction restraining the decree-holder to execute the decree dated 19th February 2015 by itself or through agents or auctioneers. The auctioneers should also be restrained from carrying away the Applicants' good which were proclaimed goods on 3rd March 2015.**

[2] The application is supported by the Supporting Affidavit and Supplementary Affidavit sworn by Maryanne Njeri Njoroige on 5th March 2015 and 20th March 2015, respectively.

Applicants' gravamen

[3] The Applicants best argument is that on 13th September, 2013, they filed the defence dated 13th September, 2013. The date and evidence of the filing is in the court's rubber stamp affixed on the defence as well as in the receipt for Kshs. 75 that they paid for the said defence. No explanations have been given by court personnel why these documents are not in the court file and interlocutory judgment was entered in the circumstances of the case. The Defendants seemed to be laying some sort of blame on the Plaintiff for the disappearance of the defence from the court file. And therefore, the Plaintiffs should not be allowed to derive benefit from their own mischief. According to the Applicants, because the defence had been filed at the time the interlocutory judgment was entered into, the said judgment should be set aside *ex debito justitiae*. See Ringera J (as he then was) as quoted in the case of **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORP vs. ANTHONY MWAU & ANOTHER NBIHCCC NO 170 OF 2001** and **ABRAHAM KIPTANUI vs. DELPHIS BANK & ANOTHER** that an irregular judgment should be set aside as of right. As a result of such setting aside, the Applicants submitted that the proclamation levied upon the properties of the Defendants should be set aside as of right too. They added two other reasons which impugn the attachment herein, to wit, that;

(1) The firm of advocates upon which execution was levied is a partnership between the 1st Defendant and Salome Nyagah who is not a party in the suit; and

(2) The execution was levied upon tool of trade which are not attachable under the Auctioneers Act. for purposes of the latter point, see the case of JOHN AMENDI & CO ADVOCATES vs. EDITH NYAMBOKEAMERO & ANOTHER NBIHCCC NO 329 of 2008.

[4] Even if the judgment should be set aside as of right, the Applicants urged that they have tangible and real issue which should be heard on merit. They referred to the defence annexed hereto. They sought the judgment and execution thereon to be set aside.

Respondent opposed application

[5] The Respondents opposed the application. They filed a Replying Affidavit and a Further Affidavit. It was averred and submitted that the defence now being put forth was not in the court file when the case went for pretrial. The Respondents stated that the Applicants were served with the amended plaint as well as notice for pre-trial. And on 31st October 2014 when the matter was set down for pre-trial before Gikonyo J the Defendants were represented in court. The only remedy they have is against their advocate for incompetence and laxity in handling their case. In any event, the purported defence was never served on them contrary to Order 7 rule 1 of the Civil Procedure rules. Therefore, the registrar properly entered the interlocutory judgment herein.

[6] The Respondents submitted further that the defence does not raise any triable issue as they have admitted that they received the monies under the agreement in issue herein. Matters of privity of contract were also argued to show that the defence does not raise triable issues.

DETERMINATION

[7] I have considered all the arguments for and against the application. But, there is one thing on which the decision of the court may as well turn; that the defence was filed on 13th September 2013 and paid for through receipt number 5526733. This is one of the major grounds for applying. The Plaintiff submitted that no defence was in the file when interlocutory judgment was entered into. The Defendants have insinuated possible impropriety by the Plaintiff in obtaining the interlocutory judgment herein given the fact that a defence had been filed. When a court of law is confronted with allegation that a party filed a pleading and another refutes that fact, a question of possible impropriety or abuse of process or malice arises, and in such circumstances, it is always good practice to require the Deputy Registrar to file a report from the relevant office which deals with payment of court fee, to establish;

- (1) The authenticity of the receipt presented in court;
- (2) The date indicated thereon; and
- (3) That it is for the defence purportedly filed in this case. Depending on the report from the D/R, the question of irregularity of the interlocutory judgment will be decided at once and the court will be able to pronounce itself on the other grounds of the application.

Accordingly, I order the D/R to file, within 14 days, a report on Receipt number 5526733 with regard to the matters aforementioned. Upon receipt of the report I shall pronounce myself on the application herein. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 20th day of July 2015.

F. GIKONYO

JUDGE