



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 505 OF 2011

IMPACT COMMUNICATIONS LIMITED.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

1. The application before me is the Notice of motion dated **24th April 2014** and filed in Court on even date. It is expressed to be taken out under **Order 10 rule 11** of the **Civil Procedure Rules** as well as **Sections 1A, 1B, and 3A** of the **Civil Procedure Act**.
2. The application seeks for orders that this Honourable Court be pleased to set aside the interlocutory Judgment entered on the **5th of June 2012** and that the Defendant's Defence filed on **2nd August, 2013** be deemed to be duly filed and served. It is based on the several grounds as stated therein and is supported by the undated affidavit of one **DEBRA AJWANG'-OGADA** described as the legal manager of the Defendant.
3. The background of the application is that the Plaintiff filed the current suit on **15th November 2011**. Together with the Plaintiff was the Notice of motion dated **14th November 2011** brought under a Certificate of urgency. The said application was dismissed on **28th December 2011**. It is averred by the Defendant's Legal manager that the Defendant was served with summons to enter appearance on **29th March 2012** to which they filed a Memorandum of appearance on **6th December 2012**. The Defendant later filed a Defence on **2nd August 2013**.
4. It is further averred for the Defendant that the Plaintiff applied for the interlocutory Judgment through a letter dated **25th April 2012** and filed in court on **29th May 2012**. It is the Defendant's contention that the interlocutory judgment was granted on **5th June 2012** despite the Defendant having filed a Notice of appointment of Advocates and defending the application dated **14th November 2011**.
5. It is the Defendant's position that the Plaintiff had all along represented to them that the suit would be set down for hearing and that the parties were in the process of complying with pre-trial directions. The Plaintiff had forwarded to the Defendant copies of its "Statement of Trial Issues" and the "Pre-trial questionnaire". *Copies of the same are attached to the Plaintiff's application and marked DAO-5.*
6. It is averred by the Defendant's legal manager that they came to learn of the Interlocutory Judgment when their Advocates were served with a hearing Notice for a formal proof. According to the Defendant,

they were never served with a notice of entry of interlocutory judgment as required by law. It is the Defendant's case that they are desirous of defending this suit and that the Defence on record raises triable issues. The Defendant prays to this Court for an opportunity to be heard and to defend itself.

7. The application is opposed. The Plaintiff filed a Replying affidavit on **27th May 2014** sworn by NAMADA SIMONI, an Advocate of the High Court of Kenya.

8. It is the Plaintiff's position that the Defendant did not enter appearance or file Defence within 15 days as required by law. As earlier stated, the summons to enter appearance was served upon the Defendant on **29th March 2012** while the memorandum of appearance was filed on **6th December 2012**. According to the Plaintiff they wrote to the Defendant on **11th July 2013** reminding them that they had not filed their Defence but the letter elicited no response. Thereafter, the Plaintiff fixed a date for formal proof and served the Defendant on **7th March 2014** but no action was taken.

9. It is the Plaintiff's contention that the Defendant never bothered to file the defence in time or to apply to set aside the interlocutory judgment at the earliest opportunity. It is therefore the Plaintiff's case that the current application is an abuse of the Court process.

10. The application was prosecuted by way of written submissions.

ANALYSIS

11. I have considered the application, the affidavits on record as well as the written submissions of both parties.

12. This is an application to set aside interlocutory judgment which is governed by **Order 10 Rule 11** of the **Civil Procedure Rules**. The said Order gives this Court the discretion to set aside or vary an interlocutory Judgment on terms that are just. The Court's discretion under that Rule has been considered in several Court decisions, among them **PATEL -VS- E.A. CARGO HANDLING SERVICES [1974]EA 75-**

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be 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.”

13. I have noted that summons to enter appearance in this matter was served upon the Defendant on **29th March 2012** while the memorandum of appearance was filed on **6th December 2012**. Ideally, the Defendant should have entered appearance 15 days after 29th March 2012 and filed the Defence within 15 days of entering appearance. However, that was not the case. The Defendant entered appearance eight months after they were served with summons. The Defence was thereafter filed approximately seven months after entering appearance. The Defendant has not given any significant reasons for the said delay.

14. It is very clear from the above circumstances that Counsel for the Defendant was not diligent at all. As a result of this sheer negligence, an interlocutory Judgment was entered against the Defendant. It is Counsel's submission that the failure to file the requisite documents on time was inadvertence on their part and the same ought not to be visited upon the client. That much I agree, however the manner in which the matter was handled by the Counsel in charge is wanting. There is nothing to show why simple matters such as entering appearance and filing a Defence in time were not adhered to.

15. That said, I take note of the fact that in the Defendant's submissions, Counsel for the Defendant earnestly apologizes for the delayed filing of the Defence. Counsel for the Defendant humbly submitted that any prejudice from the resulting delay on their part should not be visited on the Client/Defendant. As I have earlier noted, Counsel was negligent in handling this matter. However, a mistake is a mistake and it would not be in the interest of this Court to punish a litigant for the mistakes of its Advocates. It is also

my view that the prejudice that may be occasioned to the Plaintiff can be compensated by way of costs.

16. It is also worthy to note that the Ruling dated 28th December 2011 relating to the interlocutory application filed by the Plaintiff on **14th November 2011** to some extent found the Plaintiff liable for the breach of obligations under the subject contract. Therefore, on the face of it, the Defence has triable issues. For that reason, I am inclined to allow this matter to proceed on its merits.

17. In the upshot, the Defendant's Notice of Motion dated **24th April 2014** and filed in Court on even date is hereby allowed. However, the Defendant shall bear the costs of this application for the unnecessary delay they have caused in the prosecution of this matter. Those costs are assessed at Kshs.10,000/= to be paid within 7 days.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 3rd Day of October 2014.

E.K.O OGOLA

JUDGE

Present:-

M/s. Muigai for Defendant/Applicant

Absent for Plaintiff/Respondent

Teresia – Court clerk