REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 416 of 2010

TECHNICAL EQUIPMENT INTERNATIONAL LIMITED…….. PLAINTIFF

VS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ……..…..…….. DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 24th May 2012 brought by the Defendant seeking orders for setting aside the *ex parte* judgment and consequential decree issued in this matter on 9th March 2012. The Applicant also seeks unconditional leave to defend the suit in this matter.

2. The application is based on grounds set out on the face of the application and is further supported by the affidavit of William Ndemwa, the acting General Manager of the Defendant sworn on 7th March 2012.

3. The background to the present application is that the suit in this matter was instituted on 15th June 2010. Judgment in default of appearance and or defence was entered in favour of the Plaintiff on 1st March 2011 in the sum of Kshs. 7,174,000/- together with interest and costs. On 16th December 2011, **Mugo J** set aside the default judgment on condition that the Defendant was to deposit the decretal sum within 14 days from the date of the ruling. The Defendant was also ordered to filed and serve its Defence within 14 days from the said date.

4. There having been default in compliance with the above orders, the Plaintiff applied afresh for judgment in default of appearance or defence and obtained an ex parte judgment on 9th March 2012.

5. By an application dated 18th April 2012 the Defendant applied for enlargement of time within which to comply with the orders of Mugo J of 16th December 2011. That application was canvassed before this court an a ruling delivered on 24th May 2012 dismissing the application on the grounds that enlargement of time could not be granted there having been a second judgment entered on 9th March 2012 which

superseded the judgment of Mugo J of 16th December 2011.

6. The present application therefore seeks to set aside the latter judgment of 9th March 2012.

7. The grounds in support of the present application are that owing to a mix up the defendant was unable to put in its defence, bundle of documents and list of witnesses and statement within the stipulated period. The Defendant had deposited a substantial part of the decretal amount in court and was willing to comply with any further orders of the court. The Defendant also had triable issues in its defence and would suffer gross injustice if it was condemned without being heard. The Defendant further doubts the affidavit of service filed in court in support of the application for entry in default of the second judgment.

8. In response, the Plaintiff has filed a replying affidavit dated 5th June 2012 and filed on 6th June 2012 sworn by Patrick Kimathin Muchena, counsel for the Plaintiff. From the affidavit, the Plaintiff asserts that the application before the court and the ex parte orders obtained by the Defendant is an act of bad faith and demonstrates the Defendant's disobedience of court orders and its subversion of the process of the court. The orders sought for unconditional leave to defend the suit are an act of self-perpetuation as discretional remedies cannot be issued on the applicant's terms. The draft defence does not controvert the statement of claim in the plaint and the same is a sham and a mere denial. The affidavit in support of the application depones to matters that are not known to the deponent and consists of conjectures and speculations. The deponent does not also disclose when he assumed the position of acting General Manager Legal and does not state whether he is the one who was disclosed to the process server for purposes of service.

9. Counsel for both parties made oral submissions to the application which I have considered.

10. I have carefully evaluated the application on the basis of the affidavit evidence tendered and the rival submissions made by counsel for the parties.

11. The issues I am required to determine are firstly, whether the failure by the defendant/applicant to enter appearance and file defence in this matter was as a result of an error inadvertent and, secondly, whether the application itself meets the established conditions for setting aside interlocutory judgment and therefore whether the court should, in the circumstances, exercise its inherent powers under Sections 1A and 3A of the Civil Procedure Act to set aside the default judgment.

12. With regard to whether there was genuine inadvertence in the failure by the defendant to enter appearance and file defence in this matter, the supporting affidavit of Mr. Ndemwa merely states that there was a mix up on the part of the Applicant's advocates as to what decree was being executed. In effect the advocates for the Applicant were not aware that a second judgment had been issued on 9th March 2012. In my view, while the consequences of mistake of an advocate should not be visited upon the client, I see the mix up on the part of the Applicant's advocates as part of the lethargy that has characterized the Defendant's camp since the orders of Mugo J of 16th December 2011. The conditions given by Justice Mugo were that defence be filed within 14 days from the date of the ruling. Deposit of the decretal sum was also ordered to be made within the same timeline. As of 18th April 2012 when the Defendant filed an application for extension of time, the fresh judgment entered on 9th March 2012 was already on the court record. Basic circumspection by the Defendant's advocate would have established this position whereupon the proper application would have then applied to set the judgment aside instead of applying for enlargement of time. However, I would be inclined to accommodate the excuse by the Defendant in respect of the alleged mix up if the application succeeds on the merits of setting aside the interlocutory judgment.

13. This court has discretion to set aside default judgment under Order 10 Rule 11 of the Civil Procedure Rules and to vary or set aside any consequential decree or order upon such terms as are just.

14. In **Shah Vs. Mbogo (1967) E.A 116** the court laid down the principles that the court should apply in exercising its discretion to set aside the default judgment as follows:

"The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise) to obstruct or delay the cause of justice".

15. The basis upon which the defendant wish to have the default judgment set aside is that they have a reasonable defence to the plaintiff's claim that is arguable and which raises triable issues. A draft defence is annexed to the application and this traverses the Plaint on a number of areas including the following:

1) That the Defendant being a State Corporation could not have ordered goods worth Kshs. 5,874,000/- through its Managing Director and without adhering to the Public Procurement and Disposal Act of 2005;

2) That there was no emergency to warrant direct sourcing of the goods in question;

3) That the Plaintiff was not shortlisted as a supplier hence could not have entered into a contract with the Defendant;

4) That there was no Local Purchase Order for the goods hence there was no valid contract between the parties; and

5) That the goods were not, in any event received by the Defendant.

16 In the context of the present application, I am not required to show whether or not the points of defence raised will upon subjecting the matter to trial succeed. I am only required to establish that the points are ex facie reasonable points of defence to the claim. This approach was laid down in the case of **Tree Shade Motors limited v. D.T. Dobie & Another [1995-1998] EA317 (CAK)**where the Court of Appeal held as follows:

"Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex parte judgment aside".

17. In that regard, given that the proposed defence in this matter is heavily built upon the contention that the supply forming the basis of the claim failed to comply with the Public Procurement and Disposal Act 2005 to which the Defendant is subject, and given that the existence of a contract for the said supply is itself contested as well, I think the Defendant has established a number of triable issues that can only be determined upon full hearing of the suit. And as **Ringera J** (as he then was) remarked in the case of **Alloys Ongaki vs. Justus Arusi Wamburu & Patrick Okolla - Bungoma HCCC No. 94 of 1999 (unreported):**

"to deny a litigant a hearing should be the last resort of a court"

18. I am also minded to acknowledge that the Defendant has already deposited in court the bulk of the decretal sum herein and therefore the Plaintiffs position is sufficiently cushioned.

19. For the above reasons, I am inclined to allow the Defendant/Applicants' Notice of Motion dated 24th May 2012 with no orders as to costs.

20. The parties are directed to prepare the suit for hearing by filing and exchanging pre-trial documents and complying with other requirements of Order 11 of the Civil Procedure Rules 2010, within 30 days from the date of this ruling and to fix the matter for hearing within 14 days thereafter.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 5th day of July 2012.

J. M. MUTAVA

JUDGE