REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 137 of 2012

LIVINGSTONE JOEL WECHE
T/A L WECHE JOEL TRANSPORTERS.....PLAINTIFFS

VERSUS

P Z CUSSONS EAST AFRICA LIMITED……..……DEFENDANT

RULING

This suit was instituted by the plaintiff against the defendant by way of a plaint dated 24th February 2012 filed on 21st March 2012. The plaintiff is claiming General damages for breach of contract, costs and interest. According to the said plaint, the cause of action arose from the defendant's breach of transportation agreement by which the plaintiff was to transport the defendant's goods at a fee. The defendant entered appearance on 12th April 2012. However, as no defence was filed within the stipulated period of 15 days from the said date, the plaintiff vide a request dated 7th May 2012 and filed in Court on 8th May 2012, requested for judgement under Order 10 rules 6 and 10 of the Civil Procedure Rules. On 10th May 2012, the Deputy Registrar of this Court accordingly entered interlocutory judgement and directed the matter to be fixed for "formal proof".

On 25th June 2012 the suit was duly fixed for formal proof on 2nd October 2012. From the record, the hearing notice was served on the defendant's advocates on 28th June 2012. Upon the said service the defendant on 28th September 2012 filed an application dated 27th September 2012 seeking in the main an application seeking orders that the interlocutory judgement entered herein be set aside and that the defendant be granted leave to defend. The application was supported by an affidavit sworn by **Hasna Mdeizi**, the defendant's advocate on 27th September 2012. According to the said affidavit, after the entry of appearance towards the end of April 2012, she was ready to file the defence but her clerk could not trace the court file even after assessing the defence. Some time in July 2012, she was informed by her clerk that interlocutory judgement against the defendant on or about 11th May 2012. However, once again the file could not be traced and was later informed that the case had been fixed for formal proof on 2nd October 2012 hence the reason why the file could not be traced. According to her she has neither been served with a Notice of Entry of Judgement or Hearing Notice and had she been served she would have made the application earlier. According to the deponent, the failure to file the defence was inadvertent and not in any way calculated to prejudice the Plaintiff in any way yet the defendant has a strong defence.

In opposing the application the plaintiff swore a replying affidavit on 10th October 2012, in which he deposed that the application is frivolous, misconceived and bad in law and an abuse of the court process. It was further deposed that the application lacks merit and is meant to delay the hearing of the matter and ought not to be entertained. It was further deposed that when the defendants deliberately failed to file a defence within the prescribed time the plaintiff instructed his advocates to request for judgement which

was done. It was also deposed that the court file has always been available in the court registry and that the plaintiff's advocates have always been able to access the file and that there is no evidence that the file has been missing hence the application is not made in good faith and is calculated to prejudice the plaintiff. According to the plaintiff the defendant's draft defence is frivolous a shame and does not raise any triable issue. Further it is the deponent's view that the Court ought not to aid the indolent.

On 2nd October 2012 I gave directions that the application be prosecuted by way of written submissions and placed the matter for further orders on 29th October 2012. Come the said date and the defendant had neither filed written submissions nor was the defendant represented. Accordingly, I directed the matter to proceed and **Ms Ouma**, learned counsel for the plaintiff addressed the Court. Apart from reiterating what had transpired before and after interlocutory judgement was entered learned counsel submitted that the draft defence does not disclose any triable issue as the existence of the agreement is admitted and the same is a mere denial and does not add any value to the suit.

I have considered the foregoing. The principles guiding the exercise of the Court's discretion to set aside a default or ex parte judgement or order are now trite. The Court of Appeal in **Macharia vs. Macharia [1987] KLR 61** held *inter alia* as follows:

"The Court had a very wide discretion to exercise under the relevant order and rule and there were no limits or restrictions on the discretion of the learned judge except that if the judgement was varied it had to be done on terms that were just... This discretion is intended 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...The matters which should be considered include the facts and circumstances, both prior and subsequent, and all the other respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex parte and whether or not it would just and necessary, upon terms to be imposed... The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and, finally, it should be always remembered that to deny the subject a hearing should be the last resort of a court... And because it is discretionary power it should be exercised judicially or in a selective and discriminatory manner, not arbitrarily and idiosyncratically for otherwise the parties would become dependent on judicial whim".

It is not in dispute that the judgement that was entered in default of defence was a regular one. That being the position the next issue is whether there is a defence on merits. This is not the same thing as to say that the defence ought to be one that must succeed. I have perused the draft defence. The fact that there was an agreement between the parties is not denied. However, the defendant avers that the plaintiff has no *locus standi* in the matter since the contract was terminated by effluxion of time and relies on clause 2 of the said contract. According to the said clause the agreement was to remain in force for 24 months from the effective date which is indicated as 1st May 2008. The fact that the contract was to terminate after 24 months is acknowledged by the plaintiff. Accordingly that does not seem to be an arguable point. The second issue raised is that there was a mechanism for dispute resolution provided. However, it is not alleged that the resort to Court was barred. Accordingly, it is my view that this does not disclose a prima facie arguable defence. I agree with the plaintiff that the rest of the averments contained in the draft defence are bare denials.

Apart from the foregoing I have taken into account the conduct of the defendant in this suit. First and foremost the affidavit in support of the application is riddled with hearsay evidence since the clerk to whom the fact of unavailability to trace the Court file is attributed has not sworn any affidavit. There is also evidence that the Hearing Notice was served on 28th June 2012 yet no action was taken until 28th September 2012 and no explanation has been offered for this non-action. To make matters worse the defendant failed to comply with the directions given by the Court on 2nd October 2012 and failed to

appear in Court on 29th October 2012. Under section 1A(3) of the Civil Procedure Act:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

In my view a party who fails to comply with the directions of the Court does not deserve a favourable exercise of the Court's discretion. In my view the defendant herein perfectly fits the description of a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

Accordingly, the Notice of Motion dated 27th September 2012 lacks merit and the same is dismissed with costs to the plaintiff.

Dated at Nairobi this 5th day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of Ms Omukwe for the Plaintiff