



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL CASE NO. E515 OF 2023

BETWEEN

**VENDOME GOLD DMCC PLAINTIFF/
RESPONDENT**

VERSUS

**GROUP ELYKIA LIMITED 1ST DEFENDANT
JEAN PAUL TSHIKANGU MUSANGU
2ND DEFENDANT
VENAN MA-MABIAL 3RD DEFENDANT/APPLICANT**

RULING

Introduction & Background

1. For determination is the Notice of Motion dated 19th November 2024, brought by the 3rd defendant, seeking to challenge an interlocutory judgment entered *ex parte* on 22nd December 2023 in favour of the respondent. The applicant prays for leave to have the firm of Michael Were & Associates come on record on his behalf. He further seeks orders to set aside, review, and/or discharge the said interlocutory

judgment, and that he be granted unconditional leave to defend the suit.

- 2.** The applicant contends that he had appointed an advocate to represent him in the matter. However, despite filing a notice of appointment, the said advocate neither attended court nor took any steps to defend the claim, nor did he provide the applicant with any updates on the progress of the case. The applicant avers that he repeatedly attempted to contact his advocate, and received only vague assurances and promises of updates, which led him to reasonably believe that the matter was being handled.
- 3.** The applicant also faults the respondent for failing to serve his former advocate with the request for interlocutory judgment, the decree, mention notices, and other court correspondences, despite the advocate's address being on record. He asserts that he only became aware of the interlocutory judgment on 8th October 2024, when he was served with a notice to show cause why he should not be committed to civil jail for failure to satisfy the decretal sum of USD 5,133,060. The applicant maintains that he has a reasonable defence raising

triable issues, and that he has been wrongly dragged into a suit with which he has no connection.

4. The application is opposed through a replying affidavit sworn on 31st January 2025 by Mr. Peter Mumu, learned counsel for the respondent. Counsel confirms that, contrary to the applicant's averments, the respondent duly served pleadings and summons upon the applicant, pursuant to which his advocates entered appearance but failed to file a statement of defence within the prescribed timelines.
5. The respondent further asserts that a formal request for judgment was filed and served upon the applicant, together with the subsequent application for execution of the decree and the notice to show cause. Beyond the issue of proper service, the respondent contends that the applicant's draft statement of defence is devoid of merit and does not disclose any reasonable defence to the claim.

Analysis and Determination

6. The parties filed written submissions, which I have carefully considered. Notably, the respondent does not oppose the prayer allowing the firm of Michael Were & Associates to come on record for the

applicant. That prayer is therefore granted. The sole issue left for consideration is whether the applicant has established sufficient grounds for setting aside the interlocutory judgment entered on 22nd December 2023.

- 7. *Order 10 Rule 11 of the Civil Procedure Rules*** grants this Court discretion to set aside or vary an interlocutory judgment and any consequential decree or order on such terms as are just. This discretion is wide, but it must be exercised judiciously, not to assist a litigant who deliberately seeks to obstruct or delay justice, but to prevent injustice or hardship caused by inadvertence, excusable mistake, or error. This principle was well captured in ***Mbogo & Another V Shah, [1967] EA 116***, and reaffirmed in ***Richard Nchapai Leiyangu V IEBC & 2 Others, [2013] eKLR***.
- 8.** The first ground relied upon by the applicant is that his former advocates were not properly served with the necessary pleadings. However, the applicant concedes that his advocates did enter appearance on his behalf. It follows, therefore, that he must have been aware of the proceedings and had instructed counsel on the basis of pleadings already served.

This undermines his assertion of lack of service. Moreover, the affidavit of service sworn on 2nd November 2023 evidencing service of the pleadings by the respondent, remains unchallenged; its truthfulness was neither denied nor rebutted.

9. The applicant further alleges that he consistently called his former advocate but was not updated on the status of the suit. I find this explanation implausible. No evidence has been provided to demonstrate any genuine follow-up with counsel. Additionally, the applicant does not show what steps, if any, he took independently to safeguard his interests in the matter before the notice to show cause was issued. It is evident that he only acted once he was confronted with the possibility of committal to civil jail, which suggests a reactive rather than active approach to defending the claim.
10. Even where service has been regular, courts retain discretion to set aside an interlocutory judgment if the draft defence raises bona fide triable issues. In **Tree Shade Motors Limited V D.T. Dobie & Co. (K) Ltd, [1998] eKLR**, the Court of Appeal affirmed that: *“even if service was valid, judgment will be set aside if the Defence raises triable issues.”* The same

principle was echoed in **James Kanyiita Nderitu & Another V Marios Philotas Ghikas & Another, [2016] eKLR** and **Shanzu Investments Ltd V Commissioner of Lands, [1993] eKLR.**

11. However, a defence that consists merely of general denials cannot qualify as raising triable issues. In **Ragbir Singh Chatte V National Bank of Kenya Limited, [1996] eKLR,** Akiwumi JA. cited with approval the statement as set out in *Halsbury's Laws of England* which underscores that a party must answer allegations of fact specifically and not evasively, since a general traverse merely puts the opponent to strict proof.

12. The learned judge stated as follows:

"It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth,

except damages. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof.”

13. Similarly, in ***Magunga General Stores V Pepco Distributor Ltd, EA (1986-89) 334*** the Court of Appeal emphasized that a mere denial is insufficient and that the defendant must offer a substantive reason for disputing liability, such as absence of contract, failure of consideration, or proof of payment. The Court restated that:

“First of all, a mere denial is not a sufficient defence in this type of cases. There must be some reason why the Defendant does not owe the money. Either there was no contract, or it was carried out and failed. It could also be that

payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

- 14.** I have carefully examined the applicant’s draft statement of defence against this background. I must say that the same fails to specifically traverse the respondent’s material allegations and does not disclose any substantive ground of defence. In effect, it is obscure, lacking in detail, and incapable of sustaining a bona fide contest on the merits.
- 15.** Given the nature of the draft defence and the applicant’s conduct, I am not persuaded that this is a proper case for the exercise of the Court’s discretion in his favour. The interlocutory judgment was regularly entered, and the defence proffered is hollow and devoid of triable issues. Allowing it would only serve to delay the expeditious determination of the suit without advancing the ends of justice.

Disposition

- 16.** Accordingly, the application dated 19th November 2024 is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI
THIS 31ST DAY OF OCTOBER 2025.**

**F. MUGAMBI
JUDGE**

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