REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 39 OF 2016

POWER PLANT ENGINEERS LTD.....PLAINTIFF

VERSUS

BUSINESS PARTNER INTERNATIONAL.....DEFENDANT

RULING

(Application seeking leave to file defence out of time; plaint filed 3 years prior to the application; applicant being given time during pre-trial mention to file its defence; no defence filed; applicant through his counsel affirming during the pre-trial conference that it is ready to take a hearing date; hearing date given by consent; on the hearing date, applicant's counsel applying for more time to file defence and applying for adjournment which were declined; matter proceeding for hearing; this application being filed about 20 days after the hearing; reasons given for not filing defence being that an advocate left the applicant's law firm and failed to capture this case in his handover notes; no handover notes displayed; name of counsel not given; the date that he left the law firm not given; given the circumstances, court not persuaded that this is a fit case to exercise its discretion in favour of the applicant; application dismissed with costs)

1. The application before me is that dated 20 March 2019 filed by the defendant. It seeks the following substantive orders which are prayers 4, 5 and 6 of the application, being :-

> *(a) That this Honourable Court be pleased to issue an order vacating its directions that parties file submissions on or before the 28th of April 2019; and/or vacate its directions otherwise that parties have closed their cases.*
>
> *(b) That the Honourable Court be pleased to grant leave to the defendant/applicant to lodge its Statement of Defence and accompanying documents and statements and allow the plaintiff leave to lodge any reply that may be necessary to the defence within defined timelines.*
>
> *(c) That costs of the application be in the cause.*

2. The application is based on various grounds and is opposed. Before I go to the gist of it, I will set down the background so as to put the application in context.

3. This suit was commenced by way of a plaint which was filed on 10 February 2016. The plaintiff/respondent, averred that in the month of March 2013, the applicant advanced to it a loan of Kshs. 8,000,000/= which was secured through a charge registered over the land parcel Naivasha/Mwichiringiri Block 5/937. The respondent averred that it had made some payments, though also admitted to have been in default, but complained that upon the default, the applicant went on a rampage in wrongly calculating the interest and arrears. The applicant then moved to sell the suit property in exercise of its statutory power of sale and that is what prompted the respondent to file this suit. In its plaint, the respondent sought orders to permanently restrain the applicant from selling the suit property, damages, costs of the suit and any other orders deemed just and expedient. Together with the plaint, the respondent filed an application for injunction which was presented before me ex-parte on 15 February 2016. I granted a stay of the intended sale subject to deposit of Kshs. 1,000,000/=, which sum was duly deposited. The applicant filed a replying affidavit to oppose the application for injunction. When I looked at it, it appeared to me as if the parties could not agree on what is owing. I therefore subsequently made directions that the parties to meet and appoint accountants in an effort to reconcile the accounts and extended the interim orders stopping the sale. The parties were not able to reconcile their accounts and when the case came before me on 25 October 2018, I was of the view that a lot of time has been consumed with the applications and directed that the main suit be heard once and for all. I gave the plaintiff 14 days to file and serve its statements and documents and the defendant 14 days after this period to also file and serve its documents and statements. I directed that the case be mentioned on 22 November 2018 for a pre-trial conference.

4. On 22 November 2018, Mr. Orege was present for the respondent, whereas Mr. Simiyu held brief for Mr. Litoro for the applicant. Mr.

Simiyu stated that the defendant has complied and can have a hearing date. I then fixed the case for hearing on 7 March 2019.

5. On 7 March 2019, Ms. Kabalika was present for the respondent and was ready to proceed, whereas Mr. Charana was present for the applicant. Mr. Charana stated that he was not ready to proceed as the advocate who was handling the matter had left the law firm representing the applicant. He also stated that a defence and witness statements are yet to be filed. He however had no name of the advocate who left the law firm and no information of when he left the firm. The application was opposed by Ms. Kabalika. On my part, I did not see any merit in the application for adjournment. I pointed out that I had given time frames for parties to make ready their cases and that it had been confirmed on 22 November 2018 when the matter came up for pre-trial conference, that the applicant was ready to proceed. The hearing date was thus taken by consent. On the defence not having been filed, I noted that the applicant had close to 3 years to file defence, and further observed that I had given time on 25 October 2018, for any documents to be filed. Nothing had been filed by the applicant. I declined to allow the application for adjournment and ordered the case to proceed for hearing. The plaintiff presented two witnesses, who testified in chief and were presented for cross-examination. Mr. Charana did not however cross-examine them. The plaintiff then closed its case. Mr. Charana asked for time to present the defence witnesses but I pointed out to him that the defendant has no defence on record and hence no basis upon which to present any witness. I ordered close of the defence case and gave directions on the filing of written submissions. I further directed that the matter be mentioned on 8 April 2019 for taking a judgment date. On 27 March 2019, this application was filed under certificate of urgency. I gave direction that the same be served and be heard inter partes on 8 April 2019.

6. The applicant has presented 13 grounds to support the application, but principally, it avers that failure to file the defence was inadvertent and that it has a good defence. The supporting affidavit is sworn by Mr. James Mwangi, an advocate in the law firm of M/s CM Advocates LLP, the law firm on record for the applicant. He has deposed that the matter was previously being handled by an advocate who has since left the firm. He has averred that they (I assume the law firm) were under the mistaken belief that the directions of this Court have been complied with in terms of filing defence and the respective documents. He has stated that he received a letter on 6 March 2019, from counsel for the plaintiff, inquiring whether they had filed a statement of defence and supporting documents. Upon retrieval of the file, it was noted that the same had inadvertently been omitted from the advocate's handover report and that indeed the statement of defence had not been filed. They then proceeded to draw a statement of defence which they intended to file on 7 March 2019 before the hearing date. It is deposed that failure to file the defence within time was occasioned by an inadvertent error by counsel in omitting the file from the handover report which mistake ought not be visited upon the client. It is repeated that the applicant has a good defence and a draft defence is annexed.

7. The respondent filed a replying affidavit sworn by Jannita Ndila Daudi, and a preliminary objection stating that the application is res judicata. Ms. Daudi has deposed inter alia that the application is res judicata as a similar application, seeking time to file defence, was orally made on 7 March 2019 and refused and the avenue is to appeal. She has further deposed that failure to file defence for a period in excess of 36 months is inexcusable.

8. I have considered the application alongside the submissions of counsel for the applicant and respondent and I am of the following view :-

The application principally seeks leave to file defence out of time. Order 7 Rule 1 provides as follows on the time for filing defence :-

Defence [Order 7, rule 1.]

9. Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

10. It will be seen from the above, that a defendant is supposed to file his defence within 14 days after he has entered an appearance and such defence needs to be filed within 14 days from the date of filing. I have actually not seen a Memorandum of Appearance in the court file, but I do note that a Replying Affidavit to the application for injunction, which was filed alongside the plaint, was filed on 14 March 2016. The defence thus ought to have been filed about 14 days or thereabouts from this date. None was filed, but the applicant could have taken liberty to file its defence and all documents within the 14 days that I provided on 25 October 2018. None was filed. Indeed, as I have mentioned earlier, on 22 November 2018, when the case came up for a pre-trial conference, counsel for the applicant stated that he was ready to proceed. I wonder why the applicant's counsel mentioned that he was ready to take a hearing date for the main suit, if he still intended to file a defence.

11. Be that as it may, I have been told through the supporting affidavit, that the reason why the defence was not filed is that counsel who was handling the matter left the applicant's law firm, and that in his handover report, this file was omitted, and thus the law firm did not know of its position. I would probably have taken this deposition seriously, if there was mention of who the advocate that left the law firm is, and when he left the law firm. There is no mention of who this advocate is and when he left the said firm. Ms. Amulabu in her oral submissions, stated from the bar that this advocate is one Oscar Litoro. This of course should have been noted in the deposition, rather than being stated from the bar. Even assuming that the advocate is actually Oscar Litoro, it is still not mentioned when he left the firm. It is also not mentioned when these handover notes were made and presented to the law firm. In fact, no handover notes were ever annexed to the supporting affidavit to give credence to the claim that the reason that no defence was filed was due to this matter not being in the handover notes. As matters stand, I have no evidence of any counsel having left the law firm on record for the applicant; no date of when he left the law firm; and no handover notes to verify that indeed, the reason why a defence was not filed was because there were no handover notes. The reasons given as to why no defence was filed are thus completely unsubstantiated.

12. In the case of ***Shah vs Mbogo (1967)EA 116*** at page 123, Harris J, laid down the principles which guide the court in exercising its discretion to set aside a judgment obtained ex-parte, and he stated as follows :-

> *"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so 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."*

13. I may not be dealing with a case where judgment has already been delivered ex-parte, but I think the above dictum would still be useful when dealing with a situation where a party seeks to file defence out of time. I only wish to add that the conduct of a party seeking the discretion of the court, and the reasons given for not having filed defence within time, or within the time prescribed by court, is important when the court makes an assessment of whether or not to allow the application.

14. In the instance of this case, firstly, I am not persuaded by the reasons given, for the same are not backed up by any evidence, which evidence must be readily available for the same is mentioned, i.e the handover notes. Secondly, I am not persuaded that the conduct of the applicant, and all other surrounding pertinent circumstances, would move this court to exercise its discretion in its favour. It will be recalled that this court gave the applicant 14 days to file its documents. The applicant was already out of time but this court in its discretion allowed for this time. The applicant on 22 November 2018, signalled that it was ready to proceed for hearing, and it is on that basis that I gave the hearing date of 7 March 2019. Moreover, despite being warned by counsel for the plaintiff, before the hearing date, that it has not filed its defence, the applicant never moved with speed to ensure that the defence was on record before the hearing date of 7 March 2019. Further to that, despite this case having proceeded for hearing on 7 March 2019, this application was filed on 26 March 2019, about 20 days later. No explanation has been offered as to why this application was not filed earlier and no account given as to why it had to wait close to 20 days after the proceedings of 7 March 2019, to file this application. In addition, it has not escaped my mind that this suit was filed more than 3 years ago, and 3 years later, no defence was filed. In my view, all these reasons militate against this court exercising its discretion in favour of the applicant.

15. It has been mentioned within the application, that if the application is not allowed, the applicant stands to suffer irreparably. I am not persuaded. It has emerged that what really was in dispute is the accounts. This court will ably look into whether or not the applicant is owed and if so how much, in arriving at the decision whether the applicant was within its rights to propose to exercise its statutory right of sale as chargee based on the contract of the parties and proof of payment. Of course, I may have been enriched by the input of the applicant, but even his counsel opted not to cross-examine the witnesses of the plaintiff. If indeed this court arrives at a wrong decision, and some loss is occasioned to the applicant, the applicant can ably be compensated by damages, through a suit against its counsel for professional negligence. There will be no loss which is irreparable. I therefore do not see why the respondent ought to be prejudiced because of the tardy conduct of the applicant and/or its counsel.

16. I am aware that Ms. Kabalika, for the respondent, raised some technical points of law, including the issue that the application is res judicata, and the argument that the supporting affidavit is incompetent as it has been sworn by an advocate and not the applicant. It is not necessary for me to address these points because the application fails on merits, thus no need to look into these technical points.

17. For the above reasons, the application is dismissed with costs.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :

Plaintiff acting in person.

Mr. Opondo holding brief for Mr. Mwangi for defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU