



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 182 OF 2017

BAMBURI CEMENT LTD.....PLAINTIFF

-VS-

TELKOM KENYA LTD.....DEFENDANT

RULING

1. By a Notice of Motion dated 9th November, 2017 brought under Sections 1A and 1B of the Civil Procedure Act, Order 10 Rule 11 and Order 42 Rule 6(1) of the Civil Procedure Rules, the Defendant/Applicant seeks orders that:

- a) **The Application be certified urgent and be heard before the formal proof.**
- b) **The Court do set aside the Judgment entered on 11th July 2017 in default of Entering Appearance and filing Statement of Defence.**
- c) **The Court do stay the hearing of Formal Proof.**
- d) **The Court do grant the Applicant leave to file and serve the Statement of Defence out of time.**
- e) **The costs of and incidental to this Motion be in the cause.**

2) The Application is based on the grounds set out on the face of the Motion namely:

- i) **The summons of Enter Appearance dated 31st May 2017, Plaint dated 26th May 2017, verifying Affidavit and other accompanying copies of documents were served on the Applicant on 8th June 2017.**
- ii) **The Applicant under a letter dated 27th June 2017 to Anjarwalla & Khanna Advocates gave instructions to Enter Appearance and represent Telkom Kenya Ltd in the matter.**
- iii) **Anjarwalla & Khanna Advocates under an email dated 27th June 2017 acknowledged and accepted the instructions to act.**
- iv) **The Applicant has at all material times understood or believed that Anjarwalla & Khanna Advocates had entered appearance and filed a statement of Defence in the Suit.**

v) By a fortuitous telephone conversation on 6th November 2017, between the Defendant's Head of Legal Affairs with the Advocate for the Plaintiff, the Defendant for the first time learnt that it had no legal representation in the suit.

vi) Anjarwalla & Khanna Advocates did not at any time notify the Applicant that they had refused to execute the Defendant's instructions in the matter.

vii) The Applicant instructed Chiuri Kirui & Rugo Advocates to act for it under the letter dated 7th November 2017 and delivered on the morning of 8th November 2017 to act for it in the matter.

viii) Anjarwalla & Khanna Advocates by misstep, mistake or neglect failed to enter appearance and file statement of defence within time.

ix) The Applicant should not be condemned or driven from the seat of judgment on account of the misstep, mistake or neglect of Anjarwalla & Khanna Advocates.

x) The Applicant has a sustainable defence to the Respondent's action.

xi) The Respondent shall not suffer any prejudice which cannot be remedied by an award of costs on account of reliefs sought. The Applicant shall on the converse be condemned unheard and suffer irreparable injury with respect to its overriding interest in the Suit Property.

xii) This is a matter that requires to proceed to full hearing for justice to be done.

xiii) It is just, equitable and reasonable for the Applicant to be allowed to file its statement of Defence out of time and for the Suit to proceed to hearing on merits in the circumstances of this matter.

3. The Application further supported by the grounds contained in the Supporting Affidavit of Robert Kamau Irungu sworn on 9th November 2017 in which he reiterates the grounds in support of the Application. In addition, he deposes *inter alia*, that the Suit Property which was valued at Kshs.135,000,000.00 in 2014 was sometime in the 1970s donated by the Respondent to Kenya Posts & Telecommunications Corporation, the predecessor in title to the Applicant for purposes of putting up a telephone exchange. That it is common ground that the Applicant has been in possession or occupation of the Suit Property since 1970s and it has installed and operated telecommunications facilities and developments valued at Kshs.102,773,000.00 in 2014. He further deposes that the Suit Property has been the subject matter of prior subordinate Court proceedings- **Chief Magistrate's Court at Mombasa, Land Case No.1105 of 2014**, which was terminated without a hearing on merits by the Judgment of this Court dated 6th December 2016 in **ELC Appeal No.1B of 2014, Telkom Kenya Ltd v Bamburi Cement Ltd**.

4. The Application is opposed by the Plaintiff through a Replying Affidavit sworn by Betty Kanyagia on 21st November 2017. Briefly, the Plaintiff contends that the Defendant was duly served with the Summons to Enter Appearance together with the Plaintiff and the accompanying documents but failed to do so and the Plaintiff moved the Court to enter judgment against the Defendant which was done on 11th July 2017. That even after the Defendant was served with a hearing notice on 23rd August 2017, notifying it that the case was due for hearing on 6th November, 2017, the Defendant failed to attend the hearing or take measures in the Suit. The plaintiff avers that **CMCC NO.1105 of 2014** was heard and concluded but the judgment was overturned by the decision in **ELC APPEAL NO.1B OF 2014**. It is the Plaintiff's contention that the Application is a callous misrepresentation of facts aimed at delaying the hearing of the suit and further that the Defendant's defence is a sham.

5. Both Advocates filed Written Submissions in support of their opposing positions and also made oral

submissions to highlight the same and relied on decided cases.

6. I have considered the Application together with the affidavits in support and against as well as the submissions made and the authorities cited. The law on the setting aside of ex-parte judgment is now settled. The principle guiding the setting aside ex-parte orders are trite that the Court has wide powers to set aside such ex-parte orders save that where the discretion is exercised, the Court will do so on terms that are just. In the case of **Patel -V- East Africa Cargo Handling Services Ltd (1974) EA 75** At Page 76 Duffes P states thus:

“There is no limit or restriction 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 to it by the rules. I agree that where it is a regular judgment as is the case here, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view a defence that must succeed, it means as SHERIDAN J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication. ”

7. In **Shah –V- Mbogo (1967)EA 116** at page 123, Harris J, stated:

“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.”

8. In this case, defendant does not dispute the fact that the summons to enter appearance was served. The judgment was therefore regularly obtained. The defendant has stated that it gave instructions to Anjarwalla & Khanna Advocates who were also acting for the Applicant in a previous but related matter to enter appearance and represent it in the matter but for some unknown reason, the said advocates, altogether they acknowledged and accepted the instructions, did not enter appearance or file defence. The correspondences have been exhibited in the Application showing that indeed the Applicant instructed Counsel to take up the matter on its behalf. From the supporting affidavit, the Applicant has in my view given sufficient reason to persuade this Court to exercise its discretion in its favour. Besides taking into account the reason for the failure of the Defendant to file its memorandum of Appearance or defence, I also have to consider whether the intended defence raises triable issues.

9. A draft defence was annexed to the affidavit in support of the application in which the Applicant has denied the Plaintiff’s claim. Both parties are in agreement that the Plaintiff had in the 1970s donated part of the Suit Land to the Kenya Posts and Telecommunications Corporation, the predecessor in title to the Defendant for purposes of putting up a telephone exchange. There is also no denial that the Defendant is in possession or occupation of the Suit Property. However, the Plaintiff avers that the Defendant has not complied with the conditions pursuant to which the Suit Premises were donated, hence its intention to rescind the donation. On its part, the Defendant in the draft defence states that it has complied with all the conditions attached with respect to user and further avers that it has made all required payments and executed the transfer. The Defendant states that it is the Plaintiff who, intending to rescind the donation, refused on its part to execute the transfer for the Suit Property. In my view, the Defendant’s intended defence raises triable issues which call for trial.

10. The Plaintiff’s first witness was testifying on 6th November 2017 when the Plaintiff’s counsel applied to have the said witness stood down to enable the Plaintiff file further list of documents. The Defendant filed this Application only 4 days later on 10th November, 2017. The Plaintiff has not demonstrated that it will suffer prejudice if the orders sought are granted as its effect would be to allow the Court hear and determine the case on merit. The overriding objective of the Court would not doubt come to the aid of the Applicant.

11. In the result, I find merit in the Application dated 9th November, 2017 and the same is allowed. The

Defendant's Memorandum of Appearance dated 9th November, 2017 and filed on 10th November 2017 is deemed duly filed upon payment of the requisite fees. The defendant is directed to file its defence within 14 days from the date of this ruling. The Defendant will pay thrown away costs to the Plaintiff.

Delivered, signed and dated at Mombasa this 20th February, 2018.

C. YANO

JUDGE