REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO.745 OF 2011

GLOBAL TEN INVESTMENT LTD…….……PLAINTIFF

=VERSUS=

KANORERO RIVER FARM LIMITED…….1st DEFENDANT

OTIENO OKEYO trading as

OTIENO OKEYO & COMPANY ADVOCATES ……...2ND DEFENDANT

RULING:

The applicant herein, ***Global Ten Investment Ltd*** who is also the Plaintiff has brought this Notice of Motion application under **Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the laws of Kenya** and all other enabling provisions of the law for orders that;

a. *That the interlocutory Judgment entered herein on 15th May 2012 against the applicant in respect of the 1st Respondent's counter claim be set aside.*

b. *That the applicant's Reply to the 1st Defendant statement of Defence and Defence to Counter Claim dated 22nd May, 2012 and filed on 24th May, 2012 be admitted on record and deemed as having been filed and served.*

c. *That the Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.*

d. *Costs of the application be provided for.*

Which application is premised on the grounds set on the face of the application and also on the Supporting Affidavit of **Allan Adongo**, Advocate. Among the grounds in support of the Affidavit are:

i. *The applicant instituted this suit against the 1st and 2nd Defendants on 21st December, 2011 and*

the Defendants jointly entered appearance on 30th January, 2012 and filed their defences on 17th and 22nd February, 2012.

ii. *That subsequently, the 1st Respondent filed a request for Judgment in default of Defence to Counter Claim against the applicant herein. Interlocutory Judgment in default of Defence to Counter Claim was entered for a sum of* ***Kshs. 27,532,973/-*** *on 15th May, 2012 against the applicant.*

iii. *That the said interlocutory judgment entered was irregular and improper as the subject matter for both claim is the same and therefore indivisible.*

iv. *That the plaint as drawn by the applicant has not been struck out and/or dismissed and the same is therefore still validly on record.*

v. *That the applicant filed its Reply to Defence and Defence to counter claim on 24th may 2012, and the said defence raises very strong triable issues and the applicant was not aware that an interlocutory Judgment had been entered in default of Defence to counter claim and only got to know about it on 12th July, 2013, during the pre-trial conference.*

vi. *Further, that the applicant stands to suffer substantial loss and irredeemable loss and damages, unless the orders sought are granted. However, no prejudice will be occasioned to the 1st Respondent if the orders sought herein are granted and for the interest of justice, the orders sought should be granted.*

The application was vehemently opposed by the 1st Defendant /Respondent. The 1st Defendant filed grounds of opposition and stated that the application lacks merit and that the judgment and Decree on record on the Counter Claim is lawful, good, and regular. It was further stated that the grounds upon which the application is made to court are not sufficient for the relief sought and the application is made after undue delay.

One **Maina Chege,** the Managing Director of the 1st Defendant swore a Replying Affidavit in opposition to the Notice of Motion . He averred that the applicant failed to demonstrate why it took long to file its Defence to the 1st Defendant's counter- claim.

He further averred that it was legal and proper to enter an interlocutory Judgment in default of Defence to the Counter Claim. The Deponent further alleged that the applicant has failed to either offer or provide security for the due performance of the decree herein on the Counter Claim and costs. It was his contention that the Plaintiff did not offer explanation as to why he failed to plead its Defence to the Counter –Claim on time. He also averred that Counter Claim is distinct from the Plaint and the Plaint cannot be assumed to be the Defence to the counter claim. It was deposed that the application lacks in merit and the same should be dismissed with costs.

The parties herein consented to dispose of this matter by way of written submissions. I have now considered the instant Notice of Motion application, and the relevant laws and the Written Submissions and I make the following findings.

The application herein is premised under **Order 10 Rule 11** of the **Civil Procedure Rules** which provides that:-

"where Judgment has been entered under this Order, the court <u>may</u> set aside or vary such judgment and any consequential decree or order upon such terms as are just ."

The prayers sought by the applicant herein are therefore equitable relief which is granted at the discretion of the court. The court however has a duty to use the said discretion judicially. This was the holdings in

the case of ***Kenya Commercial Bank Ltd Vs Reuben Waweru D. Kigathi and Another , High Court Civil Case No. 325 of 1999***, where the court held that:-

"The court has unlimited discretion to set aside or vary judgment entered by default of appearance but as usual with the discretionary powers, the same discretion must be exercised judicially and upon reasons".

I have considered the pleadings herein and there is no doubt that the applicant filed a Plaint on 23/12/2011. The Defendants/Respondents entered appearance on 26th January, 2012. The 2nd Defendant filed his defence on 17th February, 2012 and the 1st Defendant filed its defence on 23rd February, 2012 and included a Counter-Claim of **Kshs. 26,810,200/=** plus costs of the Counter-Claim. Subsequently on **16/3/2012**, the 1st Defendant or Plaintiff to the Counter-Claim applied for request for Judgment against the applicant who failed to file Defence to Counter-Claim within the stipulated time.

The said judgment in default was entered on 4th may, 2012 for **Kshs, 26,810,200/=** .From the court records, the applicant filed a reply to Defence and Counter-Claim on 24th May, 2012. These documents are now on record. The applicant's now seek to set aside the said interlocutory judgment entered against the applicant on 4th May, 2012 on the counter-claim.

The suit herein was filed by the Plaintiff/Applicant for refund of **Kshs. 9,000,000/=** which the Plaintiff claimed was necessitated by breach of sale agreement for **LR No. 209/14310**. The 1st Defendant filed its Defence and counter-claim alleging that out of breach of the said Sale Agreement over **LR No.209/14310,** it incurred loss and damages to the tune of **Kshs 26,810,000/=**. The two claims therefore related to the same Sale Agreement. I will concur with the applicant's counsel's submissions that the issues raised by the applicant herein and the Plaintiff (1st Defendant) in the Counter Claim are indivisible as they relate to the said sale agreement.

The counter-claim was filed in response to the plaintiff's claim. It would therefore be difficult to establish a divide between the Plaintiff's suit and the 1st Defendant's counter-claim. Both claims are pending and entry of an interlocutory judgment against the Plaintiff herein would in effect render the Plaintiff's suit irrelevant. The two claims ought to be decided at the same time for end of justice to be seen to have been done. I will be guided by the authority cited by the applicant; the case of **Nina Marie Ltd Vs Gatuma Holdings Ltd and another (2001) KLR**, while the court held that

"in my view, the subject matter of the counter claim in this suit so closely related to the subject matter of the plaint as to be individual ..... the default judgment should not have in the first place been entered and consequently, the issues of whether or not the purported defence to the counterclaim raises any reasonable defence does not arise"

The applicant has also submitted that the Deputy Registrar herein did not have jurisdiction to enter interlocutory judgment on the counterclaim. I also concur with the above submissions and I am further persuaded by the Ruling of Kasango J, in the case of **Kenneth Njagi Njiru Versus Housing Finance Co. Ltd and another (2005) eKLR** were she held that: -

"There is no provision under that order (Order 9A of previous Civil Procedure Rules) for the entry of judgment on a counter claim. I am of the view that the plaintiff is correct in stating that the Deputy Registrar did not have power to enter judgment on counter claim."

I agree with the above findings and I find that the same position applies in this matter. The Deputy Registrar had no jurisdiction to enter interlocutory judgment on a counter claim.

The applicant filed its Defence to counter claim on 24th May, 2012. The said Defence is on record. In the case of **Shanzu Investment Ltd Vs the Commissioner of Lands, Civil Appeal No. 100 of 1993**, the court set out the tests for setting aside judgments. These tests are;

1. *Defence on merits*
2. *Prejudice and*
3. *Explanations for the delay*.

The courts have variously held that where the judgment is regular, the court will not usually set aside the judgment unless it is satisfied that there is a Defence on merits and a Defence on merit does not mean a defence that must succeed but one that raises triable issues, that is an issue which raises a **prima facie** Defence and which should go for trial for adjudication (See **Patel Vs E. A Cargo Handlings Services Ltd 1974 EA 74).**

I have considered the Defence raised by the Applicant herein and it raises triable issues and the same should be allowed to go for trial and be decided on merit.

Again in the case of **Tree Shade Motors Ltd Vs D.T Dobie & Co. Ltd and Another, Civil Appeal No. 38 of 1998**, the court held that ;-

"... Valid judgment will be set aside if Defence raises triable issues"

The Defence herein by the Applicant to the counter-claim raises triable issues and I find this being a good case for setting aside.

I have also considered the Decree herein is for **Ksh.26,810,200/-.** The Applicant has not been heard and if the same is executed, definitely, the applicant will be prejudiced and that would be against the overriding objective of the Act as envisaged in Sections ***1A and 1B*** of the **Civil Procedure Act.** In the case of **Credit Bank Ltd Vs Barclays Bank of Kenya Ltd, Civil Appeal No. 178 of 1998**, the court held that;-

"In setting aside, prejudice is an important element as the overriding principle is that of justice"

The applicant herein should feel and believe that justice has been done. ***Section 3A of the Civil Procedure Act,*** donates power to this court to do all that can be done to ensure that justice is done and also seen to have been done. I find and hold that in the instant case, justice will only be seen to have been done if the court allows the application for setting aside the interlocutory judgment to the counter-claim and allows the applicant Defence to the Counter Claim to be deemed as having been duly filed and served.

Having now considered the applicant's Notice of Motion dated 21st August, 2013, the court finds that the same is merited. I allow the said application entirely with costs to the applicant.

It is so ordered.

Dated, signed and delivered this **23rd day** of **May, 2014**

L.GACHERU

JUDGE

In the Presence of:-

Mr Odongo for the Plaintiff/Applicant

Mr Oyonga holding brief Mr Esuchi for the 1st Defendant/ Respondent and 2nd Defendant/Respondent

Lukas: Court Clerk

L.GACHERU

JUDGE

23/5/2014