IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & OKWENGU, JJ.A)

CIVIL APPEAL NO. 211 OF 2016

BETWEEN

AFRICA MANAGEMENT COMMUNICATIONS

LIMITED.....APPELLANT

AND

AIRTEL KENYA LIMITED.....RESPONDENT

(Being an appeal from the Ruling of the High Court at Nairobi, Commercial and

Admiralty Division (F. Ochieng, J.)

dated 11th July, 2016

in

H.C.C.C No. 166 of 2014)

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JUDGMENT OF THE COURT

On or about 29th April, 2013, parties entered into an agreement wherein the respondent undertook to provide the appellant with an Integrated Services Digital Network-E1 (ISDN) technology service to enable the appellant make or receive calls for a period of one year unless terminated in accordance with the aforesaid agreement. On or about September 2013, the appellant raised concerns with the respondent over the latter's inflated invoices following which the respondent suspended the service. According to the appellant, that suspension constituted a breach of contract as a result of which it brought an action on 29th April, 2014 for the recovery of losses it alleged to have incurred. Two weeks later, on 12th May, 2014, the respondent was served with summons, in response to which it filed a memorandum of appearance on 6th June, 2014.

By an application dated 23rd June, 2014, the appellant requested for judgment on the respondent's default to file a defence. The High Court, in allowing the application, entered a summary judgment in favour of the appellant on 30th June, 2014. After the judgment was entered, the respondent purported to file a defence. Seeing the futility of this, it moved the court below with an application dated 23rd February, 2015 praying that the dispute between the parties be referred to arbitration, and in the meantime, there be an order staying further proceedings until the dispute is referred to arbitration. In dismissing that application on 26th April, 2016, the Judge found that it was made long after the defendant had entered appearance; that the application ought to have come together with the memorandum of appearance; and secondly, that the arbitration clause in the agreement (clause 18.2) did not create an automatic and mandatory referral to arbitration of any disputes between the parties.

Buoyed by this victory, the appellant applied on 11th May, 2016 for leave to execute the aforesaid judgment. The respondent, on the other hand, aggrieved with the turn of events, took out an application dated 13th June, 2016 to set aside the summary judgment, complaining, in the main that the appellant failed to comply with the provisions of **Order 36 rule 1(3)** of the Civil Procedure Rules by not giving it notice of the application for judgment and that the court file disappeared, making it difficult to file any paperwork in the matter.

Both applications were placed before Ochieng, J who noted that, by the respondent entering appearance without raising the issue of the existence of an arbitration clause in the agreement, it was estopped from raising it at the time it did; that as a result, therefore, the court had jurisdiction to enter the judgment in default of a defence.

In determining whether the appellant had complied with **Order 36 rule 1(3)**, the learned Judge found that in the instant case, judgment was entered in default of defence and was not, in his opinion, a summary judgment; that in that case there was no requirement that the respondent be served with an application for judgment; that in fact there was no "application" for judgment but a "request" for judgment. In the end, the learned Judge concluded that the summary judgment was regular. But in the interest of justice, he went on to explain, even in circumstances where the judgment was properly entered, the court retained the discretion to **"determine whether or not a regular judgement may be set aside".** With that, the Judge expressed the view that, since the proposed defence and counterclaim raised serious triable issues, there was enough reason to set aside the judgment. That decision provoked this appeal.

The appeal has been brought on 8 grounds which were argued by Mr. Ogembo learned counsel for the appellant as follows; that upon the learned Judge making the finding that the judgment was regular and lawful, it was incumbent upon him to apply the well established principles of setting aside a regular and lawful judgment, but he failed to do so; that the burden was on the respondent to satisfy the court that there were justifiable reasons for setting aside the judgment; that, by failing to address the reasons for failure to file the defence, the Judge improperly exercised his discretion; that, while a court will exercise its discretion to avoid injustice or hardship resulting from inadvertence or mistake or error, it would not assist a person who deliberately seeks to obstruct or delay the course of justice; that the learned Judge failed to find that there were no valid reasons to justify the failure to file the defence within the stipulated period and; that despite the respondent being aware of the judgment on 31st August, 2015 it only filed the application to set aside the judgment on 13th June, 2016 which was well over a year and even after participating in the execution proceedings initiated by the appellant.

It was further submitted that the respondent failed to demonstrate if the judgment was set aside, it had a defence that would raise triable issues; that by purporting to file its defence on 18th July, 2014, way after the judgment had been entered, the respondent was in abuse of the court process; that in the ruling of 26th April, 2016, the Judge correctly held that the defence was of no effect on a judgment which had already been entered; that that determination was never set aside and therefore, it was erroneous for the Judge, after declaring that defence was a nullity and nonexistent to turn around and find that it raised triable issues. It was finally posited that the respondent was determined to deliberately obstruct the course of justice, and the Court should not allow this by granting it the orders sought.

The appellant invited us to find relevance in the decisions of **Raila Odinga & 2 Others V Independent Elecoral & Boundaries Commission & 3 Others** (2013) eKLR, **Mohamed & Anor V. Shoka** (1990) KLR 463, **Mbogo V Shah** (1963) E.A 93 and **Tree Shade Motors Ltd V D. T. Dobie and Company (K) Limited & Anor**, Civil Appeal No. 38 of 1998).

Mr. Esilaba, holding brief for Mr. Nyaribo for the respondent submitted that the reasons for delay in filing the defence were properly explained by the respondent; that it is apparent from the record that the respondent was unable to file its defence since the court file had been misplaced and mysteriously removed from the registry; that the court file had to be reconstructed; that the High Court was satisfied with the explanation after considering all the circumstances surrounding this matter in terms of **Order 10 rule 11** of the Civil Procedure Rules; that if merits are shown, courts will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication on merits; that the Judge was satisfied from the respondent's defence, which was already on the record, that the defence disclosed *prima facie* merit; that **Article 159** of the Constitution supports the view that unnecessary technicalities should not hinder delivery of justice; and that discretion to dismiss a suit should be exercised sparingly.

On the allegations by the appellant that the application to set aside the judgment was filed well over one year, counsel submitted that since what it sought to be set aside was a default judgment, **Order 50** of the Civil Procedure Rules does not set the time within which to apply to set aside such judgment;

and that the default judgment will be set aside if the party wishing to execute fails to serve the other side with a 10 day notice of entry of a default judgment as set out under the provisions of **Order 22 rule 6** which is couched in mandatory terms. It was argued that in this case the appellant purported on 2nd September, 2015 to serve the respondent with the requisite 10 day notice under **Order 22** aforesaid; that the notice was of no effect; and that it is surprising that the appellant then waited for 1 year after serving the 10 day notice, being 13th June, 2016, to apply for execution. We were asked by the respondent to consider and apply the *ratio decidendi* in the cases of **Evans V. Bartlam** (1937) AC 473 and **D.T Dobie & Company Kenya V Joseph Mbaria Muchina**, Civil Appeal No 37 of 1978.

This appeal challenges the exercise of discretion by the learned Judge in setting aside the judgment that was entered on 30th June, 2014 in favour of the appellant. In considering the respondent's application to set aside that judgment, the learned Judge expressed himself thus;

> **"22. The point I am making is that "Summary Judgement" as envisioned under Order 36 is completely different from "Judgement – in – default of Defence", as provided for under Order 10.**
>
> **23. In this case, judgement was entered in default of Defence. It was not a summary judgement. Therefore, there was no requirement that the defendant be served with an application for judgement.**
>
> **24. Indeed, there was no application for judgement, but a request for judgement.**

25. Therefore, I find that the judgement as entered was regular and lawful.

26. If the judgement had been irregular or unlawful, it would have been set aside forthwith. However, the court has the discretion to determine whether or not a regular judgement may be set aside". (Our Emphasis)

For the purpose of this appeal, we are concerned more with the determination in paragraphs 25 and 26, in which the Judge categorically stated that the judgement as entered was regular and lawful; and that, that notwithstanding, the court had the discretion to determine whether the court can nonetheless set it aside.

Having found, in our view, correctly that the judgment was regularly entered **"in default of defence"**, the Judge proceeded to set it aside stating that;

"27. I find that the Defence on record raises serious issues of both fact and law.

28. The defendant also lodged a counter-claim against the plaintiff"

29. In my considered opinion, justice will be best served if the parties were both given an opportunity to canvass their respective cases. In order to enable that to happen, I do now set aside the judgement which was entered on 30th June 2014".

So, for two reasons, the Judge set aside the judgment. That is, that the defence and counterclaim raise triable issues and in the interest of justice. We shall return to this determination.

Though it is a technical point, and no application will be defeated for failure to comply with it, **Order 51 rule 10** of the Civil Procedure Rules directs those drafting applications under those Rules to indicate in the body of the application (usually at the top) the provision of the Rules under which an application is made.

In respect of the prayers for the setting aside of the judgment, no provision was cited on the application. Only **Order XL1 rule 4**, **L rule 1** (as if the application was being made under the repealed rules) and **Section 3A** of the Civil Procedure Rules were cited. Yet, the Judge went into great detail about the distinction between a judgment entered pursuant to **Order 10** and that entered under **Order 36**. These two rules were not cited. The former deals with judgment in default of appearance. **Sub rule 4** provides that;

"4. (1) Where the plaint makes a liquidated demand only

and the defendant fails to appear on or before the day

fixed in the summons or all the defendants fail so to

appear, the court shall, on request in Form No. 13 of

Appendix A, enter judgment against the defendant or

defendants for any sum not exceeding the liquidated

demand together with interest thereon from the filing

of the suit, at such rate as the court thinks reasonable,

to the date of the judgment, and costs". (Our emphasis).

The entire **Order 10** deals predominantly with consequences of non-appearance, and with necessary modification to situations where a party has failed to file a defence.

In contrast, **Order 36**, dealing with summary judgments in default of defence, stipulates as follows;

"(1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) …where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the

amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits".

Indeed, there is a distinction between a judgment entered pursuant to **Order 10** and that under **Order 36**. Though both are default judgments, courts have treated judgment under the former as default and under the latter as summary. In this appeal, we are dealing with a summary judgement, and not default as the Judge appears to have mixed up the two. It is a summary judgment because the respondent had only entered appearance. It is essential also to emphasize that the action was for a liquidated claim of $ 250,000. We reiterate what we said earlier and in line with what this Court said in **Kingsway Tyres and Automart Ltd vs. Rafiki Enterprises Ltd**, (1996) eKLR that, notwithstanding regularity of a summary judgment, a court may, nonetheless, set it aside at the instance of a defendant. Unlike an irregularly obtained summary judgment, which can be set aside *ex debito justiciae*, as a matter of right and even *suo motto*, a summary judgment obtained regularly can only be set aside upon application by the defendant and satisfying the court as to the reasons for failure to file a defence. That is the import of **Order 36, rule 10**, that;

> **"Any judgment, given against any party who did not attend at the hearing of an application under this Order, may, on application be set aside or varied on such terms as are just".**

From the language above, the court has unfettered discretion in determining whether or not to set aside a summary judgment. In exercising that discretion, the Court will take into account such factors as the reason for the failure to file a defence; the length of time between the entry of the judgment and when the application to set it aside was brought; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; and whether on the whole it is in the interest of justice to set aside the judgment, among considerations.

See **Kwanza Estates Limited V. Dubai Bank Kenya Limited (In Liquidation) & 2 others** (2019) eKLR; and **James Kanyiita Nderitu & another V. Marios Philotas Ghikas & another** (2016) eKLR.

In other words, the court has to look at the whole of the relevant circumstances and decide whether or not sufficient cause or explanation has been shown or given. The absence of an explanation for the default, particularly if it is coupled with prejudice to the plaintiff, may justify the denial of relief, but only when considered with other relevant circumstances. If discretion is judicially exercised, this Court will not interfere with the decision. However, it will disturb it if, as De Lestang VP (as he then was) observed:

> **"……. it is satisfied that its decision is clearly wrong,**
>
> **because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."** See **Mbogo vs. Shah** (1968) EA page 93.

We repeat, judgment was entered on 30th June, 2014 after the period permitted for filing a defence had expired. The application to set it aside was taken out on 13th June, 2016. What explanation did the respondent give to the learned Judge for its failure to file a defence?

According to the Judge in his ruling of 26th of April, 2016, the respondent ought to have brought the application for stay of proceedings so as to refer the dispute to arbitration at the same time it filed a memorandum of appearance on 6th June, 2014. In the circumstances, the respondent was required by **Order 7, rule 1** of the Civil Procedure Rules to file its defence within fourteen days from that date. It ought to have done so on or before 20th June, 2014 but only did so on 18th July, 2014, obviously out of time and after summary judgment had already been entered. It took the respondent nearly two years to move the court with the application under review to set aside the judgment. But it explained that it only came to learn of the judgment on 31st August, 2015. If that were so, then it took the respondent almost 10 months to make the application for setting aside.

According to the respondent, its attempts to file the defence earlier were unfruitful because the court file could not be traced in the registry; that it sought help from the registry staff without success; that the file resurfaced "for a short stint in July. 2014" when it was able to file the defence on 18th July, 2014. The appellant, for its part has denied that the court file was ever misplaced during the whole time.

We have ourselves perused the record and throughout, we are unable to find any evidence or indication that the file was missing. The respondent did not demonstrate, as it was bound by rules of evidence, that the file disappeared during the period it was required to file the defence. Apart from a solitary letter dated 7th September, 2015 to the Deputy Registrar, there is no evidence of effort to trace the file; there is no word from the Deputy Registrar confirming the unavailability of the file during the relevant period. The letter of 7th September, 2015 complained that the file had been missing "for weeks". The weeks of concern were those between 6th and 20th June, 2014.

Although under **Order 36, rule 10** aforesaid, the Judge had unfettered discretion in determining whether or not to set aside the summary judgment, he could only do so on settled principles, which we have set out earlier in this judgment. The learned Judge did not allude to any of those factors, save for finding that the defence on record raised "serious issues of both fact and law"; and that in the interest of justice, it was proper to set aside the judgement. In that determination, the Judge did not consider, for example, the reason for the failure to file a defence; the length of time between the entry of the judgment and when the application to set it aside was brought; the respective prejudice each party is likely to suffer. We stress that it was only after weighing all these factors that the Judge could consider whether, on the whole, it is in the interest of justice to set aside the judgment.

The learned Judge himself had earlier on found that the respondent had waited for a whole 10 months after entering appearance, to make the application for setting aside the judgment. On the defence, he was clear in his mind that the defence was "of no consequence at all" because it was filed out of time. If the defence was not regularly on record, it did not exist, hence *ex nihilo nihil fit.* It was not available and could not

logically form the basis of any decision.

In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR, the Supreme Court, applying Rule 53 of its Rules, which like section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, warned against the practice of filing pleadings out of time and asking the Court to extend time. It described the practice as presumptive and in-appropriate.

Such a filling, it went on to say, renders the 'document' so filed a nullity and of no legal consequence. The Court cited with approval the decision of English Court of Appeal in **Costellow V Somerset County Council (**1993)1 All ER 952 - where that court emphasized the importance of rules of procedure thus;

> **" … The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met…"**

How then, we may ask, could a defence rejected by the Judge himself as of no consequence subsequently be said to have raised serious issues?

The practice is to tender a draft statement of defence together with the application for setting aside at the same time. It is on the basis of the draft statement of defence that the court can consider the strength or weakness of the defendant's case. That is what **Tree Shade Motors Limited vs. D.T. Dobie and Company (K) Limited & Another** (1998) eKLR prescribes.

Clearly, from what we have said, the Judge misdirected himself. He paid attention to matters which led him to a wrong decision and failed to take into consideration the fact that the respondent had no plausible explanation for the delay and the likely prejudice the appellant stood to suffer after such a prolonged delay.

In concluding, we think that from the beginning, the respondent's case has been poorly handled. Many wrong steps were taken at the initial stages that ultimately has resulted in us finding merit in this appeal.

Accordingly, we allow the appeal, set aside the ruling of Ochieng, J rendered on 11th July, 2016 setting aside the summary judgment and substitute therefor, an order dismissing the respondent's application dated 13th June, 2016 and reinstate the summary judgment entered in favour of the appellant on 30th June, 2014. We award costs to the appellant.

Dated and delivered at Nairobi this 8th day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR