



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 395 OF 2018

BETWEEN

ACTIVE PARTNERS GROUP LIMITED.....1<sup>ST</sup> APPELLANT

MOHAMED ABDULRAHMAN MOHAMED FAGIR.....2<sup>ND</sup> APPELLANT

AND

HASSAN ZUBEIDI.....1<sup>ST</sup> RESPONDENT

AND

DUBAI BANK KENYA LIMITED (IL).....1<sup>ST</sup> INTERESTED PARTY

MUNGU & COMPANY ADVOCATES.....2<sup>ND</sup> INTERESTED PARTY

*(An appeal from the ruling and order of the High Court of Kenya at*

*Nairobi (Francis Tuiyot J.) delivered on 29<sup>th</sup> May 2018 in H.C.C.C No. 475 of 2016)*

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AND HEARD WITH

CIVIL APPEAL NO. 414 OF 2018

BETWEEN

HASSAN ZUBEIDI.....APPELLANT

AND

ACTIVE PARTNERS GROUP LIMITED.....1<sup>ST</sup> RESPONDENT

MOHAMED ABDULRAHMAN MOHAMED FAGIR.....2<sup>ND</sup> RESPONDENT

DUBAI BANK KENYA LIMITED (IL).....3<sup>RD</sup> RESPONDENT

AND

MUNGU & COMPANY ADVOCATES.....INTERESTED PARTY

*(An appeal against the ruling and order of the High Court of Kenya at*

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**JUDGMENT OF THE COURT**

Two appeals, C.A No. 395 of 2018 and C.A 414 of 2018 were heard together as they stem from the same cause of action. In regard to Civil Appeal No. 395 of 2018, **Hassan Zubeidi (Mr. Zubeidi)** (the then plaintiff and 1<sup>st</sup> respondent therein) filed a plaint on **24<sup>th</sup> November 2016**, against **Active Partners Group Limited** (the Company), a Company registered in Sudan, (the then 1<sup>st</sup> defendant/ the 1<sup>st</sup> appellant therein), **Mohamed Abdulrahman Mohamed Fagir (Mohamed)** (the then 2<sup>nd</sup> defendant and the 2<sup>nd</sup> appellant therein), jointly and severally. The firm of **Mungu & Company Advocates** was named as an Interested Party, as is the case in the appeal. The institution of the suit was on the basis of two separate agreements entered into on **18<sup>th</sup> August 2010**. **Mr. Zubeidi** claimed USD 11,000,000 from the first agreement signed by himself and the Company. In respect of the second agreement, **Mr. Zubeidi** contended that it was entered into by the Company and one **Jalal Hussen Diab (Jalal)** and proceeds from this agreement, a sum of USD 70,000 were later assigned to him (**Mr.Zubeidi**) by a Deed of Assignment. In the plaint, **Mr. Zubeidi** made the following prayers:

“

1. *The sum of US Dollar Eleven Million, (USD 11,000,000) inclusive of interest at court rates till payment in full.*
2. *The sum of US Dollar Seventy Million (USD 70,000) inclusive of interest at court rates till payment in full.*
3. *An order of injunction restraining the law firm of Mungu & Company Advocates, its agents, partners, associates and/or bankers, (the interested party herein), from paying, releasing, transferring, remitting or in any manner whatsoever any sums of money received and/or held for and on behalf of the 1<sup>st</sup> Defendant, its subsidiaries, associate companies, affiliates and directors pursuant to any legal and/or arbitral proceedings related to the agreement dated 16<sup>th</sup> June, 2015 and any addendums thereto, signed between the 1<sup>st</sup> Defendant and the government of south Sudan.*
4. *An order of injunction directed at the law firm of Mungu & Company Advocates, its agents, partners and/r associates, (the interested party herein), compelling and/or directing them to within 7 days of this order, disclose and/or avail to the court, records, bank statements, letters and all other relevant documents relating to all monies received for and on behalf of the 1<sup>st</sup> defendant, its subsidiaries and directors, pursuant to any legal and/or arbitral proceedings related to the agreement dated 16<sup>th</sup> June, 2015 and any addendum thereto, signed between the 1<sup>st</sup> Defendant and the Government of South Sudan.*
5. *An order of injunction directed at the law firm of Mungu & company Advocates, its agents, partners and /or associates, (the interested party herein) compelling them to remit and/or deposit in court all monies received for and on behalf of the 1<sup>st</sup> Defendant, its subsidiaries, associate Companies, affiliates and directors, pursuant to any legal and/or arbitral proceedings related to the agreement dated 16<sup>th</sup> June, 2015 and any addendums thereto, signed between the 1<sup>st</sup> Defendant and the Government of South Sudan; IN THE ALTERNATIVE, the said monies be deposited in a joint interest earning account to be opened between the law firms of Ahmednasir, Abdikadir & Co. Advocates and Mungu & Company Advocates or any such other law firm as the 1<sup>st</sup> Defendant may appoint for purposes of these proceedings;*
6. *An order of injunction directed at the 1<sup>st</sup> Defendant, its subsidiaries, associate companies, affiliates and directors compelling and/or directing them to within 7 days of this order, disclose and/or avail to the court, records, bank statements, letters and all other relevant documents relating to all monies received and paid to it, its associate companies, affiliates and directors, pursuant to any legal and /or arbitral proceedings related to the agreement dated 16<sup>th</sup> June, 2015 and any addendums thereto, signed between the 1<sup>st</sup> Defendant and the Government of South Sudan.*
7. *An order directing and /or compelling the 1<sup>st</sup> Defendant to deposit a security equivalent to the tune of USD 11,000,000. In the alternative, the 1<sup>st</sup> Defendant to deposit a security equivalent to the difference between USD 11,000,000 and the amount that may be deposited in court under clause 8 above.*
8. *An order of injunction restraining, the 1<sup>st</sup> Defendant, its associate companies, affiliates and directors from transacting, dealing and /or in any manner whatsoever interfering with and /or operating the account 26116295 and 26116318 in name of APG Active Partners Limited, held at Abu Dhabi Islamic Bank, United Arab Emirates;*
9. *Any other orders as this Honourable Court deems fit to grant;*
10. *Costs of the suit herein”.*

The 1<sup>st</sup> and 2<sup>nd</sup> appellants entered appearance on **25<sup>th</sup> November, 2016** and on the same date (**25<sup>th</sup> November, 2016**) filed a motion to strike out the suit as they challenged the jurisdiction of the High Court of Kenya to try the suit. This was on the basis of identical exclusive jurisdiction clauses contained in the two agreements.

According to the appellants, exclusive jurisdiction was vested in the Court of the Sudan. The motion was premised on the grounds that:-

- (a) the parties to the agreements, the subject matter of the suit have expressly agreed and submitted themselves to the exclusive jurisdiction of the courts in the Sudan
- (b) the courts of Kenya have no jurisdiction to entertain this suit save for giving costs to the defendants
- (c) this suit is incompetent, bad in law and an abuse of the court process.

On **28<sup>th</sup> November, 2016**, the appellants filed an amended memorandum of appearance under protest.

The application challenging the jurisdiction of the High Court of Kenya was heard by **Tuiyot, J.** To strengthen their argument that the Kenyan Court lacked jurisdiction, the appellants submitted before the High Court that the Company was registered in the Sudan, had its assets in Khartoum and had no place of business, employees or agents in Kenya. Similarly, **Mohamed** asserted that he was domiciled in the Sudan and he had no connection to Kenya.

**Mr. Zubeidi** vide a replying affidavit sworn on **28<sup>th</sup> November, 2016** opposed the application on the basis that the jurisdictional clauses in the two agreements were predicated upon the existence of a state known as ‘*The Sudan*’ which as from **June 2011**, did not exist anymore as South Sudan had gained its independence from the North. **Mr. Zubeidi** asserted that the jurisdictional clauses were therefore rendered inoperable and incapable of being enforced by either party.

Additionally, in his affidavit sworn on **28<sup>th</sup> November, 2016**, **Mr. Zubeidi** deposed that the High Court (**Nzioka, J**) on **22<sup>nd</sup> October, 2016** consented to the release of Kshs. **177,000,000** from accounts held by the Government of Sudan to be paid to the Company in a bank situated and based in Kenya. The money was to be paid through the Company’s advocate Messrs **Mungu & Co. Advocates** (the 2<sup>nd</sup> Interested Party herein) situated and carrying out business in Kenya. **Mr. Zubeidi** dismissed the jurisdictional claims by pointing out that the appellants had submitted to the jurisdiction of the Kenyan Court by having entered an unconditional appearance. The High Court was thus urged to dismiss the application with costs.

In his ruling of **29<sup>th</sup> May, 2018**, the learned Judge acknowledged that the two agreements vested exclusive jurisdiction to the Sudan. However, the learned Judge considered that when Dubai Bank (K) Ltd (the Bank) made an application to be enjoined to the suit, the appellants did not object and hence they had by acquiescence submitted to the jurisdiction of the High Court of Kenya. He stated:

***“However, the entry of Dubai Bank (IL) into the fray, which it needs to be repeated was supported by the Defendants and the Interested Party, disturbs the scales. Some aspects of the dispute, which may now involve this third party, may involve a discussion of the Banking Act of Kenya. The support of the entry by this third party may be construed as an acknowledgement by the Defendants and the Interested party that this Court can properly and ably adjudicate the entire dispute”.***

The learned Judge was thus convinced that the appellants’ lack of opposition to the application by the Bank to be enjoined in the suit was sufficient acknowledgment of the court’s jurisdiction and thus a waiver of their right to rely on the exclusive jurisdiction clause.

This is the ruling that prompted the appellants to file **Civil Appeal No. 395 of 2018** mainly on the grounds that the learned Judge erred in:

- (i) vesting jurisdiction in the courts of Kenya despite the express wishes of the parties,
- (ii) failing to consider the established principles with regard to the parties’ choice of jurisdiction and law, and
- (iii) failing to appreciate the inherent difficulties to be faced by the High Court in hearing a case under Sharia Law including its practices and procedures.

The appellants sought the following orders that:

- “
1. **this appeal be allowed,**
  2. **the order made on 29<sup>th</sup> May 2018 be set aside,**
  3. **this Honourable Court make an order of stay of proceedings in the High Court of Kenya at Nairobi Commercial and Admiralty Division Civil Case No. 475 of 2016**

**Between**

**Hassan Zubedi.....Plaintiff**

**And**

**Active Partners Group Limited.....1<sup>st</sup> Defendant**

**Mohamed Abdulrahman Mohamed Fagir.....2<sup>nd</sup> Defendant**

**Dubai Bankk Kenya Limited (IL).....3<sup>rd</sup> Defendant**

**Mungu & Company Advocates.....4<sup>th</sup> Defendant**

**Or the alternative,**

**4. that the said civil case be dismissed with costs”.**

On his part, **Mr. Zubeidi** filed a Notice of Cross-Appeal on **5<sup>th</sup> December, 2018**, challenging the same ruling of **Tuiyot, J of 29<sup>th</sup> May, 2018**. He faulted the learned Judge for:

(i) failing to find that the appellants had not submitted to the jurisdiction of the court despite filing an unconditional memorandum of appearance,

(i) failing to find that the jurisdictional clauses were predicated on the existence of ‘the Sudan’ which had, at the time of filing the suit, ceased to exist,

(iii) failing to acknowledge that some monies in dispute were received by the appellants pursuant to a judgment in **H.C.C.C Misc. Application No. 531 of 2015** and that the 2<sup>nd</sup> Interested Party, **Mungu & Co. Advocates**

held some of the monies in its accounts in Kenya; and

(iiii) failing to have regard to the totality of his replying affidavit and/or submissions.

He sought the following orders:

**“a) the appeal be dismissed.**

**b) the Cross-Appeal be allowed.**

**c) costs of the appeal and Cross-Appeal be provided for”.**

Whilst the application to determine the issue of jurisdiction was still pending, judgment in default of defence was entered on **7<sup>th</sup> April, 2017**. Obviously, unhappy with this outcome, the appellants by a motion dated **20<sup>th</sup> April, 2017** and filed on **21<sup>st</sup> April 2017**, sought orders of the court to unconditionally set aside that judgment.

The application was centred mainly on the grounds that the judgment was obtained by concealment of material facts in that the issue of jurisdiction was yet to be determined. **Tuiyot, J** heard the application and delivered his ruling on **1<sup>st</sup> November 2017**.

He determined that the judgment entered was regular as nothing stopped **Mr. Zubeidi** from seeking judgment in default of defence. Nevertheless, the learned

Judge reckoned that it was in the interest of justice to set aside the judgment entered on **7<sup>th</sup> April, 2017** so as to give an opportunity for the hearing and disposal of the motion on jurisdiction. The learned Judge rendered himself thus:

**“The court record shows that on the date that the Deputy Registrar entered judgment, the defendant’s Notice of Motion dated 25<sup>th</sup> November, 2016 seeking stay of proceedings and a dismissal hereof had been fixed for hearing on 30<sup>th</sup> may, 2017. That date was fixed on 30<sup>th</sup> March, 2017 in the participation and presence of a counsel for the plaintiff.**

**The entry of judgment may fend off the determination of the Defendant’s Motion of 25<sup>th</sup> November, 2016 on merit. Because, why would the court have to hear the application when the defendants are already shackled with a judgment? It may be true even as the parties waited for the hearing of that Motion, nothing stopped or stayed the plaintiff from seeking judgment on default of defence but it is nevertheless also true that by the parties taking a date for hearing of that Motion, there would be a reasonable expectation that the Motion would be dealt with on merit. In the circumstances of this mater, this Court does allow the application for setting aside of the judgment to give an opportunity for the hearing and disposal of the defendant’s Notice of Motion of 26<sup>th</sup> November, 2016”.**

He ordered that:

**“i) The 1<sup>st</sup> Defendant is directed to deposit into Court all monies (not exceeding USD 11,000,000) received or to be received pursuant to the consent recorded on 4<sup>th</sup> May 2017 in Nrb HCC No.531 of 2015 Active Partners v Republic of South Sudan pending the hearing of the Notice of Motion dated 4<sup>th</sup> May 2017 interpartes on 19<sup>th</sup> May 2017.**

ii) *The Plaintiff/applicant shall within 7 days hereof furnish a suitable undertaking as to Damages in respect to the above order.*”

This ruling by **Tuiyot, J** delivered on **1<sup>st</sup> November, 2017** is the subject of **Mr. Zubeidi’s** Civil Appeal No. 414 of 2018. **Mr. Zubeidi’s** appeal was on the basis that the learned judge erred in:

- (i) ignoring the established principles for setting aside default judgments,
- (ii) failing to make a finding that Order 10 Rule 4 and 10 of the Civil Procedure Rules entitles an applicant to request for judgment when the defendant has failed to file a defence within the statutory period despite having entered appearance,
- (iii) failing to take into account the totality of the arguments made in opposition to the application,
- (iiii) exercising discretion in favour of the appellants though no draft defence had been exhibited in the application,
- (v) violating **Mr. Zubeidi’s** right to protection of the law as well as the right to equality before the law,
- (vi) violating **Mr. Zubeidi’s** right to access justice under Article 48 of the Constitution as well as right to fair trial under Article 50(1) of the Constitution, and
- (vii) exercising discretion in favour of the appellants.

**Mr. Zubeidi** sought the following orders in this appeal (CA No. 414 of 2018) that:

“

- (i) **the ruling and orders of the Honourable Court (Tuiyot, J) rendered on 1<sup>st</sup> November, 2017 in HCCC No. 145 of 2017 in respect to the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s Notice of Motion application dated 20<sup>th</sup> April, 2017, Hassan Zubeidi vs Active Partners Group Limited & 3 others be set aside in its entirety,**
- (ii) **the Notice of Motion Application dated 20<sup>th</sup> April 2017 be dismissed with costs to the appellant herein,**
- (iii) **In the alternative, if the Honourable Court deems it fit to sustain the Orders of the Superior Court, there be an order as a pre-condition abiding the setting aside of the default judgment, that the 1st and 2nd respondent be directed to deposit Court appropriate security sufficient to address the plaintiff’s claim as pleaded in the plaint, in**
- (iiii) **the appellant be allowed costs of this appeal and costs of the Application in the Superior Court”.**

The two appeals came before us for plenary hearing on **30<sup>th</sup> April, 2017**. Learned counsel **Mr. G. J. Mungu** represented the appellants, **J. Arwa** and **P.M. Gichuru** appeared for **Mr. Zubeidi** and **Mr. J. Obuya** appeared for the Bank. The respective counsel orally highlighted their written submissions.

To begin with, in their written submissions in C.A No. 395 of 2018 dated **25<sup>th</sup> February, 2019** the appellants supported the holding of the learned Judge as being in conformity with the decision of this Court in **Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Ltd Civil Appeal No. 29 of 1999** to the effect that the filing of an application for stay of proceedings or striking out proceedings are lawful means of challenging the jurisdiction of the court. According to the appellants, it did not matter that the appearance they entered on **25<sup>th</sup> November, 2016** was an unconditional appearance.

Secondly, the appellants urged us to uphold the learned Judge’s finding in appreciating the jurisdictional clauses but faulted him for failing to find that the High Court of Kenya had no jurisdiction on the basis that the dispute was not only between the appellants and **Mr. Zubeidi**, but that there was another party, the Bank that had joined the fray.

The appellants opined that the learned Judge was misguided in finding that the Kenyan court had jurisdiction on the basis of joinder by the Bank to the suit as a defendant. The appellant contended that an application for joinder as a defendant was wrong in law since **Mr. Zubeidi**, being the plaintiff in the suit was opposed to the joinder. The Court was referred to the words of Coulson J in **The Council of the Borough of Milton Keynes v Viridor [2016] EWHC 2764 (TCC)** to the effect that a court has no power to join a party as a defendant where the claimant opposes the joinder.

Further, the learned Judge was faulted for not taking into consideration that the Bank had asserted that **Mr. Zubeidi** had entered into the two agreements on its behalf as its agent. Effectively, this meant that the Bank had acceded to submit to the jurisdictional clauses contained in the agreement. It was also submitted that despite the split of the Sudan, the forum remained in the Sudan. The learned Judge was also faulted for failing to take cognisance of the law on repudiation of jurisdictional clauses requiring that such repudiation must be clear and unequivocal, which was not the case here. The Court was referred to **Bea Hotels NV v Bellway LLC (2007) EWITC 1363 (Comm)**; and **Rederi Konmanditselskaabet Merc-Scandia IV v Couniniots S.A (the Mercanaut) (1980) 2 Lloyd’s Law Reports 183** for the proposition that repudiation of jurisdiction cannot be inferred from conduct unless such conduct is clear and unequivocal. The appellants urged the court to allow the appeal and dismiss the cross-appeal with costs.

In respect of **C.A 414 of 2018** challenging the setting aside of the default judgment, the appellants submitted that since **Mr. Zubeidi** had failed to file a Notice of Appeal in the High Court and to serve the same on the appellants, this Court lacked jurisdiction to hear and determine the appeal. Substantively, the appellants submitted that the challenge to the jurisdiction of the court could only be heard and determined first before the parties could move forward and hence it was wrong to enter judgment in default of defence. In any event, the appellants contended that the filing of a defence would have amounted to acceptance of the court's jurisdiction.

Further, that it would have been bad practice and contrary to the overriding objectives in filing a defence while at the same time challenging the jurisdiction of the court.

**J. Arwa** for **Mr. Zubeidi** opposed the appeal (C.A 395 of 2018). Taking the view that the Kenyan High Court was seized of jurisdiction, it was submitted that 'Sudan', as envisaged in the two agreements had ceased to exist and hence the learned Judge was obligated to take judicial notice of this fact and determine that the jurisdictional clauses had been rendered inoperable. This proposition was made in reliance of **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd (1985) KLR 898**. Counsel also relied on the case of **Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria vs. The Eleftheira [1969]** in setting out the relevant circumstances that make a strong case for a court to assume jurisdiction. It was also submitted that the fact of entering appearance amounted to submission to the court's jurisdiction.

As to the filing of the amended memorandum of appearance, it was submitted that no leave was sought or granted by the court to do so. Nevertheless, such an amended appearance could not annul the unconditional appearance and consequent acquiescence to the court's jurisdiction. In support of this proposition, we were referred to the cases of **Kanti & Co. Ltd v South British Insurance Co. Ltd [1981] eKLR**; and **Evergreen Marine (Singapore) PTE Ltd & another v Petra Development Services Ltd [2016] eKLR**. In consideration of these factors, it was submitted that the High Court is properly seized of jurisdiction to deal with the matter. The court was urged to allow the cross-appeal and dismiss the appeal with costs.

In urging **C.A 414 of 2018** it was submitted that the learned Judge failed to consider the relevant principles applicable when dealing with an application for setting aside a judgment in default of appearance and/or defence as elaborated in the High Court decision of **Trust Bank Ltd v Portway Stores (1973) Ltd & 4 others [2006] eKLR**. The learned Judge was also faulted for setting aside the default judgment despite finding that the same was regular. Moreover, that there was no draft defence exhibited by the appellants to form a basis of exercise of the court's discretion in support of this contention. The Court was referred to the case of **Tree Shade Motors Ltd v DT Dobie & another (1995-1998) 1 EA 324**. The learned Judge was faulted for finding that the issue of jurisdiction was sufficient reason to justify the failure to file a defence or to justify the exercise of discretion in favour of the appellants. It was submitted that a statement of defence is a primary document and/or pleadings which allowed the parties to raise issues for the court's determination, see **Captain Harry Gandy v Caspair Air Charters Ltd (1956) EA 139**; **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR**; **Charles Sande v KCC Ltd Civil Appeal No. 154 of 1992**. The learned Judge was therefore obliged to interrogate whether the appellants had raised any triable issues, which he failed to do. The Court was urged to allow the appeal.

**Mr. Obuya's** submissions on behalf the Bank were brief. In his opposition to **C.A No. 395 of 2018**, he contended that two parties (**the Bank & M/s Mungu & Co. Advocates**) were situated in Kenya. He however supported **C.A No. 414 of 2018** challenging the setting aside of the judgment.

We have considered the records of the two appeals, the oral and written submissions, the authorities cited by the parties as well as the law. It is not in dispute that the appellants and **Mr. Zubeidi** entered into two contracts on **18<sup>th</sup> August, 2010** that specifically provided that the contract between the parties would be governed by the laws of Sudan. It was provided therein as follows:

**"This Agreement shall be governed by and construed in accordance with the laws of Sudan.**

**Both parties agree that the courts of The Sudan shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement, irrevocably submit to the jurisdiction of those courts and waive any and all objections to the jurisdiction and proper venue of such courts."**

However, it was **Mr. Zubeidi's** position that the appellants had waived the jurisdictional issue by filing a memorandum of appearance on **25<sup>th</sup> November, 2016** which appearance was not conditional and neither was it under protest.

**Mr. Zubeidi's** notice of cross-appeal faulted the learned Judge for concluding that the amended notice of appeal filed after the unconditional memorandum of appeal which was filed simultaneously with an application challenging the jurisdiction of the court did not give the appellants reprieve. The learned Judge considered the contestation and came to the conclusion rightly so, in our view, that although the appellants filed an unconditional memorandum of appearance on **25<sup>th</sup> November, 2016**, they subsequently (on **28<sup>th</sup> November, 2016**), filed an amended memorandum of appearance indicating that it was a conditional entry of appearance.

The unconditional memorandum of appearance was filed contemporaneously with an application protesting the jurisdiction of the court. In our view, the fact of the filing of an application protesting the jurisdiction of the court was sufficient notice to bar any entry of judgment in default of defence.

As submitted by the appellants, the Civil Procedure Act and the Rules do not provide a procedure where a party who wishes to challenge jurisdiction should adopt.

In **Raytheon Aircraft Credit Corporation & another vs. Air Al Faraj Limited [2005] eKLR**, **Githinji, JA** rendered himself thus:-

**"There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign**

defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in *Prabhadas (N) & Co. v Standard Bank* [1968] EA 679 at page 684 paragraphs C – E is to enter a conditional appearance and then move the court for setting aside the process. In *United India Insurance Co. Ltd* (supra), the defendants entered appearance under protest and moved the court for orders to stay proceedings. In *Fonville* case (supra) the High Court said that the filing of a defence under protest, the filing of an application for stay of proceedings or striking out the proceedings and the raising of a preliminary objection to the suit before trial are lawful means of challenging the jurisdiction of the court (see page 78 paragraphs l – j). In this case, the appellant had pleaded in the defence that the court did not have jurisdiction in view of the exclusive jurisdiction clause and raised a preliminary objection to the court on account of jurisdiction clause and raised a preliminary objection to the suit on account of jurisdiction at a very early stage in the proceedings. I would reiterate what this Court said in the application for stay of proceedings (supra) that the High Court had jurisdiction to hear arguments and rule on the point of jurisdiction.

However, the procedures to be followed in this important area of litigation should no longer be left uncertain. I would recommend to the Rules Committees that appropriate comprehensive rules of procedure be urgently promulgated to facilitate the administration of justice”.

The learned Judge found that:

*“I have to find that filing an Application that protests jurisdiction simultaneously or concurrently with a memorandum of appearance (which though, may be unconditional) serves the same purpose. In the circumstances of this case the filing of the Entry of Appearance on 25<sup>th</sup> November, 2016 was not a submission to the jurisdiction of this Court as the Defendant had concurrently protested it by way of substantive application.”*

In our view, the filing of an unconditional memorandum of appearance simultaneously with the motion challenging the jurisdiction of the court on 25<sup>th</sup> November, 2016 were sufficient to indicate that the issue of jurisdiction had to be dealt with before entry of judgment in default of defence.

However, the tables according to the Judge, were turned by the fact that the appellants and the Interested Party had no objection to the Bank’s application dated 29<sup>th</sup> December, 2016 to be enjoined in the suit as a 3<sup>rd</sup> defendant. The learned Judge concluded “...that by unconditionally supporting the joinder of the Bank, the defendants and interested party had waived their right to rely on the exclusive jurisdiction clause and were happy to submit to the jurisdiction of the court.”

In our view, and with profound respect, this is where the Judge erred.

The fact that the appellants did not object to the joinder of the Bank did not mean they had waived the jurisdictional issue; moreover, if their intention was to waive jurisdiction, nothing would have stopped them from saying so.

The non-objection to joinder of the Bank cannot be used to infer the acceptance of jurisdiction as it is possible that even after the joinder, the appellants were not precluded from raising the issue of jurisdiction. It is worth noting that at the time of joinder of the Bank, the appellants’ application for stay of proceedings was undetermined. Additionally and as urged by the appellants, the Bank had asserted that **Mr. Zubeidi** had entered into the agreements as its agent. The action of **Mr. Zubeidi** of being an agent of the Bank bound the Bank, hence the jurisdictional clause submitting to the exclusive jurisdiction of Sudan bound the Bank and it was wrong for the court to use the joinder of the Bank as the basis for waiving the exclusive jurisdiction as provided in the contract between the appellants and **Mr. Zubeidi**. The place of jurisdictional clauses was highlighted in the case of **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd** (1985) KLR 898 wherein **Madan, JA** stated:

*“The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement.”*

Again, we are not aware of a practice where a party comes to court with a request to be sued. In other words, to be enjoined as a defendant. A cause of action is filed by a plaintiff and he/she knows the claim against a named defendant. It is not for a party to seek to be enjoined as a defendant. What will he/she be answering to if a plaintiff makes no claim against him/her? In **Council of the Borough of Milton Keynes vs. Viridor (Community Recycling MK) Ltd (No.2)** [2017] EWHC 239 (TCC), it was held that:

*“furthermore, I consider that it would be a nonsense if a defendant could join another defendant into the proceedings against the claimant’s wishes, in circumstances in which the Claimant would then become potentially liable for the costs of the new defendant. A Claimant is entitled to bring proceedings against the parties with whom it considers that it has a dispute. A claimant cannot be forced to issue proceedings against any other party.”*

As regards the contention that the State of Sudan had ceased to exist, we are hard placed to buy that argument. The Sudan was split into two, South and Northern Sudan. The agreement provided for its performance in what is now the Northern Sudan, as it alluded to Khartoum and hence the split of the Sudan cannot be the basis of ousting a jurisdictional clause.

In respect of C.A. No. 414 of 2018, this revolved around the issue of setting aside a default judgment entered against the appellants. As stated above, **Mr. Zubeidi** filed a suit on 24<sup>th</sup> November, 2016 against the appellants, on 25<sup>th</sup> November, 2016, and the firm of **Mungu & Co. Advocates** entered appearance on behalf of the appellants. They also filed a Motion seeking an order of stay on 25<sup>th</sup> November, 2016 and filed an “amended memorandum of appearance under protest” on 28<sup>th</sup> November, 2016. As no defence was filed on expiry of 14 days,

on 23<sup>rd</sup> March, 2017, a request for judgment was made and judgment against the appellants was entered on 5<sup>th</sup> April, 2017. On 20<sup>th</sup> April, judgment. The learned Judge was faulted for setting aside the default judgment as there was no draft defence. Reliance was placed on the case of Tree Shade Motors Ltd vs D. T. Dobie & Another [1995 – 1998] IEA 324 where it was held:

***“Even if service of summons is valid, the judgment will be set aside if defence raises a triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court set the ex-parte judgment aside”.***

Since no defence was attached to the motion seeking to set aside the exparte judgment it was contended that there was no triable issue warranting the setting aside and the issue of jurisdiction could not be deemed as a “reasonable defence”.

In our view, the appellants were not desirous of filing a defence but instead they wanted the jurisdictional issue determined first and foremost. The situation prevailing herein is different from the situation prevailing in the **Tree Shade Motors Ltd vs. D.T. Dobie** (Supra) wherein a default judgment was challenged on the basis of service of summons. In the instant matter, the appellants had no desire to file a defence until after the issue of jurisdiction was determined. Given the appellants position, no draft defence was available to be annexed to the application to set aside the judgment of 7<sup>th</sup> April, 2017.

There was also the issue that no notice of appeal was filed in respect of Civil Appeal No. 414 of 2018. This was not denied by **Mr. Zubeidi**. However, in view of the conclusions arrived at above, we deem it not necessary to address the issue of non-filing of the Notice of Appeal in Civil Appeal No. 414 of 2018.

The upshot of the above is that we allow with costs Civil Appeal No. 395 of 2018 and dismiss with costs the cross-appeal thereof. We also dismiss Civil Appeal No. 414 of 2018 with costs to the appellants.

It is so ordered.

***Dated & Delivered at Nairobi this 8<sup>th</sup> day of November, 2019.***

**M.KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**