IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 12 OF 2014

BETWEEN

BAI LIN (K) LIMITED..1ST APPELLANT

YANTAI GOLDEN STAR LEATHER CO. LTD...2ND APPELLANT

DONG LIN LU..3RD APPELLANT

AND

ZINGO INVESTMENTS LIMITED...................1ST RESPONDENT

ROBERT NJOKA MUTHARA........................2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Havelock, J.) dated 25th day of September, 2013

in

H.C.C.C. NO. 428 OF 2012)

****

JUDGMENT OF THE COURT

The basis of the dispute giving rise to this appeal is a written contract between the 2nd appellant and the 1st respondent for the supply of hides and skin where the latter was contracted to supply to the former 20 pallets of wet blue goat skin at a consideration of U.S $ 90,000, 50% of which was to be paid in advance and the balance upon delivery. The 2ndappellant was to, in turn export the consignment to China. It is alleged that despite the 2nd appellant paying U.S$ 45,000, constituting 50%, the 1strespondent only supplied 5 pallets valued at U.S $ 22,500, leaving a balance of 15 pallets. This forced the 2nd appellant to source for the shortfall from Nairobi Tannery. In view of this, the parties renegotiated and reviewed the contract on how the 1st respondent would supply the difference of the consignment. According to the 2ndappellant, it was agreed in the subsequent contract that the 1st respondent would utilize the balance of U.S $ 22,500 to supply, instead wet blue goat hides as opposed to wet blue skins. We shall be considering how the learned Judge treated the distinction between wet blue skins and wet blue hides. Suffice here to

say that the 2nd appellant contended that, in breach of the new terms the 1st respondent failed to supply the hides or refund U.S $ 22,500.

The appellants then brought an action to recover U.S $ 22,500, interest at 17% per annum from 17th October, 2010 until payment in full and costs of the action. The respondents responded by a defence and a counter-claim. In the counter-claim they alleged that pursuant to the terms of the two contracts entered into on 11th June, 2010, the respondents supplied to the appellants 5 pallets of wet hides valued at U.S $ 22,500 and 20 pallets of wet blue skins worth U.S $ 45,533 making a total of U.S $ 68,033; and that the appellants only paid U.S $ 45,000, leaving a balance of U.S $ 23,033, the payment of which plus interest and costs they were demanding.

On 14th January, 2013 the respondents requested for judgment in default of a defence to the counter-claim citing the provisions of **order 10 rule 4** of the Civil Procedure Rules. On 1st February, 2013 an interlocutory judgment on the counter-claim was entered against the appellants, who upon learning of it, took out a motion on notice to set it aside on the grounds that their advocate had been unable throughout the month of January, 2013 to file a request for judgment against the respondents, who had failed to enter appearance and file a defence, as the court file could not be traced. They were therefore surprised to learn on 6th February, 2013 when the file resurfaced that an interlocutory judgment had been entered against them on the counter-claim; that during the period preceding January 2013 their advocate had been heavily engaged in cases involving boundaries delineation, which entailed traveling out of Nairobi where she practiced law as a sole proprietor. During the period the advocate had posted a big sign on the door to her chambers advising that all documents meant for her be delivered at the firm of Musalia Mwenesi & Co. Advocates, APA Insurance Arcade, 1st Floor Room No.6, on the building right opposite the appellants' advocate's chambers; that for these reasons the defence and counter-claim were never served on their advocate; that the respondents would not suffer any prejudice by the interlocutory judgment being set aside; and that the delay between the time they discovered that judgment had been entered and when the application for setting aside was brought was due to the fact that the counterclaim had to be translated into Chinese for the appellants to be able to give instructions.

The respondents resisted the application and maintained that the application was incompetent and bad in law as it was brought after inordinate and unexplained delay of 2 months; that the appellants were duly served with the relevant court processes which were left at the advocate's chambers and subsequently sent by post; that if indeed the advocate's chambers were closed the appellants had failed to disclose where they obtained a copy of the counter-claim; and that to set aside the interlocutory judgment would be prejudicial to the respondents.

The application was argued before Havelock, J. who in dismissing it expressed satisfaction with the contents of the process server's affidavit and that, in terms of the *ratio decidendi* in the authorities cited the appellants had failed to justify their failure to file a defence to counter-claim; that closing office by a litigating counsel and merely fixing a notice on the door directing where documents should be delivered was not professional; that it was difficult to make head or tail of the draft defence filed by the appellants which in his view amounted to a sham; and that the appellants had been dilatory in bringing the application after two months.

The appellants were not satisfied by this outcome and brought this appeal arguing that the learned Judge failed to appreciate their difficulty in filing a reply to defence and a defence to counter-claim when the court file was missing; that their advocate had a genuine reason why she could not be served; that he further erred in describing the closing by their advocate of her chambers, posting a notice on the door and directing where documents should be delivered unprofessional; that the learned Judge ought to have found that there was no service; that it was in error to visit the mistakes of their advocate on them and to hold that the draft defence was a sham; and that the learned Judge failed to uphold the appellants' rights under **Article 50 (1)** of the Constitution and improperly exercised his discretion by dismissing the application.

What is before us is a simple question of whether the learned Judge in dismissing the application judicially exercised his discretion, it being a common factor that the appellants did not file a defence to the counter-claim.

In their written submissions the appellants have contended that there is no procedure for entry of a judgment in default of a defence to counter-claim under order 10 and that there is no provision to the effect that the rules as to the consequences of default in filing a defence to a plaint should apply *mutatis mutandis* to counter-claims; and that in the absence of such a rule it was necessary to make a substantive application for a default judgment, instead of merely writing a letter.

Although this question was not before the learned Judge and was not therefore determined in the impugned ruling, we ourselves think the argument lacks substance as the provisions of **order 7** of the Civil Procedure Rules leave no doubt that, as an independent or a cross-action, a counter-claim follows the course of a suit. When a defendant in a suit files a defence and counter-claim **rule 5** requires the pleadings to be accompanied by the same documents as if it is a suit. Within 14 days of service with the defence and counter-claim, by dint of **rule 11** any person named in the defence as a party to a counter-claim, including the plaintiff in the original suit who becomes a defendant in the counter-claim, must deliver a reply within 15 days of service. But of significance is **rule 17 (3)** which in a sentence provides the answer thus:

> **"Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defence."**

It is settled that where a party makes a liquidated claim and the defendant fails to either enter appearance or file a defence within the prescribed period, on request in a prescribed form, the court can enter judgment for the liquidated sum claimed together with interest. Where judgment has been entered as explained here, **rule 11** of order **10** gives the court unfettered power to set it aside or vary it on such terms as the court itself thinks just.

This appeal, as explained earlier challenges the exercise of discretion by the learned Judge. It is established that the duty of the Court of Appeal in such appeal is not to interfere with the decision of the judge unless it is shown that he has exercised his discretion wrongly in principle or perversely on the facts of the case. See **Corporate Insurance Co. Ltd V Nyali Beach Hotel (1995-1998)1EA 7.**

The discretion in question related to the rejection by the learned Judge of the application for the setting aside of an interlocutory judgment in default of defence. We must reiterate the following oft-cited passage by Duffus P in **Patel vs. E.A Cargo Handling Services Ltd** (1974) E.A 75 regarding the exercise of discretion to vary or set aside a judgment;

> **"I also agree with this broad statement of the principles to be followed. 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 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 the merits. In this respect, defence on the 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."**
>
> (our emphasis)

The following short statement by **Ainley J**, as he then was, adopted with approval by Sheridan J in **Sebei District Administration V Gasyali** (1968) E.A 300, is equally useful;

> **"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregular, should be considered, the question as to whether the**

> **plaintiff can <u>reasonably be compensated by costs</u> for any delay occasioned should be considered, and finally….it should always be remembered that to deny the subject a hearing should <u>be the last</u> <u>resort of a court</u>"** (our emphasis)

The *ratio decidendi* of these and other authorities, bearing in mind the two cardinal edicts, that whatever decision the court reaches must be to do justice to the parties and that to deny a party a hearing should be the last resort, is that the learned Judge was to satisfy himself that there was a good defence and a good defence, as was explained in **<u>Patel</u>** (supra), does not mean, a defence that must succeed, but one that raises *prima facie* issue which should go to trial. Secondly he was to be convinced that there were justifiable reasons for the delay in filing the defence. Thirdly he was to bear in mind the nature of the suit and also consider whether the respondents could reasonably be compensated by costs for the delay.

The learned Judge considered the above issues and concluded that the delay of two months was inordinate; that the explanation or reason for the delay was not plausible; and that the draft defence to the counter-claim was a sham.

It is not clear when the defence and counterclaim was filed but according to the affidavit of Justus Kilima he slipped the respondents' memorandum of appearance in respect of the main suit under the door of the appellants' advocate's chambers on 17th August, 2012 after he found the chambers locked; that on 30th August, 2012 he went back to serve a memorandum of appearance (it is not clear why this was necessary after slipping another under the door on 17th August, 2012), respondents' defence and counter-claim, verifying affidavit, among other documents but returned with them after two trips and finding the door still locked ; that for the third day he returned to serve on 31st August, 2012 and after failing to do so decided to send the documents by registered post.

In terms of order **7 rule 11** the appellant had fifteen days after service to respond to the defence and counter-claim. The date that concerns us is 31st August, 2012, the date of postage of the documents. On this the learned Judge said;

> **"Although the date on the certificate of posting is unreadable, there is no reason to disbelieve the contents of affidavit of service of the process server…".**

The question of service being central, it was not open to the learned Judge to make a guess. Secondly and of more significance, is that after failing to access the appellants' advocate's chambers, by dint of **order 5 rule 14** as read with **order 7 rule 20** the process server had the option of affixing copies of the documents on the door. He has sworn that he, instead slipped the documents under the door. To our mind, the effect of slipping documents under the door and affixing them on the door would be the same. We do not however think that the process server could, without leave of the court resort to postage, being a substituted mode of service. On this question we come to the same conclusion, albeit for a different reason, as the learned Judge, that the appellants' advocate was duly served by the documents being left at her chambers.

Next consideration was whether the proposed defence was arguable. In an eight paragraph draft defence the appellants denied the existence of two contracts executed on the same day as alleged by the respondents but insisted that there was handwritten amendment of the original contract which was effected on 31st August 2010 for wet blue **hides** after the respondents failed to supply wet blue goat **skins,** forcing the appellants to source for the **skins** from Nairobi Tannery. They have also insisted that they did not owe the respondents any money; that instead it was the respondents who breached the contract by failing to supply, in terms of the original contract, wet blue goat **skin** and further breached the terms of the amended contract by failing to supply wet blue **hides.**

This is how the learned Judge treated these averments;

> **"Firstly, the counter-claim seeks judgment in the amount of US$23,033 being what the 1st defendant claims the balance owing on a contract for the supply of 5 pallets of wet blue goat**

skins by the plaintiff. The 1st defendant maintained that the total contract price was US$68,033 of which the plaintiffs only paid US$45,000. In response, in the draft defence to counter-claim, the plaintiffs maintained that there were in fact 2 contracts entered into on the same day, one for wet blue goat skins and the second for wet blue hides such contracts being signed on 11th June 2010 and 31st August 2010, respectively. The 1st plaintiff admits that the contract for the wet blue goat skins was for a total value of US$90,000 of which US$45,000 was paid. It then went on to state that it paid the defendant US$22,500 on 23rd August 2010 and thereafter the 2nd defendant refused to supply the balance of wet blue goat skins hence the necessity to enter into the second contract for wet blue hides to compensate for the outstanding balance of wet blue goat skins. Regretfully for the plaintiffs, this court can make neither head nor tail of what is meant by the defence to the counter-claim. As it reads, there is an admission of the payment of US$45,000 so that, at least, tallies with the account of the defendants. However, to say that the two contracts, one for the supply of wet blue goat skins and the other for the supply of wet blue hides (whatever may be the difference between the two) were entered into on the same day and then to give two different dates for the supposed contracts to have been entered into, only gives rise to query. I find that the plaintiffs' defence to the 1st defendant's counterclaim is a sham and has no merit."

With respect, and without deciding the question, there appears to be no agreement on the issue of the second agreement with the appellants alleging that the respondents were introducing one allegedly executed on the same day as the original one with the intent to committing fraud on them. Secondly, the learned Judge confessed that he could not make head or tail of what is meant by wet blue **skins** and wet blue **hides** yet that was another area of contention, whether the respondents failed to supply **hides** as agreed in the amended contract. We think, from these averments that there was a defence raising *prima facie* triable issues to go for trial.

Was the period of two months' delay inordinate? The answer to this question will depend on the reasons for the delay. It was the intention of the appellants to request for judgment against the respondents in default of appearance and defence but could not do so as the court file could not be traced. It was not until 6th February, 2013 that it resurfaced. It was at that stage they became aware that, instead there was an interlocutory judgment against them on the counter-claim. On 8th April, 2013, two months later they brought the application to set it aside. We also bear in mind that the judgment was entered on 1st February, 2013 but the respondents themselves had taken no steps on the matter until the appellants brought the application.

Apart from the fact that the court file could not be traced, the advocate for the appellants further explained away the delay as occasioned by her engagement in the cases for electoral boundaries delimitation which required her and her entire office staff to travel out of Nairobi. Her chambers for this reason remained closed. The fact that the chambers were closed during this period was confirmed by the process server, who deposed that he was informed from the neighbouring offices that the advocate was a sole proprietor and that her chambers had been closed for some time. The process server himself visited the chambers several times on different dates but found the door locked. He, however did not say anything regarding the notice allegedly posted on the door directing that documents be delivered at the chambers of Musalia Mwenesi, Advocate.

Although the learned Judge was not satisfied with this arrangement, we do not think it amounted to being unprofessional. We would have agreed with him had the advocate simply shut down and vanished. In the circumstances, we do not think it was unreasonable to do what the advocate did. Sole proprietors fall sick, are bereaved, go on holidays, attend training and such like things. Although in such situations the support staff would keep the office running, in this case the advocate has explained that what she engaged in required her staff to accompany her out of town.

On the final consideration we also hold the view that given the nature of the claims by both sides an award of costs would adequately compensate the respondents, instead of driving away the appellants from the seat of justice. The explanation that the file was missing from the registry, was infact confirmed by

the respondents who wrote to the Deputy Registrar complaining of the loss of the file for the good part of January 2013. When the file was traced and the appellants learnt of the interlocutory judgment their advocate caused it to be translated into Chinese, the language of the appellants in order to obtain instructions on what kind of defence to proffer. A copy of the translation was presented in the court below.

We conclude that the delay of two months was not inordinate, the proposed defence is not a sham and should go to trial, the explanation proffered was not unreasonable and costs would atone the respondents. Unless the transgression amounts to an outright and deliberate intention to obstruct or delay the course of justice, the court must always balance these considerations and strive to do justice. Because of the failure on the part of the learned Judge to strike this balance, wecome to the ultimate conclusion that his exercise of discretion against the appellants was improper.

In the result the appeal is allowed with costs to the respondents. The interlocutory judgment entered on 1st February, 2013 is set aside, we substitute the order dismissing the appellants' application to set aside the judgment with one allowing that application, and grant the appellants seven days from the date of this decision to file a reply to the defence and a defence to counter-claim.

We so order.

Dated and delivered at Nairobi this 25th day of November, 2016.

ASIKE – MAKHANDIA

……………………………………

JUDGE OF APPEAL

W. OUKO

……………………………….

JUDGE OF APPEAL

K. M'INOTI

……………………………..

JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>