IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 17 OF 2014

LINUMARK INVESTMENTS LIMITED …………………….. APPELLANT

AND

DIAMOND SHIELD INTERNATIONAL …………………… RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Kisumu

(Chemitei, J) dated 21st January, 2014

in

H.C.C.C. NO. 161 OF 2012)

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JUDGMENT OF THE COURT

This is an appeal against the ruling of the High Court (Chemitei, J.) dated 21st January, 2014, whereby the learned Judge, among other things, set aside interlocutory the judgment that had been entered against the respondent, ***Diamond Shield International.***

The facts giving rise to this appeal are straight forward and are as follows. By a plaint dated 17th October, 2012, the appellant***, Linumak Investments Ltd***, sought judgment against the respondent for a liquidated sum of Kshs.38,240,000/=. The cause of action arose out of an alleged sale of brown sugar and cooking oil by the appellant to the respondent at the purchase price of Kshs.38,240,000/=. The appellant delivered the said goods on or before 22nd August, 2012 but the respondent failed to pay the said purchase price despite demand for the same from the appellant.

The respondent entered appearance on 22nd October, 2012 but did not file a written statement of defence within the prescribed period thereby prompting the appellant to request for judgment on 12th November, 2012. On the same date, judgment was entered for the appellant against the respondent as prayed in the plaint.

The record has a flurry of applications but the application which is the foundation of this appeal was made by the respondent vide a Notice of Motion dated 25th October, 2013 and filed the following day. The respondent sought, among other orders, the setting aside of the judgment entered on 12th

November, 2012 in favour of the appellant. By his ruling dated 21st January, 2014, the learned Judge made the following orders on the said application:-

"1) The prayer seeking to set aside the consent order dated 30-10-2012 is disallowed.

2) The prayer seeking to lift the corporate veil in respect of Joyce Wanyiri Mwaura is disallowed.

3) The interlocutory judgment entered against the defendant on 12-11-2012 is set aside and the defendant is ordered to file its defence within 14 days from the date hereof.

4) Costs of this application to the respondent."

The appellant was aggrieved, hence this appeal premised upon six (6) grounds which in reality raise one issue that the learned Judge failed to exercise his discretion judiciously when he set aside the judgment which had been entered against the respondent in favour of the appellant.

The appeal was canvassed before us quite eloquently by Mr. Ojuro, learned counsel for the appellant, and Mr. Mulanya, learned counsel for the respondent. Mr. Ojuro gave a brief history of the matter and referred to orders made against the respondent which were not obeyed. Counsel specifically referred to a consent order recorded by the court on 30th October, 2012 as follows:-

"<u>30/10/2012</u>

Before H.K. Chemitei – J

C/O Omollo

Ojuro for the plaintiff/applicant

Jaleny for the Defendant

<u>By Consent</u>

The Defendant is granted 10 days to deposit the amount claimed in the plaint.

The same order to apply in No. 163/12.

Mention on 13/11/12 for further orders."

Mr. Ojuro complained that despite the consent order, the respondent did not deposit the sum claimed in the plaint or any sum within the appointed period or at all. In counsel's view, such a litigant is not deserving of the court's discretion, especially as not even a defence was filed as ordered. Learned counsel also took issue with the fact that even after the order of the learned Judge maintaining the consent order, the respondent has not made any deposit. Considering all circumstances, so counsel contended, the default judgment should not have been set aside.

Mr. Mulanya in opposing the appeal, submitted that the Judge had extensive knowledge of the matter and exercised his discretion properly when he set aside the judgment entered in default of defence. In learned counsel's view, there is no justification for interfering with the learned Judge's order which orders, according to counsel, should not be disturbed.

We have considered the record of proceedings, the ruling of the High Court, the grounds of appeal, the submissions of learned counsel and the law. We think the principles applicable to setting aside a default judgment are settled. The court's discretion to set aside such judgment is unfettered. The discretion is to be exercised in order to do justice as between the parties. (See **<u>Patel - V – E.A. Cargo</u>**

Handling Services Ltd [1974] EA 75]). In weighing the interests of justice the court considers such matters as the reasons, if any, for the default of the applicant; the conduct of the parties with particular reference to the effect it has on the course of justice in the particular case; the *prima facie* merits of the defence if disclosed from the papers filed by the applicant. [See **Evans - V – Bartlam [1937] AC 473];** whether the respondent can be compensated by costs for any delay which may be occasioned by the setting aside of the default judgment and it should always be borne in mind that to deny a person a hearing should be last resort of a court of law.

In the matter at hand, the learned Judge considered the delay in moving the court. He however found that the respondent had *"a strong and arguable defence which should be heard"* and that *"it would be unfair not to allow the defence as there appears to have been many intervening factors"*.

We think one of the triable issues was whether the appellant dealt with the respondent or its former officials.

In **Chemwolo & another - V - Kubende [1986] KLR 492**, this Court held, *inter alia that*:-

> ***"2. The concern of the Court is to do justice to the parties and the Court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the Court will not usually set it aside unless it is satisfied that there are triable issues which raise prima facie defence which should go for trial."***

In the case before us, the learned Judge found that the respondent had *"a strong case"* and that it would be just that the default judgment be set aside. Considering the facts before the learned Judge, we are unable to detect any misdirection on his part. He had an unfettered discretion and exercised it in favour of the respondent in our view properly on the basis of reasons which he stated.

We will not lightly interfere with the exercise of discretion by the learned Judge unless we are satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the Judge was clearly wrong in the exercise of his discretion and as a result a miscarriage of justice occurred. (See **Mbogo - V – Shah [1968] EA 93**).

The learned Judge considered that it was unjust to shut the respondent from the seat of justice given that it had disclosed a strong defence to the appellant's claim. The learned Judge set aside the default judgment on terms that the consent order dated 30th October, 2012 remained undisturbed. The appellant was also given costs. We find no basis to fault the learned Judge's exercise of discretion.

There is however, one aspect of the order of the learned Judge to which we must give teeth. The order disallowing the setting aside of the consent order of 30th October, 2012 meant that the condition that the respondent deposits the amount claimed in the plaint within ten (10) days remained valid. However, the order of the learned Judge did not indicate the period within which the deposit was to be made the effect of which was that the respondent may have delivered its defence and has not to date made the deposit of the amount claimed in the plaint or any part thereof. The result has been that since 30th October, 2012 when the consent order was recorded, the respondent has benefited from the lacuna in the order declining to set aside the consent order. It is now over two years since. The learned Judge could have been asked to specify the time within which the deposit was to be made. We do not think we should refer the matter to the learned Judge. We have jurisdiction to prescribe the said period. We order that the respondent does within thirty (30) days of the date of this judgment deposit the sum claimed in the plaint in an interest bearing account in the joint names of the parties' advocates in a reputable financial institution. In default of the deposit within the period stated, the respondent's application dated 25th October, 2013 will stand dismissed with costs. If a defence has been filed, the same will stand struck out.

As the appellant has only succeeded in having the order of the learned Judge limited in time. In the circumstances we order that each party bears its own costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR