



Gatundu & Co Advocates v Penelly Construction & Engineering Ltd; Renewable Energy Corporation (Garnishee) (Commercial Miscellaneous Application E819 of 2021) [2023] KEHC 25159 (KLR) (Commercial and Tax) (10 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E819 OF 2021
FG MUGAMBI, J
NOVEMBER 10, 2023**

BETWEEN

GATUNDU & CO ADVOCATES PLAINTIFF

AND

PENELLY CONSTRUCTION & ENGINEERING LTD DEFENDANT

AND

RENEWABLE ENERGY CORPORATION GARNISHEE

RULING

Brief Background

1. This ruling determines two applications; the defendant's Notice of Motion dated 16th February, 2023 plaintiff's Notice of Motion dated 20th April, 2023.

The Application Dated 16th February 2023

2. The application was brought pursuant to the provisions of Articles 50 and 159 (2) (d) of the Constitution of Kenya, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules and all the enabling provisions of the law. The defendant seeks the following orders:
 - i. Spent;
 - ii. Spent;
 - iii. Spent;



- iv. That the interlocutory judgment entered against the defendant herein on 1st November, 2021 and all other consequential orders be set aside *Ex Debito Justitiae*;
 - v. That the defendant be granted unconditional leave to file its memorandum of appearance and replying affidavit and other documents in this suit as per the annexed drafts marked “MC 1a and 1b”;
 - vi. That the matter be allowed to proceed for trial on merits;
 - vii. That the costs of this application be provided for.
3. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn by Moses Chelugui, the defendant’s director on 16th February 2023 and 8th March 2023. In opposition thereto, the plaintiff filed a replying affidavit sworn on 22nd February, 2023 and a further affidavit sworn on 31st May 2023 by Alex Gatundu, an Advocate of the High Court of Kenya practicing with the plaintiff. The application was canvassed by way of written submissions.
 4. The defendant takes issue with the irregular judgment entered on 1st November, 2021 on the ground that the defendants were not properly and physically served with the Originating Summons and its accompanying documents. The defendant relied on the provisions of Order 10 Rule [Civil Procedure Rules, 2010](#) which gives this Court discretion to set aside or vary such judgment and any consequential decree or order upon such terms as are just.
 5. The defendant further argued that the law on default judgments did not provide for an interlocutory judgment on a liquidated demand and on that basis the interlocutory judgment herein ought to be set aside. It was further stated that even though the plaintiff specified the sums of money owed to it by the plaintiff in the Originating Summons, the said sums of money still required investigations and the validity of the agreement should have been confirmed in trial.
 6. The defendant argued that the matter ought to have proceeded to formal proof hearing with notice to the defendant since it was an interlocutory judgment that was entered and not a final judgment. It further averred that its draft replying affidavit contained triable issues that can only be properly ventilated at a hearing.
 7. The defendant relied on the legal fees agreement dated 22nd December, 2020. The agreement provided that the defendant would pay the plaintiff 8% of the total arbitral award. According to the defendant, the plaintiff’s judgment of ksh 39,311,456.68 was way beyond the legal fees that the plaintiff was entitled to under the agreement, noting that other than filing its notice of change, statement of defence and defence to counter-claim, the plaintiff did not participate in the arbitration proceedings at all.
 8. On its part the plaintiff relied on the provisions of Order 10 Rule 4 of the [Civil Procedure Rules, 2010](#) and submitted that the defendant had not sought for an order to set aside the default judgment and decree but had instead invited the Court to set aside a non-existent interlocutory judgment.
 9. On the issue of service, the plaintiff referred to the provisions of Order 5 Rule 22B and noted that there was nothing in law to presuppose service of Court processes via email shall only apply to individual parties as opposed to corporations.
 10. It further stated that the defendant has not offered any explanation as to why an application to set aside a non-existent interlocutory judgment has been filed approximately two years after default judgment was entered by this Court in favour of the plaintiff against the defendant. The plaintiff deposed that the fact that the decree herein has remained unexecuted for over two years is prejudicial to the plaintiff who deserves to enjoy the fruits of its judgment.



Analysis and Determination

11. I have carefully considered the pleadings and submissions filed by the parties in support of their cases. On this application the main issue is whether the defendant has made out a case for the prayers sought and particularly the setting aside of the judgment entered in favour of the plaintiff on 1st November, 2021.
12. Order 5 Rule 22B of the [Civil Procedure Rules](#) provides as follows:
 - i. “Summons sent by Electronic Mail Service shall be sent to the defendant’s last confirmed and used E-mail address.
 - ii. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 - iii. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 - iv. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”
13. This provision was introduced to the law through the Civil Procedure Amendment Rules, 2020 in a bid to embrace technology and facilitate efficient and expeditious access to justice. The said provision introduced electronic mail service as a recognized mode of service of pleadings and other Court documents by the Kenyan Courts. I agree with the finding by this Court, (Majanja. J), in [Mathews v Masika](#), (Civil Case E180 of 2022), [2022] KEHC 12194 (KLR) that:

“From the aforesaid provision, the plaintiff is entitled to serve summons upon the defendant at his last confirmed and used e-mail address. Contrary to the defendant’s suggestion, electronic service is not an alternative or substituted mode of service hence the plaintiff need not to make any attempt to serve the defendant personally.”
14. Against this background, it is clear that the plaintiff served the defendant with the pleadings in this case on 28th September, 2021 vide the defendant’s email address; penelly99@gmail.com. The defendant does not dispute this email address neither does it dispute the service by way of email. The defendant submits that the plaintiff ought to have effected proper service by way of personal service especially since the defendant is a juristic person.
15. This is a misapprehension of the provisions of Order 5 Rule 22B of the [Civil Procedure Rules, 2010](#). The provisions in my view apply equally to both natural and juristic persons. Nothing would have been easier for the drafters of the rules than to say so if there was meant to be a contrary purpose. For all these reasons, this Court finds that the defendant was duly served with the Originating Summons and all its accompanying documents on 28th September, 2021.



16. I further disagree with the assertion that the plaintiff requested for interlocutory judgment against the defendant. I note that *vide* a letter dated 14th October, 2021 the plaintiff made an application to this Court for default judgment to issue in this suit. The letter read in part as follows:

“Kindly enter judgment in default of appearance and or defence against the defendant herein, who despite being duly served as per affidavit of service of the undersigned advocate has not entered appearance.”

17. Thereafter, this Court entered default judgment for the plaintiff against the defendant on 1st November, 2021 allowing the Originating Summons dated 22nd September, 2021 as prayed. In light of the foregoing, this Court finds that the default judgment entered by this Court on 1st November, 2021 in favour of the plaintiff against the defendant and the resultant decree are not only valid but also legally binding.

18. Finally, as correctly submitted by the defendant, this Court has discretion to set aside an interlocutory judgment as well as a default judgment pursuant to the provisions Order 10 Rule 11 of the [Civil Procedure Rules](#), 2010. I have already stated that the court is dealing with a default judgment. I find useful the holding in the celebrated case of *Shah v Mbogo & Another*, [1967] EA 116 at page 123 where the court stated as follows:

“Applying the principle that the Courts discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”

19. From the record, I note that while the default judgment was entered on 1st November 2021, the defendant did not file the application for setting aside the judgment until 16th February 2023, approximately fifteen (15) months later and has not offered any explanation whatsoever for the delay in filing it.

20. I am also cognizant of the fact that besides the time taken to file an application for setting aside, the Court is also required to consider whether the defendant’s defence raises triable issues when dealing with an application for setting aside an interlocutory judgment. The Court of Appeal in the case of [Philip Kiptoo Chemwolo & Mumias Sugar Company Ltd v Augustine Kubede](#), (1982-1988) KAR when faced with a similar application made the following observation:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. (*Kimani v MC Connell* (1966) EA 545). Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.”

21. Further, in the case of *Thorn PLC v Macdonald*, [1999] CPLR 660, cited by the Court in [International Air Transport Association & Another v Roskar Travel Limited & 3 Others](#), (Civil Case no. E457 of 2020) [2022] KEHC 200 (KLR) the Court of Appeal highlighted the principles to be considered when dealing with an application for setting aside a default judgment as hereunder:

“(i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;



- (ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
- (iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
- (iv) prejudice (or the absence of it) to the claimant also has to be taken into account.”

22. There is general agreement from these judicial pronouncements that when all is said and done, the Court ought to look at the justice of the matter, and beyond the time taken to file an application for setting aside a default judgment. This is so especially where the court is convinced that the defence raises triable issues. In the matter before the Court, as to whether the defendant’s response raises triable issues, I think it does.
23. I say so noting that the plaintiff’s claim against the defendant is for ksh 39,311,456.68 being legal fees for representing the defendant in arbitration proceedings. The defendant takes issue with the representation of the plaintiff. It was averred that the plaintiff did not represent the defendant in the arbitration proceedings, and that all it did was file a Notice of Change of Advocates and reply to amended defence and counter claim. It was averred that the voluminous pleadings in the arbitration proceedings were not prepared exclusively by the plaintiff since the bulk of the said pleadings were prepared by the law firms of Wairimu Mugo Advocates and Okundi & Company Advocates.
24. The defendant further challenges the legal fees agreement and contended that the plaintiff’s claim of ksh 39,311,456.68 was against public policy as it constitutes an illegality and unjust enrichment hence unenforceable.
25. I have perused the subject agreement on legal fees that has been produced by the defendant. It is dated 22nd December 2020. Clause (b) refers to payment of a fee of 75,000/= to facilitate the arbitration. From clause (c) it appears that the defendant was to pay the plaintiff 8% of the total arbitral award. The defendant avers that the arbitral award was ksh 64,728,160.00 and 8% of the said amount is equivalent to ksh 5,178,252.00 and not ksh 39,311,456.68.
26. The plaintiff confirms that the legal fees were calculated based on the value of subject matter of the suit. Without saying any more, I am convinced that the circumstances of representation of the defendant by the plaintiff and the computation of the legal fees claimed by the plaintiff are issues that require interrogation in a full trial. I am therefore persuaded that the defendant’s defence contains bona fide triable issues. The justice of the matter demands that the issues be canvassed substantively to finality.
27. Finally, as to whether the defendant shall suffer prejudice in the event the default judgment entered in its favour against the defendant is set aside and the defendant is granted leave to defend this suit, I am of the view that it shall not. This is because the defendant will have an opportunity to file a further affidavit in response to issues raised in the defendant’s response.
28. Further, in as much as the application herein has been filed after some delay, I am of the view that the plaintiff can be compensated for this delay by way costs. The totality of the foregoing is that this Court finds that the defendant has made out a case to warrant grant of an order for setting aside the default judgment.



Application Dated 20th April, 2023

29. The plaintiff's Notice of Motion is brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act cap 21 and Order 23 of the Civil Procedure Rules. The plaintiff seeks orders directing the garnishee to appear before this Honourable Court to show cause why they should not pay the plaintiff the sum of ksh 39,311,465.68 being the outstanding decretal sum pursuant to the decree issued on 1st November, 2021.
30. Having set aside the default judgment herein, it follows that the garnishee application dated 20th April, 2023 automatically collapses as the garnishee proceedings are not grounded on a decree of the court as required by Order 23 rule 1 of the Civil Procedure Rules. The garnishee's costs in the application shall be paid by the plaintiff/decreet holder.

Determination

31. In conclusion, the application dated 16th February, 2023 is merited and the same is allowed with the effect that:
- i. The default judgment entered by this Court on 1st November, 2021, the resultant decree issued on 10th November, 2021 and all consequential orders against the defendant are hereby set aside;
 - ii. The attached draft memorandum of appearance and replying affidavit be filed and served within 7 days of this orders and parties shall attend before court for further directions on the disposal of the Originating Summons dated 22nd September, 2021;
 - iii. The defendant shall pay thrown away costs of ksh 50,000/= to the plaintiff within 14 days from today failure to which the default judgment entered in 1st November, 2021 together with the resultant decree issued on 10th November, 2021 and all ex parte proceedings shall remain in force.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 10TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

