



REPUBLIC OF KENYA



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**Joint Commercial Suppliers Limited v County Government of Kiambu
(Civil Suit E015 of 2022) [2024] KEHC 9780 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E015 OF 2022**

A MSHILA, J

JULY 26, 2024

BETWEEN

JOINT COMMERCIAL SUPPLIERS LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KIAMBU DEFENDANT

RULING

1. Before the Court is an application filed under the provisions of Order 10 Rule 8 of the *Civil Procedure Rules* and Article 159(2) (a) (b) & (d) of the *Constitution* 2010 and all other enabling provisions of the law. The Applicant sought for the following orders;
 - a. Spent
 - b. That the Plaintiff/Applicant be granted leave to request for interlocutory judgment in default of appearance against the Defendant/Respondent.
 - c. The costs of this Application be borne by the Defendant/Respondent.
2. The Application was supported by the sworn Affidavit of Joseph Kiarie Njenga who stated that the Applicant filed the current suit against the respondent on 25th July, 2022 and served the same on 28th July, 2022.

Pursuant to the Rules the Defendant/Respondent ought to have filed its Defence and since June 2022 and for over six (6) months the Respondent has failed to enter appearance and file its statement of defence.
3. The Applicant therefore seeks leave from the court and requests for interlocutory judgment in default of appearance by the Respondent.



4. Thereafter the Respondent its Replying Affidavit in opposition to the application and also filed a Memorandum of Appearance and a Draft Statement of Defence and prayed to be allowed to file the same out of time
5. The reasons given for the delay was that the parties had mutually embarked on an Arbitration process sometime in 2022 which fell through; there was also an ongoing Audit exercise pertaining to the Applicants engagement with the Respondent touching on the public procurement process which contributed to the delay in entering an appearance. The circumstances leading to the delay in this instance would not lead the court to an inescapable conclusion that it was so gross and inordinate and therefore inexcusable; Reference was made to the case of *Peter Kariuki Waweru v Kiambu County Government & Anor* (2015) eKLR .
6. The Respondent submitted that the draft Defence dated 16/02/2023 and filed on 20th February, 2023 raises triable issues which ought to be heard and determined on merit by the court; therefore the Court was urged to invoke its inherent jurisdiction to admit the Defence in order to do substantive justice as opposed to dwelling on technicalities. Referred to the case of *Nicholas Kiptoo Salt v IEBC & Others* (2013) eKLR where it was held:-

‘...Justice must not be sacrificed at the altar of strict adherence to the provisions of procedural law which at times creates hardship and unfairness.’
7. The Respondent implored the court for the sake of public interest to disallow the request for leave for interlocutory judgment.
8. The second Application is a Notice of Motion dated 21st February 2020 brought pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 10 Rules 6, 10 and 11 & Order 51 Rule 1 of the *Civil Procedure Rules* for the following orders;
 - a. The interlocutory judgment entered against the 2nd Defendant on 3rd December 2019 and all other consequential decree and/or orders emanating therefrom be set aside ex debito justitiae.
 - b. The Court deems the 2nd Defendant/Applicant’s draft Statement of Defence and Counterclaim attached herein to be properly filed upon payment of requisite court fees and be admitted on record.
 - c. The costs of this Application be provided for in favour of the 2nd Defendant/Applicant.
9. The Application was supported by the sworn Affidavit of Victoria Mulwa who stated that the Plaintiff filed the instant suit on 2nd October 2019 and served the pleadings together with a defective and undated Summons to Enter Appearance upon it on 17th October 2019.
10. The 2nd Defendant was unable to timeously instruct an advocate to enter appearance on its behalf because at the time the 2nd Defendant was undergoing transition in its management which deprived it of the capacity to effectively conduct its day to day affairs.
11. The Applicant stated that the Plaintiff obtained the interlocutory judgment irregularly on 3rd December 2019 in breach of the express and mandatory provisions of Order 10 Rule 6 of the *Civil Procedure Rules*. An interlocutory judgment can only be entered where the Plaintiff is drawn with a claim for pecuniary damages only. The Plaintiff herein was drawn with claims not only for pecuniary damages but also for general damages for alleged breach of contract, interests, costs among others.



Applicants' Case

12. The Applicants submitted that Plaintiff herein was not entitled to interlocutory judgment in the circumstances herein and accordingly, the Deputy Registrar ought not to have entered interlocutory judgment in favour of the Plaintiff. The interlocutory judgment entered against the Defendants herein was irregular as the Plaintiff's Plaintiff is drawn with multiple claims which do not contain pecuniary damages only. These non-pecuniary reliefs included a prayer for general damages for breach of contract and such relief disentitles the Plaintiff from obtaining interlocutory judgment.
13. The Applicant's while relying on the case of Court of Appeal in the case of *Abdalla Mohamed & Another V Mbaraka Shoka* [1990] eKLR stated that 2nd Defendant's Draft Defence raises the following triable issues namely whether there exists privity of contract as between the Plaintiff and the 2nd Defendant.
14. Further to the above, the 2nd Defendant raises triable issues in its counterclaim against the Plaintiff in breach of fiduciary duty and/or in breach of trust wherein the Plaintiff fraudulently, irregularly and without any colour of right withdrew from the 2nd Defendant's bank accounts the sum of Kenya Shillings Twenty-Two Million, Three Hundred and Twelve Thousand and Five Hundred (Kshs 22,312,500/-).
15. The Applicants added that where the Defendants' Defences raises a triable issue, the Court ought to set aside the interlocutory Judgment and allow the matter to be heard on the merits.
16. It was also the Applicant's argument that the Plaintiff has not disclosed in its responses to the Applications herein that it would suffer any prejudice if the Applications herein were to be allowed. Even if such prejudice would be occasioned to the Plaintiff, which has not been disclosed, any such prejudice may be mitigated by damages and/or costs.
17. It was the Applicants' submission that the delay in filing the Defence was not inordinate. The 1st Defendant has averred that the Statement of Defence was not filed within time as the advocate who had personal conduct of the matter had proceeded on emergency leave in the month of November 2019 to attend to his spouse who was expectant and had given birth at the material period.
18. The reasons advanced for the delay are genuine and the 1st Defendant cannot be held responsible for the circumstances giving rise to the delay. If the reasons constitute mistake in the circumstances, then they can only be attributed to counsel for the 1st Defendant. Inadvertence on the part of the counsel ought not to be visited upon the 1st Defendant by driving the 1st Defendant away from the seat of justice unheard.
19. As regards the 2nd Defendant's delay, the Applicants contended that the 2nd Defendant was served with the pleadings and defective Summons to enter appearance, the 2nd Defendant was unable to timeously instruct an advocate to enter appearance on its behalf and defend its interests in the instant suit because at the material time when the Plaintiffs suit was filed herein the 2nd Defendant was undergoing transition in its management which deprived it of the capacity to effectively conduct its day to day affairs.
20. The 2nd Defendant was never notified of the entry of interlocutory judgment but only learned upon being informed that the 1st Defendant's Application to set aside the interlocutory judgment was fixed for hearing on 25th February 2020.



21. The Applicants urged the Court to find that Defendants' Applications herein are merited and the interlocutory judgment entered herein be set aside and the Defendants heard on the merits of their respective defences.

Respondent's Case

22. In response, the Respondent submitted that the judgment entered against the defendants in default of appearance and defence was absolutely regular and proper. Further, whether the claim is for pecuniary damages, meaning liquidated, together with other non-pecuniary damages and any defendant fails to appear or fails to file defence after appearing rule 10, the court has power to enter judgment in default. Upon entry of that judgment the plaintiff will then set down the suit for assessment of damages for the nonpecuniary claim (general damages).
23. On the issue of delay, the Respondent contended that the Applicants' reasons for delay are not sufficient explanation which a court, exercising its discretion judicially, can or should accept. In addition, failure to supply evidence which, if the purported facts are correct, the advocate should have, is not treating the court seriously.
24. It was the Respondent's submission that none of the defences, or counterclaim, of the defendants raise any triable issue worth going for trial. Thus, the application is misconceived, the same has no merit and should be dismissed with costs.

Issues for Determination

25. Having carefully considered the Application and the written submissions by the parties; the court has framed only one issue for determination:
- a. Whether to grant leave for interlocutory judgment to be entered against the Defendant herein.

Analysis

26. Order 10, rule 8 of the *Civil Procedure Rules*, provides that leave of the court to enter interlocutory judgment against the Government must be first had and obtained and the section states as follows: -
- “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
27. In the case *Mohamed & Another -v- Shoka* (1990) KLR 463 the Court set out the tenets a court should consider in entering an interlocutory judgment to include:
- i. Whether there is a reasonable explanation for any delay;
- ii. Whether there is a defence on merit;
- iii. Whether there would be any prejudice.
28. The Plaintiff was filed against the Respondent on 25th July, 2022 and the Plaintiff and summons to enter appearance were served on/to the Defendant on 28th July, 2022 as evidenced by the Respondents inscribed 'Received' stamp.
29. In accordance with the Summons to enter appearance the Defendants had 15 days to enter appearance from 28th July, 2022 and then thereafter another 14 days to file and serve Statement of Defence. The Respondent herein stated that despite being served it was unable to enter appearance and file a Defence due to the mutual agreement to embark on Arbitration which failed thereafter the delay was further



occasioned due to an ongoing audit query exercise brought about by irregularities and illegalities that had occasioned the termination of all contracts.

30. From the chronology of events and the reasons advanced by the Respondent for the delay was that it was unable to enter appearance and file a substantive defence due to the internal audit transition process; this court is satisfied that there was a reasonable, excusable and satisfactory explanation for the delay
31. Whether there is a defence on merit? In its Defence The Respondent submitted that the huge sums sought by the Applicant were untenable and in order to safeguard public interest and funds the suit ought to go for trial and be determined on merit.
32. A cursory glance at the draft Defence demonstrates that the Statement of Defence raises triable issues and this court is satisfied that there is a defence on merit.
33. Whether there would be any prejudice? In the circumstances, it is this Court's considered view that the Applicant will not suffer any prejudice that cannot be compensated by way of costs.
34. In exercise of the court's discretion the court, while acknowledging that it is satisfied by the reasons advanced by the Respondent are satisfactory; The upshot of the above is that from the material placed before it and in the interest of justice this court finds that this is a suitable case where it can exercise its discretion and grant the Respondent one last chance to set its house in order. Findings and Determination
35. For the foregoing reasons this court makes the following findings and determinations;
 - i. The Application for leave to enter interlocutory judgment is hereby held in abeyance.
 - ii. The Defendant's Memorandum of Appearance and Statement of Defence dated 16th February, 2023 upon payment of the requisite fee (if any) within Thirty (30) days it shall be deemed as properly filed and be admitted on record.
 - iii. The costs of this Application shall be borne by the Respondent.
 - iv. Mention before the Deputy Registrar on 25/09/2024 for case management.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 26TH DAY OF JULY, 2024.

HON. A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Chemutai – for the Applicant

N/A – by the Respondent

