REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASENO.47 OF 2013

MULTISCOPE CONSULTING

ENGINEERS ……PLAINTIFF/RESPONDENT

VERSUS

UNIVERSITY OF NAIROBI …….. 1ST DEFENDANT/APPLICANT

THE ENGINEERS BOARD

OF KENYA ……... 2ND DEFENDANT/APPLICANT

R U L I N G

By an application by way of notice of motion dated 21st March 2014 and filed in court on 25th March 2014, the applicant/2nd defendant, the Engineers Board of Kenya seeks from this court. orders for:

1. Stay of proceedings herein pending hearing and determination of this application;

2. Setting aside of interlocutory judgment entered herein and all consequential orders thereof;

3. Leave be granted to file statement of defence on such terms as the court may deem necessary;

4. Costs of the application be provided for it is premised on the grounds that;

i) The 2nd applicant/defendant was served with plaint and application on 20th February 2013.

ii) That it was never served with any summons to enter appearance

iii) **That it then instructed their advocates to represent it in the proceedings based on documents served hence, the filing of notice of appointment of advocates by Kerongo & Co Advocates on its behalf and not memorandum of appearance.**

The said application is supported by the affidavit of Patrick Nyariki Kerongo advocate who deposes

among other things, that his client was never served with summons to enter appearance requiring them to enter an appearance and that that is the reason why they only filed notice of appointment of advocates on 14th March 2013. He attached copy of instructions note from his client forwarding plaint, notice of motion application and mention notice, all received on 20th February 2013 by the 2nd defendant and after exchanging communication on the matter, he was surprised to learn from the plaintiff's advocates that the matter had now been fixed for formal proof. He contends that the affidavit of service does not indicate receipt of the said summons (stamp or otherwise on the summons to enter appearance); and that as the client is keen to have the matter defended to the fullest, it could not fail to enter appearance had it been served with summons to enter appearance.

The application was opposed by the plaintiffs through a replying affidavit sworn by Samuel Maugo the managing director of the plaintiff company on 6th May 2014. He deposes that he is aware effective service of summons to enter appearance was done as per the affidavit of service as he had the process server dropped to effect the said service upon the 2nd defendant and that is why they immediately appointed advocates to represent them in the suit as well as communication concerning referring the dispute to arbitration wherefrom the 2nd defendant curiously withdrew. He accuses the 2nd defendant of seeking to obstruct the cause of justice as they were aware of the judgment as early as 6th August 2013.

When parties appeared before **Hon. Onyancha J**, they agreed to dispose of this subject application by way of written submissions.

The applicants filed their written submissions on 21st August 2014. The same is dated 19th August 2014 whereas the plaintiff's written submissions were filed on 2nd October 2014. They are undated. The two sets of written submissions mirror the depositions in the rival affidavits and cite the relevant law applicable to applications of this nature.

In their submissions, counsel for the 2nd defendant maintains that no service of summons to enter appearance was effected upon his client and that this is demonstrated by the fact that all the documents which were served upon the 2nd defendant had the registrar's stamp on them as per exhibit "(K3)". He challenged the plaintiff to avail a copy of the summons to enter appearance that was allegedly served and received by the 2nd defendant.

He maintained that in law, time for filing of memorandum of appearance only starts running after service of summons is effected hence interlocutory judgment was irregularly entered. He pointed out that in any event, the process server does not specify which "documents were received and stamped" by the "gentleman", the 2nd defendant being a statutory body or corporation. He cited the case of **Maina – Vs – Muriuki [1984] KLR 407**, **O'Kubasu J** (as he then was) held that

"The discretion to set aside exparte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed for a party which has deliberately sought to obstruct or delay the cause of justice."

He maintained that his client had no intention of delaying or directly or indirectly obstructing the cause of justice.

He further submitted that the 2nd defendant being a corporate body, the process service must be effected on an officer known or designated to receive service on behalf of the corporation, citing the case of **Kimwele Muneeni – Vs – Carolyne Mango & 2 Others [2005] eKLR**.

He further urged the court to exercise its discretion in favour of the 2nd defendant who was not a party to

a consent referring the dispute to an arbitrator and who had a good defence to the plaintiff's claim as could be ascertained from the draft annexed to the application pointing out that the plaintiff was seeking damages for inducement of breach of contract, against the 1st defendant in another forum and doubted further whether a claim for defamation against a corporate body is sustainable in law. He cited the cases of **Maina – Vs – Muriuki [1984] KLR 40** where it was held that

"Before the exparte judgment can be set aside it must be satisfied that there is a valid defence. There was a valid defence filed in the suit and there was no suggestion that the defence was a sham";

And the case of **Patel – Vs – Cargo Handling Services** where the Court of Appeal considered the meaning of defence in the context of Order 9A Rule 10 and held that;

"In this respect, defence on the merits does not mean in my view a defence that must succeed. It means as Sherridan J put it 'triable issue'"

He maintained that from the attached correspondences exchanged between the parties, the 2nd defendant was interested in pursuing the matter/dispute herein to its logical conclusion and not obstructive or indolent as described by the plaintiff and concluded that no prejudice will be suffered by the plaintiff if interlocutory judgment entered against the 2nd defendant is set aside.

In response and opposition to the notice of motion, the plaintiff's counsel Nyakundi & Co Advocates submitted maintaining that the process server's affidavit of service is clear, that he effected summons to enter appearance together with other documents stated at paragraph 24 of his affidavit of service filed on 21st February 2013. Counsel introduces the name of Engineer Misumi as the person who must have been served with the said summons to enter appearance excusing him of dishonesty and maintaining that the *"secretary"* and the *"gentleman"* found in the office ought to have sworn affidavits to state what transpired on 20th February 2013.

He also castigated the 2nd defendant for failing to summon the process server for cross examination on his sworn affidavit, citing the case of **Amayi, Okumu Kasiaka & 2 Others – Vs – Moses Okware Opari & Another Kisumu Court of Appeal CA No. 15 of 2010** where the court so held that where service is disputed, the applicant ought to have called and cross-examined the process server.

He outlined the facts leading to the entry of interlocutory judgment and referring to the case of **Shah – Vs – Mbogo 1967 EA 116** urged the court not to exercise its discretion to set aside the said judgment as his was not a suitable case for such discretion.

Citing **Maina – Vs – Muriuki HCC 1079/80**, he urged the court to find that there is no valid defence to the claim as **Hon. Odunga J** had held in a Judicial Review matter pitting the same parties hereto that the 2nd defendant was in blatant abuse of power (**JR MISC CA 36/2013 Republic – Vs – Engineers Board of Kenya Exparte Multiscope Consulting Engineers Ltd**). He urged the court to dismiss the 2nd defendant's application with costs.

I have carefully considered the application by the 2nd defendant and the opposing submissions. In my view, the following emerge as key issues to be determined;

i) Whether there was service of summons to enter appearance upon the 2nd defendant.

ii) Whether exparte interlocutory judgement was regular.

iii) Whether the 2nd defendant is entitled to the orders sought and if so, on what premises.

Before delving into each of the above issues, it is worth noting that the application herein is brought under the provisions of Order 17 Rule 3,Order 10 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 5 and as of the Civil Procedure Act and any other enabling provisions of the law.

In answer to issue No. 1 above, on 22nd February 2013, the 2nd defendant wrote to its advocates Mr. P.N. Kerongo addressing them on the subject of a mention notice as follows:

"We have received a mention notice dated 15th February, 2013 from Multi Scope Consulting Engineers Ltd on the above subject.

The purpose of this letter is to request you to represent the Board on this matter. The necessary documents are enclosed for your action as necessary. Note that the mention was on 21st February, 2013.

Yours faithfully,

Eng. Gilbert M. Arasa, OGW

Registrar

Engineers Board of Kenya."

The said letter was received on 25th February 2013 by Kerongo & Co Advocates at 9.43 a.m. On 13th March 2013, the advocate filed a notice of appointment of advocates. The affidavit of Mr. Kerongo advocate annexes documents forwarded by the 2nd defendant's Registrar.

The court record shows that suit was filed on 18th February 2013 and summons to enter appearance signed and issued on 20th February 2013. On 21st February 2013, Dominic Gachuma swore an affidavit of service at paragraphs 2 and 4 as follows

"2. That on 20th day of February, 2013, I received from the firm of M/s Nyakundi & Company Advocates copies of plaint, summons to enter appearance, list of witnesses statements, list of documents, notice of motion application, supporting affidavit together with annextures dated 15th February 2013 and mention notice dated 20th February 2013 all in triplicate with instructions to effect service upon the defendants herein.

4. That on the same day, I further proceeded to Transcom House, 1st Ngong Avenue where the 2nd defendant offices are situated and upon my arrival, I found the secretary whom I introduced myself to and stated the purpose of my visit. She then directed me to a gentleman who received the aforementioned documents by stamping on the front cover of the plaint. Underlined for emphasis.

At paragraph 5 of the said affidavit, the process server deposes that

5. That I now return herewith the aforementioned documents duly served and attached hereto."

The documents attached to the affidavit of service are the plaint, mention notice and no other. Each of the two documents have endorsements with stamp of the 2nd defendant and the 1st defendant for 20th

February 2013. On 21st February 2013, the 1st defendant University of Nairobi filed notice of appointment of advocates through the firm of KTK Advocates and on 13th March 2013, the 2nd defendant's advocates' Kerongo & Co Advocates too filed notice of appointment of advocates.

With the 2nd defendant denying service of summons to enter appearance and indicating that they were only served with notice, plaint and notice of motion, and the process server insisting that he served summons to enter appearance, the question that comes to my mind is, if such summons to enter appearance were served on both defendants, why did the 1st defendant too file notice of appointment of advocates and not memorandum of appearance" Secondly, why is it that no summons to enter appearance was returned and filed in court to show service" Knowing very well that the time for entering appearance only starts to run from the time of service of summons to enter appearance and not plaint or notice of motion"

The court file shows the two original copies of summons to enter appearance retained in the court file addressed to both defendants. There is not even a semblance of filing, together with a plaint, witnesses statements or list of documents, the alleged summons to enter appearance. The plaintiff argues that where service is disputed, the 2nd defendant should have called for cross-examination of the process server.

Order 6 Rule 1 (1) of the Civil Procedure Rules provides that when a suit has been filed, a summons shall issue to the defendant ordering him to appear within the specified time.

Under Rule (3) (a) where the suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation or if the process server is unable to find any of the officers of the corporation mentioned herein, (i) leave it at the registered office of the corporation. From the affidavit of service filed in court, there is no evidence that the process server ever intended or sought to effect service of the summons on the secretary, director or other principal officer of the corporation. There must be good reason why the law was framed as such, to ensure that persons being served are those who understand the type of documents being served and what action would be required upon receipt of such documents. The process server focused on a "gentleman" without indicating the position of that "gentleman" and neither did he seek to know who that "gentleman" was.

In addition, it is highly doubtful that such summons to enter appearance were ever served as alleged. There is no explanation why all the documents served had receipt stamps on them except the summons to enter appearance, which is not even returned and filed back in the court file, yet the process server does not state that the "gentleman" refused to receive on the said "served" summons to enter appearance. I find no reason to suspect that the 2nd defendant "gentleman" deliberately refused to acknowledge on the summons to enter appearance, noting that upon receipt of the documents, they immediately and without any delay, forwarded them to Mr. Kerongo advocate instructing him to take necessary action on their behalf.

Under Rule 13,

"where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons;

Provided that, if the court is satisfied that the defendant or such agent or other persons has refused to so endorse, the court may declare the summons to have been duly served."

From the affidavit of service filed in court, there is no indication by the process server that he rendered summons to enter appearance on the gentleman and required him to acknowledge them by endorsing on the same and he refused. In the absence of such evidence, this court is unable to find that there was, indeed, service of summons to enter appearance on the 2nd defendant to enable them enter an appearance within a specified period of time as required by Order 6 Rule 1 of the Civil Procedure Rules.

Furthermore, Order 6 Rule 15 mandates the serving officer in swearing an affidavit of service, annex to the original summons an affidavit of service stating the time and manner in which the summons were served. No such original summons were returned. In order to expect the defendant to enter an appearance, summons to appear, must be served, as such summons specify the time frame within which an appearance should be entered (See Order 6 rule (1) of the Civil Procedure Rules.)

Under Order 7 Rule 1, a defence can only be filed after the defendant has been served with summons to appear and made such an appearance.

The record shows that interlocutory judgment was entered against the 2nd defendant on 1st August 2013 for non appearance and or filing of defence, based on the process server's affidavit of service, under Order 10 Rule 6 & 10 of the Civil Procedure Rules.

The 2nd defendant has invoked the provisions of Order 10 Rule 11 seeking setting aside of the interlocutory judgment as having been improperly entered as there was no service of summons to enter appearance, on them. Albeit it is true that Order 6 Rule 16 of the Civil Procedure Rules provides that where it is alleged that the service of summons to enter appearance was improper, the court may call the process server for cross examination, in the instant case, and taking into account all circumstances surrounding the alleged service of summons to enter appearance on the 2nd defendant and examining the affidavit of service by the process server, I find that no service of summons to enter appearance was effected upon the 2nd defendant summons to enter appearance. And cross-examination of the process server would be unnecessary as he did not return the original summons to court as required under Rule 15 (1) and even if I was wrong in my finding which is most unlikely, Order 10 Rule 11 of the Civil Procedure Rules gives this court unfettered discretion to set aside interlocutory judgment, on conditions.

This discretionary power of the court to set aside interlocutory judgment was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (1982-88) KAR 1036** where the Court of Appeal in adopting principles set out in the English case of **Evans – Vs – Barltam [193]AC 473] at pg 480**, **Lord Atkin** stated thus:-

"The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning, that the applicant must produce to the court evidence that he has a prima facie defence. The reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

The main principle expoused in the above passage is that the setting aside of an interlocutory judgment entered because of default in answering to a claim is governed essentially by the discretion of the court.

It is not in doubt from the record that there was no intention to have the suit herein determined in court

as shown by the consent between the plaintiff and 1st defendant, on 15th April 2013 leaving out the 2nd defendant, yet the said 1st defendant never entered appearance. Consent Order No. 3 thereof stayed the suit herein pending the hearing and determination of the arbitral proceedings and it was not until 8th May 2013 that another consent was filed, specifying that the stay was only with respect to the suit between the plaintiff and 1st defendant upon which, on12th June 2013 by a request for judgement dated 5th June 2013 the plaintiff sought judgment against the 2nd defendant for failure to file defence in time without indicating whether judgment sought to be entered was interlocutory.

The endorsement on13th June 2013 by the Deputy Registrar is clear that there was no return of service and summons annexed so she declined until a letter dated 24th July 2013 was written by the plaintiff's counsel enclosing a copy of affidavit of service (with no original summons attached) to which the Deputy Registrar again gave directions that there was a consent dated 15th April 2013 staying suit. It was again not until 31st July 2013 when the plaintiff counsel wrote to court on 26th July 2013 insisting for judgment that the Deputy Registrar endorsed that judgment as against the 2nd defendant to be entered. The endorsement for interlocutory judgment dated 1st August 2013 stated that the 2nd defendant *"… having been served with summons to enter appearance …*" yet as I have stated, during the first request for judgment the Deputy Registrar was clear in her mind that the summons were not annexed to the affidavit of service. There is no evidence that the original summons were later filed to satisfy the Deputy Registrar on that aspect of service of summons to enter appearance, upon the 2nd defendant, to enable her enter judgment. On that ground and for that reason, I find that the interlocutory judgment as entered by the Deputy Registrar on 1st August 2013 was irregular, and that settles the second issue.

On whether the 2nd defendant is entitled to set aside the said interlocutory judgment, and if so what should be the conditions to it, as I have stated, the judgment entered was irregular and must be set aside. And had the said judgment been regular, as was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (Supra)**, citing with approval **Evans – Vs – Bartlam (Supra)**, the applicant must produce evidence that he has a prima facie defence before the court's discretion can be invoked and exercised in his favour. Although this court has wide discretion in setting aside exparte interlocutory judgment, in the case of **Patel – Vs – East Africa Cargo Handling Services Ltd (1974) EA. 75**, it was held that a regular judgment will not normally be set aside unless the court is satisfied that there is a defence on its merits. In other words, even if I had found that the judgment as entered against the 2nd defendant on 1st August 2013 was regular, I would, in exercising my discretion to set aside a regular judgment demand that the 2nd defendant satisfies the court that it has a prima facie or arguable defence on its merits.

But a good defence or arguable defence has been held not to mean a defence which must succeed. It merely needs to satisfy the concept of a prima facie defence per **Hon. Ogola J** in **Shailesh Patel t/a Energy Co. of Africa – Vs – Kessels Engineering Works Prt Ltd & 2 Others [2014] eKLR,** where the learned Judge, despite finding that there was regular judgment entered against the defendants and despite finding the proposed defence not to appear to address the issues in the claim, nonetheless allowed the application for setting aside interlocutory judgement while acknowledging the defendant's right under Article 50 of the Constitution to a fair hearing.

Nonetheless, as was held in the case of **Mbogo & Another – Vs – Shah, EALR [1968] P. 13** that a court's discretion to set aside an exparte judgment or order for that matter is intended to avoid injustices or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

In this case, the 2nd defendant has annexed to their application a draft defence to the claim by the plaintiff. The plaintiff contends that there is no valid defence to its claim as was found in **JR Misc Civil**

App No. 36/2013.

With due respect to counsel for the plaintiff, if there was such judgment against the 2nd defendant by Hon. Justice Odunga, then I see no reason why another suit had to be filed against them. The plaintiff should simply have executed decree in that Judicial Review matter, as the Judicial Review division has the jurisdiction to award damages for any loss or damage occasioned by blatant abuse of power. I have perused that decision and the Judicial Review orders of certiorari, mandamus and prohibition sought therein. It arose from a purported review of the proposed structural designs of the proposed University of Nairobi Tower Building and the alleged intention by the 2nd defendant to take disciplinary action against the plaintiff. The observation attributed to **Hon. Justice Odunga** were, in fact made by **Hon. Justice Weldon Korir** on 14th May 2014.

In my view, the draft defence raises triable issues as there is vehement denial to the allegations that the 2nd defendant induced the 1st defendant to breach a contract between the plaintiff and the 1st defendant and or that the 2nd defendant in performing their statutory duty could be sued in damages for defaming the plaintiff which is a limited liability company. Those issues ought or deserve to be resolved in the context of a trial.

This court further employs the principle that a right to a hearing and therefore fair trial as enshrined in Article 50(1) of the Constitution is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under Article 48 of the Constitution. It is the duty of this court, therefore, to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

As it was held in **Richard Ncharpi – Vs – IEBC & 2 Others [2013] eKLR**, the Court of Appeal observed

"Nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."

The 2nd defendant, it is noted, is a statutory body which exists to serve the interests of, not only the individual members of the Engineering profession, but also of the public, which relies on its advise in matters of the nature and subject of the dispute herein, which I find to be weighty and of great significance to the construction industry. There are allegations of the structural design of the proposed University of Nairobi Tower Building being under designed and or overdesigned, among other allegations.

The High Court vide JR 36/2013 did quash the report by the applicant herein on the grounds that the purported review was done in defiance of the rules of natural justice, by not according the respondent an opportunity to be heard and that the Peer Review Panel was biased. That being the case, the decision thereof does not bar the applicant from commencing the review process afresh, taking into account factors and lessons learnt from the quashed process. The Hon. Justice Korir was clear in his judgment that having quashed the report,

"the issuance of orders of prohibition and mandamus as proposed by the applicant will be superfluous."

And he proceeded to dismiss the prayers for orders for orders of prohibition and mandamus.

The upshot of above expositions is that:

i) The interlocutory judgment entered herein against the 2nd defendant in default of filing a memorandum of appearance and or defence and all consequential orders and actions based on the said interlocutory judgment be and are hereby set aside.

ii) There being no evidence of service of the summons to enter appearance upon the 2nd defendant applicant, and the original summons as issued on 20th February 2013 having expired, and applying the tenets of substantive justice in the administration of justice and the provisions of Article 159(2)(d) of the Constitution at the altar of procedural technicalities, in order to meet the ends of justice in an expeditious and economical manner, I hereby validate the said summons and direct that the same shall be issued and served upon the applicant within 7 days from the date of this ruling, to enable the 2nd defendant enter an appearance as required by law and file such defence within the prescribed period.

Costs of this application shall be to the successful litigant in the main suit.

Dated, signed and delivered at Nairobi this 1st Day of December, 2014.

R.E. ABURILI

JUDGE