



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO.11 OF 2015

WILLIAM KIMUNGAT.....PLAINTIFF/RESPONDENT

VERSUS

KENYA POWER &

LIGHTING COMPANY LTD.....DEFENDANT/APPLICANT

RULING.

1. The Plaintiff/Respondent filed this claim for Kshs.4,637,760/= plus costs and interest. The Plaintiff was served on 3rd August, 2015. The Defendant/Applicant was served on 16th June 2015, as per the affidavit of service filed herein on 3rd August, 2015.

2. A request for Judgment dated 1st August, 2015 was filed on 3rd August, 2015. Judgment was entered on 14th August, 2015. A Notice of the Entry of Judgment dated 5th October, 2015 was issued and served on the Defendant/Applicant (ML1).

3. Upon the receipt of the Notice of Entry of Judgment the Defendant/Applicant filed this Notice of Motion dated 5th October, 2015 under **Order 51, Rule 1** and **Order 10 Rule 11** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** for an order to set aside the exparte judgment entered herein and all subsequent proceedings;

(ii) Unconditional leave for the Defendant/Applicant to defend this case in terms of the annexed draft defence.

4. The main ground is that the Defendant/Applicant has been condemned unheard and should be given a chance to be heard.

The Application is supported by the affidavit of Maureen Litunda an advocate in the firm of Sichangi Partners Advocates appearing for the Defendant/Applicant.

5. She explains that on 2nd October, 2015 they learnt of the notice of entry of judgment against the Defendant/Applicant. It was also at this point that they learnt of instructions given to them concerning this case via email. They were however unable to trace the email with the said instructions.

6. She annexed a copy of the draft defence (M12) and asked the court to give the Defendant/Applicant an opportunity to defend the suit.

7. The Plaintiff/Respondent filed the following grounds of opposition dated 9th October, 2015;

(a) that the application is misconceived and bad in law.

(b) that the application is incompetent and embarrassing.

(c) that the application is an abuse of the process of the Court.

(d) that the application is without merit.

8. When the Application came before me for hearing Mr. Okwengu for the Defendant/Applicant submitted on their grounds and relied on the supporting affidavit. He submitted that the Defendant/Applicant upon learning of the entry of judgment acted very fast hence this application.

He also asked the court not to punish the Defendant/Applicant for the mistakes of its Counsel. He relied on the case of **Mbogo & Anor. V Shah 1965 E.A 93** to plead his case.

9. Mr. Ngure for the Plaintiff/Respondent opposed the application relying on his grounds of opposition. He submitted that the Applicant's representative should have sworn an affidavit. The affidavit by the Counsel does not say what happened to the summons to enter appearance. That the issue of instructions has not been proved by any annexures. It was Mr. Ngari's submission that the application was brought after inordinate delay and is meant to delay the cause of justice.

10. I have considered this application, affidavits, grounds of opposition and the submissions by both Counsel.

11. There is no dispute that the Defendant/Applicant was served with the Plaint and Summons to enter appearance on 13th July, 2015. As at the time judgment was entered herein (on 14th August, 2015) the Defendant/Applicant had not entered and/or filed its defence.

12. The excuse about instructions and emails is neither here nor there because the person who allegedly gave the instructions and also sent the email did not swear any affidavit nor was any email annexed to the Application.

Indeed, there was delay in entering and filing defence by the Defendant/Applicant herein.

13. It is also not disputed that the Defendant/Applicant became aware of the judgment on 2nd October, 2015. From what is before Court its not clear when the said Notice of Entry of Judgment was served. What is clear is that Counsel for the Defendant/Applicant became aware of the Judgment on 2nd October, 2015 and came to the Court to find out at the Kericho Court. The present application was then filed on 5th October, 2015 under Certificate of Urgency.

14. The Defendant/Applicant is calling upon this court to exercise its discretion in his favour in this matter. Is it deserving of these Orders"

In the case of **Mbogo & Anor. Vs. Shah supra** the Court of Appeal dealt with the issue of setting aside an exparte judgment. Setting aside an exparte a judgment is a discretion of the Court which must be

exercised judicially.

15. In an application of this nature the Court will consider the following;

- *Delay*

- *If the defence raises any triable issues*

- *If any prejudice will be caused to the Respondent if the application is allowed.*

16. The Defendant/Applicant was served but failed to enter appearance and/or file defence. The entry of the ex parte judgment was on 14th August, 2015. Notice of the said entry of judgment was issued to the Defendant/Applicant who on 2nd October, 2015 notified its Counsel of the same. Counsel acted by proceeding to Kericho Law Courts to peruse the file. They then filed the present application.

17. It is true that there is no affidavit filed by a representative of the Defendant/Applicant. There is also no evidence of the email or instructions by the Defendant/Applicant to its advocates. There is no substantial explanation for the failure to enter appearance and/or file defence. I however take note of the fact that from the time of filing suit to the date of this application is four (4) months. The Defendant/Applicant acted very fast after being informed of the entry of judgment. It filed this application within three (3) days of the said notification. That cannot be said to be inordinate delay.

18. By this action the Defendant/Applicant has actually shown its intention to defend the suit herein. A draft defence has been annexed to this Application. The claim against the Defendant/Applicant is a liquidated sum.

The Plaintiff/Respondent was not heard on it but got an ex parte judgment since there was no appearance nor defence filed.

19. It is also noted that the Defendant/Applicant has now come up within the shortest time and shown an interest in the matter against it. A draft defence has been annexed to the Application. Would the Defendant/Applicant be said to be deliberately seeking to obstruct and delay the cause of justice?"

20. Every party in a case has a right to be heard. That right should not be denied unless there are very good reasons for doing so. I have considered the facts and circumstances of this case and find that the Defendant/Applicant should be given a chance to be heard and the matter determined on merit. This Court therefore exercises its discretion in favour of the Defendant/Applicant and allows the Application dated 5th October, 2015. The ex parte judgment entered on 14th August, 2015 is hereby set aside plus all other consequential orders.

- Any thrown away costs to be borne by the Defendant/Applicant.

- The Defendant/Applicant to file and serve its defence within seven (7) days of this Ruling.

- The claim herein is a matter within the jurisdiction of the Chief Magistrate's Court.

I hereby transfer the same to Kericho Chief Magistrate's Court for hearing and determination.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 21ST DAY OF DECEMBER, 2015.

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H.I.ONG'UDI

JUDGE



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