



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E189 OF 2019

CHARLES OKUMU ODERO.....1ST PLAINTIFF

PEMPHARMA SOLUTIONS LTD.....2ND PLAINTIFF

VERSUS

ISABELLA TEMBLA OKUMU.....DEFENDANT

RULING

BRIEF FACTS

1. This ruling disposes three applications. The plaintiff's application dated 20th November 2019 and the defendant's applications dated 12th September 2019 and 21st June 2019. The applications were canvassed by way of written submissions.

Application dated 20th November 2019

2. The plaintiffs filed the application dated 20th November 2019 seeking the following orders: -

1) Spent

2) THAT pending the hearing and determination of this application there be a stay of execution of this court's judgment purported to have been entered against the plaintiff.

3) THAT this honourable courts interlocutory judgment purportedly entered against the plaintiffs and all other consequential decree or orders emanating from the same be set aside.

4) THAT this honourable court grants the plaintiff leave to file its reply to defense and defense to counterclaim out of time.

5) That upon grant of payer 4 above, the reply to the defence and defence to counterclaim annexed herewith be deemed as duly filed upon payment of requisite court fees.

6) That costs of this application be provided for.

3. The application is supported by the 1st plaintiff's affidavit and is based on the following grounds: -

- 1) *That the respondent has caused to be obtained an irregular judgment allegedly in default of defence to counterclaim in this matter.*
- 2) *The respondent has issued the plaintiff with 10 days' notice of entry of judgment thereby giving notice of execution of the irregularly obtained judgment aforesaid.*
- 3) *On the 13th September 2019, the respondent mischievously, illegally and irregularly requested for judgment in default of defence.*
- 4) *It is trite law that where a counterclaim is inseparable/ indivisible from the claim, judgment in default of defence to counterclaim cannot issue: the defendant's counterclaim is inseparable/ indivisible from the plaint, the judgment entered in default of defence to counterclaim was therefore irregular and illegal. The judgment entered herein should therefore be set aside exdibito justitiae.*
- 5) *It is trite law that where a defendants counterclaim does not raise a liquidated demand/ claim, judgment in default of defence cannot issue without formal proof. The defendant's counterclaim raises not liquidated claim yet in default of defence to counterclaim was entered against the plaintiff.*
- 6) *The plaintiff has a defence to the defendant's counterclaim that raises triable issues: the counterclaim will in any event be adequately addressed by the conclusion of the plaintiff's suit.*
- 7) *The defendant shall suffer no prejudice if the orders sought in the application annexed herewith are granted.*
- 8) *It is in the interest of justice and fairness that the orders sought are granted.*

4. The respondent opposed the application through her replying affidavit dated 3rd December 2019 wherein she states that the plaintiffs took advantage of the interim orders to expropriate property and divert business from the 2nd plaintiff by informing its clients that the company had changed its name to Genelife Africa Limited. She avers that the defendant did not engage in any illegal conduct as alleged by the plaintiffs as her actions were anchored in law. She faults the plaintiffs for failing to file a reply to the defence and counterclaim despite having been served with the letter requesting for the entry of default judgment.

Application dated 12th September 2019

5. The defendant's application dated 12th September 2019 seeks orders that: -

- 1) *Spent.*
- 2) *THAT the honourable court be pleased to vacate its orders issued on 12 July 2019 and 15th July 2019 by Honourable Justice Okwany since the 1st plaintiffs conduct has clearly been prejudicial to the defendant/applicant.*
- 3) *THAT the honourable court issues an order of permanent injunction. against the 1st plaintiff to cease soliciting and diverting business under his new company, Genelife Africa Limited from clients of the 2nd plaintiff.*
- 4) *THAT this honourable court issues an order of permanent injunction against Genelife Africa Limited to cease soliciting business from clients of the 2nd plaintiff and to cease selling Tempharma Solutions Ltd products.*
- 5) *THAT the honourable court orders the 1st plaintiff and Genelife Africa Ltd to account for any proceeds and/or secret profit made from diverting business from the 2nd plaintiffs client and deposit the same to bank accounts operated by the 2nd plaintiff.*
- 6) *THAT the honourable court orders Onestep Medical Center Limited and the 1st plaintiff to account for and return any monies received from the 2nd plaintiff used to support the business and operations of Onestep Medical Center Limited.*

7) **THAT the Honourable Court orders of Rama Homes Ltd to refund any monies received from the 1st plaintiff for purchase of residential property to the 2nd plaintiff and that refunded monies be placed under a bank account belonging to the 2nd plaintiff that is jointly operated by the 1st plaintiff and the defendant/applicant.**

8) **THAT in the event Rama homes Ltd has refunded the monies to the 1st plaintiff, the Honourable court orders the 1st plaintiff to place the monies received into a bank account belonging to the 2nd plaintiff that is jointly operated by the 1st plaintiff and the defendant/applicant.**

9) **THAT the honourable court orders that the signing mandate for the bank accounts operated by the 2nd plaintiff be changed to BOTH to sign.**

10) **THAT costs of this application be provided for.**

6. The application is supported by the defendant's affidavit and is premised on the grounds that; -

a. The orders issued by the Honourable court on 12th July 2019 and on 15th July 2019 were issued ex parte and in the absence of counsel for the defendant/applicant.

b. That on the basis of the orders issued on 12th July 2019 and on 15th July 2019, the 1st Plaintiff has been running the affairs of the company, 2nd plaintiff, in a manner that is prejudicial to the defendant/applicant who is a shareholder and director of the 2nd plaintiff. It is inevitable that if this continues the company, Tempharma Solutions LTD will just be a shell.

c. The prejudicial conduct on part of the 1st plaintiff/respondent involves establishing another company Genelife Africa Ltd. This is a clear breach of the 1st plaintiff's duty as a director of the 2nd plaintiff whereby he is required to avoid conflict of interest especially in situations involving exploitation of opportunities and business accruing to the Company: Tempharma Solutions limited.

d. Genelife Africa Limited, a company solely owned by the 1st plaintiff, has been selling products distributed solely by Tempharma Solutions LTD without any legal authorization from Tempharma Solutions Ltd. This is a clear case of fraud meant to deny Tempharma solutions Ltd business and profits that legally accrue to it.

e. The 1st plaintiff has established a Company called One Step Medical Center Limited and it is feared that he has been funding the operations of the same using monies belonging to the 2nd plaintiff. Such use of funds belonging to the 2nd plaintiff would have been without authorization and clearly meant to stymie the business of the 2nd Plaintiff in a manner that is detrimental to the interests of the defendant/applicant.

f. The 1st plaintiff entered into an agreement with Rama Homes Ltd for the Purchase of residential property using funds belonging to the 2nd Plaintiff where the defendant/applicant is a shareholder. This is a clear case of fraud since the purchase of the property was never authorized by the Company: Tempharma Solutions Ltd.

g. Rama Homes Ltd has issued a warning letter to the 1st Plaintiff of its intention to cancel the agreement on account of failure by the 1st plaintiff to complete his payment obligation. Subsequent to the cancellation, Rama homes will refund the deposit paid less 10% to the 1st plaintiff. This would be unjust enrichment on the part of the 1st plaintiff since the deposit was funded from monies belonging to the 2nd plaintiff.

h. It is in the interest of justice and fairness for the orders to be granted as prayed.

Application dated 21st June 2019

7. Through the 3rd application, the 1st plaintiff seeks orders that; -

1) THAT pending the hearing and determination of this application and suit an order of injunction be issued directed at SBM Bank restraining it from effecting the illegal instructions by the defendant contained in the defendant's hand written letter dated

the 14th June 2019.

2) *THAT pending the hearing and determination of this application and suit an order of permanent injunction be issued directed at the defendant restraining her from further acting in breach of her fiduciary duties as a director and shareholder to the 2nd plaintiff and further from in any other manner interfering with the 2nd plaintiff's operations whether directly or constructively.*

3) *THAT pending the hearing and determination of this application and suit an order of permanent injunction be issued directed at the defendant restraining her from further acting in breach of her fiduciary duties as a director and shareholder to the 2nd plaintiff and further from in any other manner interfering with the 2nd plaintiff's operations whether directly or constructively.*

4) *THAT pending hearing and determination of this application and suit an order of mandatory injunction be issued compelling the defendant to return company property in her possession which includes but is not limited to the motor vehicle registration number KBZ 407C.*

5) *THAT costs of this application be provided for.*

8. The application is supported by the 1st plaintiff's affidavit and is based on the following grounds; -

a. The defendant, after deserting work at the 2nd plaintiff, has illegally and maliciously instructed the 2nd plaintiff's banks, SBM bank and Bank of Africa to stop debits into its accounts and change the signing mandate such that the 2nd plaintiff can no longer operate its business.

b. That the defendant is in breach of her fiduciary duties to the 2nd plaintiff's property integral to its operations which resulted to the 2nd plaintiff coming to a grinding halt.

c. That the defendant is in breach of her fiduciary duties to the 2nd plaintiff and has commenced malicious assault on it in order to halt it, put it to debts and kill it all together.

d. The 2nd plaintiff shall inevitably be plunged into a myriad of litigation and or suits if it shall be caused to breach the various contracts it has with its various creditors including employees if the defendant is not restrained by the orders sought in the application herein.

e. That the defendant out of a sinister motive has decided to breach companies corporate governance principles to further her own selfish interest which is further in breach of her fiduciary duties to the company.

f. If the court does not intervene at once the 2nd plaintiff shall permanently be condemned to close business with no chance of reviving.

g. The 2nd plaintiff has medicine at the port of Mombasa which they can't clear because of the defendant's actions.

h. The 2nd defendant ordered for the aforesaid medicine pursuant to orders made to it by its various customers and which if the court does not intervene in time, it shall default in the supply to its customers and/or creditors.

i. The 2nd plaintiff shall further be unable to meet its obligations of payment of salaries to its employees come end month as it cannot have access to monies in its account courtesy of the defendant's malicious actions.

j. It is in the interest of justice and fairness that the application herein is placed before the judge on priority.

Analysis and Determination

9. I have carefully considered the three applications, the replying affidavits and the submissions made by the parties' respective advocates. The first issue for determination is with regard to the application dated 20th November 2019 on whether the default

judgment should be set aside.

10. The plaintiffs contend that the judgment entered in default of defence to counterclaim is irregular. They further state that since the counterclaim was not for a liquidated sum, judgment could not be entered without a formal proof. In response, the defendant observed that she duly effected service of the statement defence and counterclaim on the plaintiff. She faults the plaintiffs for failing to file their defence to counterclaim as a way of delaying the suit.

11. *Order 10, rule 11* of the Civil Procedure Rules, provides 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.”

12. In *James Kanyũta Nderitu & Another vs Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)*, the Court of Appeal observed that; -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. EA. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173]*.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito iustitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango 0100 v. Attorney General [1986-19891 EA 456]*’.

13. The court went on to say; -

“The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:*

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.

14. In *Mwala -vs- Kenya Bureau of Standards EA LR (2001) 1 EA 148*, the court stated; -

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance

or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular judgment on its record.”

15. In the case of, *Patel vs EA Cargo Handling Services Ltd (1974) EA 75*, the Court held that: -

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

16. The above cited cases affirm the position that Order 10 rule 11 Order empowers the court to set aside or vary a judgment that has been entered under **Order 10 in accordance to terms that are just to the parties having regard to the merit of their cases. The plaintiff’s reason for failing to file a defence to the counterclaim is that the counterclaim was not for a liquidated sum and was inseparable and indivisible from the main claim.**

17. I have perused the statement of defence and counterclaim dated 2nd August 2019 and I note that the prayers sought in the counterclaim are similar to prayers contained in the main suit. It is my finding that the matter should have proceeded for formal proof and that the default judgment is irregular. I am guided by the decision in *Deacons (East Africa) Plc Limited vs Modern Techno Fitness Gym Limited & Another [2021] eKLR* where the court observed that; -

“There is no procedure for requesting for judgment in default of a Reply to a counter claim and Order 10 Rule 3 is certainly inapplicable. I hold that, for a counter claim, unlike a plaint, there is no procedure for requesting for judgment in default of a defence. Where the plaintiff fails to file a defence to counterclaim, the remedy is for the defendant to fix the matter for formal proof and not request for judgment. Way back in 1979 Harris, J in Kahuru Bus Service v. Praful Patel [1979] KLR 213 took the same position and said “Neither Order VI nor Order IXA of the Civil Procedure Rules gives the Court jurisdiction to give judgment on a counterclaim, in default of the filing of a defence to the counterclaim.”

18. I further find that the plaintiff’s application dated 20th November 2019 is merited and that it will be in the interest of justice to set aside the default Judgment.

19. In respect to the application dated 12th September 2019, the main issue for determination is whether the defendant is entitled to the injunctive reliefs sought. The threshold for the granting of interlocutory injunction was set out in *Giella –vs- Cassman Brown & Company Limited (1973) EA 3585* where Spry J. held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

20. A prima facie case was defined in the case of *Mrao Limited –vs- First American Bank of Kenya and 2 Others (2003) KLR 125*, where the Court of Appeal states as follows; -

“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

21. The applicant seeks to vacate the orders issued on 2nd July 2019 (sic) on the basis that the 1st plaintiff has been running the affairs of the 2nd plaintiff in a manner that is prejudicial to the defendant. The applicant contends that the 1st plaintiff registered a company known as **One Step Medical Center Limited** which is being funded by money belonging to the 2nd plaintiff. The defendant further seeks to stop the 1st plaintiff from soliciting and diverting business under his new Company, **the Green Life**

Africa Limited, and for the orders that the 1st plaintiff accounts for any proceeds made by diverting business from the 2nd plaintiff's client and deposits.

22. On his part, the 1st plaintiff admitted having opened another company but claimed that it is distinct in object and interest and does not conflict with the 2nd plaintiff's interest. He observed that the 2nd plaintiff was still operational and that the defendant was hell-bent on frustrating the 2nd plaintiff with an aim of killing it.

23. A perusal of the court record reveals that it is not disputed that the 1st plaintiff and the defendant are both directors of the 2nd plaintiff company where they each hold 50 ordinary shares. The Directors have misunderstandings over the running of the affairs of the Company. The 1st plaintiff faults the defendant for changing the signatures mandate in the 2nd plaintiff's account held at SBM Bank. As a result of the misunderstanding, the 1st plaintiff moved the court with an application for injunction and in a ruling delivered on 12th July 2019 the defendant was restrained from issuing further instructions to the 2nd plaintiff's bank and from further acting in breach of her fiduciary duties as a Director and shareholder of the Company.

24. The defendant now seeks to have the injunctive orders vacated on the basis that the 1st plaintiff has been running the affairs of the 2nd plaintiff in a manner that is prejudicial to the defendant.

25. Under Order 40 Rule 7 of the Civil Procedure rules 2010, any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. To bolster his case, the defendant attached a letter dated 16th July 2019 (annexure "D005") through which the 1st plaintiff informed the 2nd plaintiff's clients of change of names from **Tempharma Solutions Limited** to **Genelife Africa Limited**. Having regard to the contents of the said letter, I am convinced that the actions of the 1st plaintiff are prejudicial to the defendant as it interferes with the running of the 2nd plaintiff. I therefore find that the defendant has established a prima facie case against the 1st plaintiff. I further find that it will be in the interest of justice, to protect the proprietary rights of the defendant pending the hearing and determination of the main suit. In this regard, the application succeeds with respect to prayers 2 and 9 only. It is my view that the rest of the prayers sought in the application can only be considered and granted after hearing the main suit.

26. Turning to the application dated 21st June 2019, I note that the 1st plaintiff seeks injunctive orders to restrain the defendant from acting in breach of her fiduciary duties as a director and shareholder. The 1st Plaintiff also seeks an order of injunction directed to SBM Bank to restrain it from effecting illegal instructions from the defendant. I however note that the Court has already pronounced itself on this matter through the orders of 12th July 2019 when dealing with the application dated 12th September 2019 which should have been a response to the application dated 21st June 2019.

27. In the upshot, I make the following final order: -

- 1) *The default judgment is set aside and the 1st plaintiff is granted leave to file the defence to the counterclaim out of time.*
- 2) *The draft reply to defence attached to the applications to be deemed as duly filed upon payment of the requisite fees.*
- 3) *The orders issued on 12th July 2019 are hereby vacated.*
- 4) *The signing mandate for the bank accounts operated by the 2nd plaintiff to be changed so that both Directors can sign.*
- 5) *Costs of the application shall abide the outcome of the main suit.*

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of August 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ogutu for Defendant.

No appearance for Plaintiff.

Court Assistant: Sylvia



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