



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 267 OF 2013

MIDROC WATER DRILLING CO LTD.....PLAINITFF

VERSUS

CABINET SECRETARY, MINISTRY OF

ENVIRONMENT, WATER & NATURAL RESOURCES.....1ST DEFENDANT

EWASO NGIRO NORTH DEVELOPMENT AUTHORITY.....2ND DEFENDANT

MANAGING DIRECTOR, EWASO NGIRO NORTH

DEVELOPMENT AUTHORITY.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 2nd and 3rd Defendants' Notice of Motion application dated and filed on 26th August 2013 was brought under the provisions of Order 22 Rule 22, Order 10 Rules 10 & 11 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act Cap 21 (laws of Kenya) and all other enabling provisions of the law. Prayers (1) and (2) of the said application are spent. The remaining orders sought were as follows:-

- a. **Spent**
- b. **Spent**
- c. **THAT the Honourable Court be pleased to set aside the *ex parte* judgment entered against the 2nd and 3rd Defendants and the subsequent Decree issued on 21st August 2013.**
- d. **THAT the 2nd and 3rd Defendants be granted leave to file Defence.**
- e. **THAT the draft Defence annexed to the supporting affidavit be deemed as filed and served upon payment of the requisite fees.**
- f. **THAT costs of the application be in the cause.**

AFFIDAVIT EVIDENCE

2. In the grounds in the body of the application and the Supporting Affidavit by Omar M. Sheikh

sworn on behalf of the 2nd and 3rd Defendant herein on 26th August 2013, the Defendants did not deny that service of summons to enter appearance was effected upon them and that they instructed their advocates M/S Rahma Jillo & Co Advocates to act on their behalf.

3. The deponent stated that their advocates entered appearance on 11th July 2013 but that the said advocates were unable to file the Defence on their behalf as some documents and witnesses were not readily available. In addition, he stated that the 2nd Defendant is a parastatal and in view of the fact that they had not been put in funds by the Treasury, they were also unable to fully instruct the said advocates.
4. It was the deponent's further averment that the certificates relied upon by the Plaintiff to obtain the interlocutory judgment herein were fraudulent and that they were subject to investigations by the Criminal Investigation Department. He also said that the judgment obtained herein was irregular as the Plaintiff did not seek leave before obtaining the judgment against the 2nd Defendant in accordance with the provisions of the Government Proceedings Act.
5. He therefore prayed that the said judgment be set aside as the Plaintiff would not suffer any prejudice and that if it suffered any prejudice, the same could be compensated by way of damages.
6. In response thereto, Mohamed Chute swore a Replying Affidavit on behalf of the Plaintiff on 2nd September 2013. He stated that the 2nd Defendant owed the Plaintiff a sum of Kshs 76,149,980.78 together with interest, cost, damages and penalties.
7. It was his contention that once the 2nd and 3rd Defendants' advocates filed a Memorandum of Appearance, they were deemed to have had sufficient instructions to defend the said Defendants. He averred that the 2nd and 3rd Defendants were indolent and that their application herein was not satisfactory, genuine and did not raise any triable or arguable issues. He based his averment on the ground that the 2nd and 3rd Defendants' consulting engineers were the ones who recommended payment and that the said Defendants had in fact given the Plaintiff undertakings to pay the monies. He said that the Plaintiff had suffered and continued to suffer loss which could not be safeguarded by way of damages.
8. He therefore stated that the 2nd and 3rd Defendants could now not raise issues of fraud and that the interlocutory judgment was regular for the reason that the 2nd Defendant was a parastatal which could sue and be sued and that consequently leave was not required as had been alleged by the said Defendants.
9. In a Reply to the Plaintiff's Replying Affidavit also sworn by Omar M. Sheikh on 4th September 2013, the 2nd and 3rd Defendants said that the outstanding amounts had not been paid as the Plaintiff did not complete the works and that the works that had been concluded, were defective. In addition, he averred that the engineer had not issued the Plaintiff with the Final Payment Certificate and that as a result, the Plaintiff was to blame for having failed to meet their contractual obligations. He annexed several payment vouchers to show that the 2nd Defendants had indeed made some payments. He prayed that the judgment be set aside.
10. In yet another Further Replying Affidavit sworn by Mohamed Chute on 6th September 2013, the Plaintiff contended that the 2nd Defendant had no defence to the monies it had claimed and denied any fraud on its part or that it had been summoned to any police station regarding the contract between itself and the 2nd Defendant. The Plaintiff therefore urged the court to dismiss the 2nd and 3rd Defendants' application to set aside the interlocutory judgment entered herein.

ISSUES FOR DETERMINATION

11. The Plaintiff identified the follows as the issues for determination by the court:-
 - a. **Whether the failure of the 2nd and 3rd Defendants to file a defence was due to an inadvertent, excusable mistake or error"**
 - b. **Whether the 2nd and 3rd Defendants had triable issues and in that case a**

meritorious defence"

c. Whether the setting aside of the *ex parte* judgment would cause any prejudice to the Plaintiff"

LEGAL ARGUMENTS

12. In their written submissions dated and filed on 20th September 2013, the 2nd and 3rd Defendants submitted that the court could set aside or vary interlocutory judgment entered under Order 10 Rule 10 of the Civil Procedure Rules, 2010 and any consequential decree and order on such terms as are just.
13. They set out the grounds in the application and the averments in the affidavits they had filed in respect of their application herein explaining why they did not file their Defence and argued that the inadvertence or mistake to file the said defence was excusable. They referred the court to the case of **Ceneast Airlines Limited vs Kenya Shell Ltd [2000] 2EA** which was to the effect that in setting aside the *ex parte* judgment did not mean that the defence must succeed but rather that it raised a *prima facie* defence.
14. They also relied on the cases of **Civil Case No 3399 of 1992 Fredrick Chege Kamenwa vs Aron K. Kandie** where the Court of Appeal held that “...notwithstanding the regularity of an *ex parte* judgment, a court may set aside the same if he has reasonable defence on the merits” and , **Civil Case No 222 of 2010 Winnie Wambui Kibinge & 2 others vs Match Electricals Limited** where the court held that, “... it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”
15. They further argued that their defence had raised triable issues as no judgment could be entered against the government without leave of the court being sought under Order 10 Rule 8 of the said rules. It was their argument the Plaintiff had itself invoked the provisions of the Government Proceedings Act and that the provisions therein could not be applied partially.
16. They submitted that the dispute regarding the certificates by the engineer was also a triable issue. It was also their contention that the matter in court was premature as Clause 67 of FIDIC (*Federation Internationale des Ingenieurs*) Conditions of Contract that governed the Plaintiff and the 2nd Defendant provided for referral of disputes between the parties to the Engineer and that Clause 60 provided for how the payments of the certificates would be made.
17. They asked the court to exercise its discretion by giving them an opportunity to argue their case as a party should only be denied a right to hearing as a last resort. They relied on the cases of **Jackson Biegon vs Charles Too [2005] eKLR** and **Patel vs EA Cargo Handling Services [1974] EA 75** in this regard
18. The Plaintiff filed its written submissions dated 24th September 2013 on the same date. It was its contention that failure by the 2nd and 3rd Defendants to complain about the certificates was a waiver of a right to object regarding the jurisdiction of this court as was stipulated in accordance with Section 5 of the Arbitration Act. It was categorical that the issue of jurisdiction of this court could not be raised in the submissions as the Defendants ought to have filed a preliminary objection. It urged the court to find that the non-payment of the certificates and the claims of fraud on its part were intended to delay the matter herein and that the 2nd and 3rd Defendant's assertions were frivolous and a mere denial.
19. It further submitted that since the 2nd and 3rd Defendants did not dispute service of summons, they did not have a *prima facie* or arguable case. It was its case that the said Defendants did not file their defence on time and consequently there was no competent claim for grant of interim orders of setting aside the *ex parte* judgment and therefore urged the court not to set the same aside.
20. It stated that it would suffer prejudice if the *ex parte* judgment was set aside as it had borrowed

monies and that the merger of ministries could mean that the said monies might never be paid.

LEGAL ANALYSIS

21. The court will not consider the documents that the Plaintiff had been annexed to its written submissions for the reason that they were not attached to an affidavit. It was clearly erroneous for the Plaintiff to have done so as any documents that a party relies upon in opposition to an application, must be introduced by way of affidavit evidence. The court will therefore only have regard to the annexures that were annexed to the affidavits that were filed by both the Plaintiff and the Respondent.
22. This court wishes to point out right at the outset that it does not find the 2nd and 3rd Defendants argument that the application ought to have been allowed as the Plaintiff did not seek leave of the court before judgment was entered against them as mandated by Order 1 Rule 20(l) of Civil Procedure Rules, 2010 correct for the reason that the 2nd Defendant is a body corporate established under Section 3 of the Ewaso Ngiro North River Basin Development Authority Act Cap 448 of the Laws of Kenya. This was a position that was ably and correctly submitted by the Plaintiff's Advocates.
23. The court also observes that the Defendant invoked Order 22 Rule 22 of the Civil Procedure Rules, 2010. This should only be cited in an application where there is already a decree. However, whereas every order, rule or other statutory provision under or by virtue of which an application is made must be ordinarily stated, no such application shall be rejected merely by reason of a failure to comply with the rule. Thus the invoking of the wrong order by the 2nd and 3rd Defendants did not therefore render the application incompetent.
24. The court will therefore consider the other provisions cited in the application. The Defendant sought orders under Order 10 Rule 11 of the Civil Procedure Rules, 2010 which gives power to the court to set aside or vary interlocutory judgment and any consequential decree or order upon such terms as are just. This power to set aside or vary such judgment is not automatic. It is a discretionary power that must be exercised judiciously.
25. Ordinarily, the court would not set aside or vary the interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case which causes it prejudice. In fact this court finds that the 2nd and 3rd Defendants explanation why it did not fully instruct its advocates may have been plausible but it was not a good excuse that would have made this court set aside the *ex parte* judgment herein as it was likely to cause a lot of prejudice to the Plaintiff herein.
26. Be that as it may, where a court has power to exercise a discretionary function, it cannot operate mechanically. It must consider other factors that would ensure that the interests of justice are met. The more important question would therefore be whether this court can set aside or vary the interlocutory judgment on the grounds that the 2nd and 3rd Defendants' Draft Defence raises triable issues and for which they should be allowed to defend the suit herein.
27. It is evident from the parties' submissions that the issue of certificates for payment was a very pertinent and central issue of the dispute between the parties. It has been held time and again that a court should not and cannot re-write a contract between parties. The documents submitted by the Plaintiff refer to FIDIC Conditions of Contract. It is, however, not clear which edition the Plaintiff and the 2nd Defendant adopted and for that reason, the court cannot with certainty point out the whole range of dispute resolution mechanism that bound them.
28. However, what cuts across all the editions of the FIDIC Conditions of Contract is that the dispute between the Employer and the Contractor must be referred to the Engineer when a dispute arises in the first instance. The various editions provide for distinct methods of resolution of the disputes, firstly to the Engineer. If the parties are not satisfied with the decision of the engineer the matter may proceed for determination by way of amicable settlement and if a party is once

again dissatisfied, the matter may be referred to Dispute Adjudication Boards and finally to arbitration as the last dispute resolution mechanism therein. The sequence really depends on the edition of the FIDIC Conditions of Contract.

29. The evidence furnished by the Plaintiff does not indicate whether it referred its dispute with the 2nd Defendant to the Engineer for determination. The issue between the parties is not a legal issue that should be decided by this court but rather by the Engineer in the first instance as parties are bound by the terms of their contract. The dispute is technical in nature as the same deals with issuance of certificates by the Engineer. The court therefore agrees with the 2nd and 3rd Defendants' submissions that the suit herein is premature and it finds paragraph 9 of the Draft Statement of Defence to be a triable issue.
30. Under Section 6 of the Arbitration Act, 1995 the 2nd and 3rd Defendants have been barred from referring the matter to arbitration as they did not apply to stay the proceedings herein as required by the law to enable them go to arbitration. Further, the referral to arbitration under FIDIC Conditions of Contract would also premature at this stage as parties do not appear to have referred the dispute to the Engineer for his decision.
31. This matter cannot also be referred to arbitration under Order 46 of the Civil Procedure Rules, 2010 unless the parties consent to do so. However, the options that this court can take have been expanded by Article 159 (2)(c) of the Constitution of Kenya, 2010 which provides as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

“Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms...”

32. In addition, Order 46 Rule 20 of Civil Procedure Rules, 2010 stipulates as follows:-

“1. Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act.

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution...”

33. Section 3A of the Civil Procedure Act also stipulates that nothing in the said Act shall otherwise limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. In addition, Section 1A of the said Act also mandates this court, while exercising power, to bear in mind the overriding objectives, which is, to facilitate the just, expeditious and affordable resolution of disputes. This is aimed at attaining the efficient disposal of the business of the court.
34. In this regard, this court takes the view that Clause 67 of the FIDIC Conditions of Contract is any other method of dispute resolution that is not excluded by Article 159 (2) (c) of the Constitution of Kenya. The said method of dispute resolution is also envisaged under Section 59 C of the Civil Procedure Act Cap 21 (laws of Kenya) which provides as follows:-

“(1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or the court considers the case suitable for such referral (emphasis mine)

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion order.”

35. It is therefore in the interests of justice that the 2nd and 3rd Defendants be given an opportunity to present their case at the right forum for a just and expeditious determination of the dispute herein in accordance with Sections 1A and 1B of the Civil Procedure Act Cap 21 (laws of Kenya). The court considers the resolution of the dispute through the mechanisms provided in the FIDIC Conditions of Contract as most suitable in the circumstances of this case.
36. For the foregoing reasons, the court finds that the 2nd and 3rd Defendants Notice of Motion application dated and filed on 26th August 2013 is merited and it is hereby allowed in terms of prayer no 3 with costs in the cause.
37. For the avoidance of doubt, the court hereby direct the proceedings herein be stayed and that parties commence settlement of their dispute in accordance with FIDIC Conditions of Contract as calling upon this court to intervene in the dispute between the Plaintiff and the Defendants herein is premature. Parties are at liberty to invoke the jurisdiction on this court only as has been provided by the Arbitration Act or any other relevant law as they clearly opted for a mode of settlement of their disputes in other fora other than the court, by their very execution of the FIDIC conditions of contract.
38. Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th day of December 2013

J. KAMAU

JUDGE



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