THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 0265 – 2014

(Arising out from HCCS 492 of 2012)

VAMBECO ENTERPRISES LTD ::::::::::::::::::::

APPLICANT/PLAINTIFF

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::
RESPONDENT/DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

In this application Vambeco Enterprises Ltd referred to as the Applicant seeks leave to obtain judgment in default of filling a defence against the Attorney General called the Respondent in these proceedings.

The application is more specifically grounded on paragraphs, 4, 5, 9 and 12 of the Applicants Affidavit in Support.

I reproduce them below for ease of reference.

4. The Respondent failed to file its defence although served and a default judgment was entered against the Respondent.

5. That however, the said default judgment and decree was not obtained with the leave of court as required under Rule 6 of the Government Proceedings (Civil Procedure) Rules.

9. The Respondent did not file its Written Statement of Defence as ordered by the Court.

11. The conduct of the Respondent in the matter from the date it was served with summons todate shows glaring disinterest in the matter.

12. The Applicant is entitled to judgment in default of filling a Written Statement of Defence against the Respondent, for which leave is now sought.

The background to this application is best understood from past relationship between the Applicant and the Respondent as parties to a consultancy services contract entered on the 12th December 2008.

In a plaint filed on the 19th October 2012, the Applicant claiming that the Respondent had failed to pay the contracted sum prayed for Ugx. 1,461,789,869= general damages, interest and costs of the suit.
Summons to file a defence were issued on the 19th October 2012.

On the 23rd October 2012 as evidenced by Buyinza Joel of Messrs Kawenje, Othieno & Co. Advocates, and more so the stamp of Ministry of Justice & Constitutional Affairs Directorate of Civil Litigation, the Respondent/Defendant was served with summons to file a defence together with the plaint.

The Respondent did not respond to the summons and so on the 20th November 2012, the Applicant sought judgment in these words;

> *"The statutory period of 15 (fifteen) days within which the Defendant should have filed a defence expired on 13th November 2012 without the same being filed.*
>
> *We accordingly pray that judgment be entered for the liquidated sum in the matter against the Defendant, we may not pursue the claim for damages at the stage"*

The Registrar entered judgment in favour of the Applicant on the 22nd November 2012.

On the 17th December 2012, the Respondent/Defendant attempted to avert the harm that had been occasioned by what it termed "some administrative lapses" within its civil registry and wrote to Counsel for the Applicant/Plaintiff. Ms. Jane Francis Nanvuma Kaddu, wrote;

> *"We were unable to file our defence within the stipulated time allowable by law. This is due to some administrative lapses within our civil registry, we kindly request you to consent to late filing of Written Statement of Defence pursuant to (Order 51 rule 7 of the Civil Procedure Rules) so that we do not waste Court's time in making formal application."*

Judgment had already been entered and Counsel for the Applicant/Plaintiff replied on 18th December, 2012 informing the Defendant of its inability to consent to belated filing of defence.

The Respondent then relaxed and made no effort to set aside the exparte judgment until 21st January 2013, almost a year since judgment was entered, when it filed an application seeking orders that

(a) The default judgment passed on the 22nd November 2012 against the Applicant be set aside.
(b) That the Applicant be allowed to defend the suit.

The ground the Respondent/Defendant relied on was that the staff in the Civil Registry of the Attorney General's chambers inadvertently placed the said file among the voluminous files that were pending payment and so no action was taken.
Also that the plaintiff had applied for and received judgment in default without first seeking leave as provided under Rule 6 of the Civil Procedure (Government Proceedings) Rules.

The application was heard on the 13th November 2013 and it was allowed with costs to the Respondent.

Court ordered that the present Respondent files a defence by 19th November 2013. The Written Statement of Defence was not filed within the stipulated time.

The application now before Court is therefore for leave to obtain judgment under Rule 6 of the Government Proceedings (Civil Procedure) Rules.
But before I delve into whether or not to grant leave, I will say something about the judgment that the Applicant obtained on the 22nd

November 2012. To get the judgment the Applicant wrote to the Registrar seeking the judgment because as he wrote;

> *"The Statutory period of 15 days within which the Defendant should have filed a defence expired on 13th November 2012."*

The Registrar entered judgment on 22nd November 2012.
It is clear that the Applicant and the Registrar were operating under Order VII Rule 1(2) which provides;

> *"Where a Defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the Court, file his or her defence within fifteen days after service of the summons."*

The learned State Attorney must also have acted under the belief that the foregoing was the rule that sets time spans for all Defendants including the Attorney General, when required to file a defence, when she wrote to learned Counsel for the Plaintiffs;

> *"We were unable to file our defence within the stipulated time allowable by law …"*

In my view, both parties did not take into account time for filing a defence in cases involving government as provided in the Government Proceedings (Civil Procedure) Rules.
Rule 11 of these rules provides

> *"In the case of civil proceedings against the Government Rule 1 of Order VIII of the Principal Rules shall have effect*

as if the words "thirty days" were substituted for the words "fifteen days" which occurs in that rule"

This means that instead of a Defendant being required to file a defence within 15 days, it had 30 days within which to do so. In other words, the judgment that was entered by the Registrar on the 22nd November 2012, was prematurely entered.

That judgment was however set aside by the Court on the 13th November 2013 and the Respondent given upto 19th November 2013 to file a defence. The Respondent did not and seems to have made no move to have a defence filed within the ambits of the rules. The Respondent in affidavit in reply stated that failure to file a defence was because Mr. Oluka, the learned Stated Attorney who was tasked to draft and file the defence fell ill and was unable to do it in time.

Mr. Rashid Kibuuka who deponed the affidavit also stated that Mr. Oluka called him and told him that there was a draft defence to be filed and instructed him (deponent) to file it in Court. He further deponed that he also instead directed a records officer to "check for the file and look for the defence to enable us file it in Court."

In paragraph 8 he alluded to a draft defence in these words

"8. That I know by the time the file was located and the draft defence filed in Court on 22nd November 2013, the time had lapsed by four days from the date Court had directed the Respondents to file (A copy of the defence is attached as annexture "A").

At this point I have to say that the annexture referred to was not attached to the affidavit in support. During the hearing learned Counsel for the Applicants submitted that even when the Respondent was given leave to file a defence he did not. That the Respondents' conduct justified the grant of leave to obtain judgment.

In reply learned Counsel of the Respondent submitted that when they failed to file the defence, they filed an application to "validate" the late Written Statement of Defence. Counsel did not however know the number of the application and the copy she had on her file was never filed she said.
She further submitted that the mistake of one should not be visited on the party to the suit and that the sum involved was so colossal that the Respondent deserved a last chance.

I have listened to both learned Counsel it is admitted by the Respondent that it failed to file a defence in the time the Court gave it. That time expired on the 19th November 2013. One would expect that on realizing that a defence had not been filed, the Respondent would have quickly moved Court for some relief. There is nothing to show that the Respondent immediately on realizing its fault made any move in Court to rectify that problem. Surprisingly to date no move has been made in the Court by the Respondent, 9 months down the road.

Its only when the Applicant filed this application seeking leave to obtain judgment in default that the Respondent woke up and filed an Affidavit in reply.

In Paragraph 9 of the Affidavit in Reply Rashid Kibuuka of the Respondent deposed.

> *"That the Respondent went ahead and filed an application to validate the Written Statement of Defence in December 2013 in the Commercial Court and the same was never given a date for hearing."*

Interestingly when Counsel for the Respondent was asked for the reference of the application, she said she did not know the number.
The affidavit in reply did not show that attempts had been made to fix this numberless application, nor was a copy of the same attached to the affidavit in reply. There was therefore no proof that since 19th November 2013 when the Respondent failed to file a defence, any attempt had been made thereafter.

In my view the application for "validation" as Counsel for Respondent called it, was never filed or she would have known its reference. In my view the Respondent has acted in a dilatory manner. All the signs of a half hearted Defendant are apparent.
Counsel for the Respondent also submitted that the failure of Counsel to file a defence should not be visited on the Respondent.

I do agree with her that that should be the case, and was the case when this Court set aside the default judgment and gave the Respondent time within which to file a defence. The Respondent did not take advantage of that order. He cannot now come up with the same reason.

Counsel also submitted that the Respondent be given a change to file a defence because the amount at stake was colossal.

My view is that, the amount on its own would have been the reason for vigilance on the part of the Respondent.
The pace at which the Defendant has moved points in a different direction. The half heartedness is also seen in the type of Written Statement of Defence the Respondent intended to file.

One of the things Court takes into consideration before it grants such relief setting aside judgments or extention of time within which to file defences is whether there are good chances of success if the matter is heard on its merits. When such a question arises Court resorts to the Written Statement of Defence to see what type of defence the Defendant intends to rely upon.

For the defence to be helpful, it must be in the form prescribed by Order 8 of the Civil Procedure Rules. The denial must not be evasive but specific.
Order 8 rule 3 provides;

> *"Every allegation of fact in a plaint, if not denied specifically or by necessary implication, is stated to be not admitted in the pleadings of the opposite party, shall be taken to be admitted except as against a person under disability ..."*

The strict application of the foregoing provision received illustration from the persuasive Indian decision in **Uttam Chand Kothari V Gauri Shankar Jalan** (2007) as which **Asari J** observed

> *"From a careful reading of Order 8 r 3, 4 and 5 (rule 3 being similar to our Order 8 r 3) it clearly emerges that when an allegation of fact, made on the plaint, is not denied, in a Written Statement of Defence, specifically or by necessary implication, or is not stated to have been not admitted, such a pleading will constitute an implied admission. In short evasive denial or non specific denial constitutes an implied admission in a judicial proceeding of a civil nature, Mulla,* ***The Code of Civil Procedure 18th Edition Volume 2 Page 1904"***

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What this means is that the Written Statement of Defence, must deal specifically with each allegation of fact in the plaint and when a Defendant denies any fact, he must not do so evasively but answer the point of substance, **Mulla supra**. A general denial of the grounds alleged by the Plaintiff is not helpful in assessing whether the Defendant has a good chance of success or not.

Odgers Principles on Pleadings and Practice 22nd Edition Page 136 on the point in question writes;

> *"Its not sufficient for a Defendant in his defence to deny generally the allegations in the statement of claim or for a Plaintiff in his reply to deny generally the allegation in a counterclaim but each party must traverse specifically each allegation of fact which he does not intend to admit."*

In the Applicant's plaint, specific claims were made in paragraph 5. I reproduce them hereunder

"The Plaintiff shall further aver and contend that the Defendant breached the suit contract when it ignored, neglected or failed to pay the monies due and owing as per the contract for which the Plaintiff shall seek recompense in special damages

Particulars of claim

i. Failing to pay the contractual sum as and when agreed by both parties.

ii. Neglecting or ignoring to respond to the demands of the Plaintiff for the payment of the said outstanding balance

Particulars of Special damages

i. Claim for idle time and equipment on site from 26th July 2010 to 17th November 2011 – Ugx. 1,037,343,000=

ii. Claim for Bank interest and penalty for certificate No. 6 approved on 28th April 2010 and paid on 2nd March 2011 – Ugx. 135,699,183=

iii. Claim for Bank interest and penalty for Certificate No. 8 approved on 27th September 2010 and part payment made on 4th July 2011 – Ugx. 132,140,526=

iv. Balance payment due on Certificate No. 8 – Ugx. 140,290,545

Total Ugx. 1,461,789,860=

By way of comment on the sum, it would seem the total exceeds the actual sum of money by Ugx. 16,316,606=.

The Respondent/Defendant after admitting the existence of the contract denied in paragraph 3(b) and (d) of the Written Statement of Defence and wrote;

> "3(b) That the Defendant denies liability out of the alleged breach of contract and shall be put to strict proof
>
> And
>
> "3(d) The Defendant shall further contend that the Plaintiff is not entitled to the special damages being claimed in the plaint.

The denial in my view is evasive and the Respondent/Defendant does not specifically deal with allegations of fact by taking each fact as alleged separately and say that denies liability. The Written Statement of Defence is wrought with evasiveness and does not answer to the point. In a claim such as the one in paragraph 5 of the plaint, it was not sufficient for the Defendant to simply say *"the Defendant shall further contend that the Plaintiff is not entitled to the special damages being claimed in the plaint ..."* The Respondent was expected to take each of the claim in 5i, ii, iii, iv and v and deny that he owed the sum or any part thereof or atleast set out how much was paid, if any.

In my view the written defence that the Respondent intends to have admitted on the file exhibits a vague routine denial. Such a Written

Statement of Defence does not help in establishing whether the Respondent in this case has a good defence as averred.

From the proceedings therefore it is seen that the Respondent having been served with Court process did not bother to file a Written Statement of Defence. It is also obvious on the record that even when a chance was given to file the Defence, the Respondent did not take that advantage to file a defence within the time that was given.

This inactivity of the Respondent was not for a short time because it spans from 19th November 2013 and todate no such application by the Respondent is on record in an attempt to rectify the situation.

One can say without fear of contradiction that the Respondent has acted in a most disinterested manner in respect of the Defence of this case. Since even the defence filed does not exhibit seriousness of combating the allegations leveled against him by the Applicant/Plaintiff, this court finds it inappropriate to give the Respondent more time to defend the suit. In any case, there is no application that the court would base on to grant such relief. In the circumstances, I find this a fit and proper case where in the Applicant/Plaintiff shall and is hereby granted leave to obtain judgment in default of filing a defence against the Respondent.
The Respondent shall bear the costs of the suit and the Application hereof.

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David K. Wangutusi
JUDGE

Date: ……

10/09/14

9:20am

- Plaintiff unrepresented
- Ms. Harriet Nalukwago of A.H General present
- Juliet Kamuntu – Court Clerk

Court: Ruling delivered as required by Hon. Justice David Wangutusi

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ASST. REGISTRAR

Date: 10/09/2014