Prime Bank Ltd v Matex Hospital Supplies Ltd & 3 others (Civil Case 192 of 2019) [2024] KEHC 9189 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 192 OF 2019

A MABEYA, J

JULY 31, 2024

BETWEEN

PRIME BANK LTD .... PLAINTIFF

AND

MATEX HOSPITAL SUPPLIES LTD .... 1ST DEFENDANT

MARY SYOMBUA NDETO .... 2ND DEFENDANT

ELIJAH YASH MUEMA .... 3RD DEFENDANT

JOHN DANSON NDUNGU .... 4TH DEFENDANT

RULING

1. Before Court is an application dated 2/11/2023 brought under Order 10 rule 11, order 12 rule 7, order 22 rule 22, order 51 of the *Civil Procedure Rules 2010* and sections 1A, 1B&3A of the *Civil Procedure Act* cap 21 Laws of Kenya.
2. The application sought orders for stay of committal to civil jail or execution against the 2nd defendant. That the interlocutory judgment and decree entered on 23/10/2019 against the 2nd defendant be set aside and that leave be granted to her to file her defence.
3. The application was supported by the grounds set out on the face of it and the supporting affidavit of Mary Syombua Ndeto sworn on 2/11/2023. It was the applicants position that on 23/10/2019 a decree was issued by the Court against her for a sum of Kshs. 211, 248,361/-. That she was summoned to Court and was committed to civil jail for the debt owed to the plaintiff for an alleged guarantee for the decretal amount.

4. She stated that no notice had been given to her of either the said judgment and nor the proceedings leading up to the execution of the warrants of arrest. She contended that she was denied a right to be heard since she had not instructed the advocate on record M/s C M Ngugi Rebiro & Company Advocates. She further stated that the guarantee she gave was for Kshs. 54,000,000/- and the same was secured with 3 properties given to the plaintiff as security. That the sum of Kshs. 211,248,361.79 was more than 3 times what she had guaranteed and was in breach of section 44 of the *banking Act*.

5. The respondent opposed the application vide a replying affidavit by its Senior Manager Legal George W Mathui sworn on 20/11/2023. He stated that the applicant had informed him that she had instructed the firm of M/s C M Ngugi Rebiro & Company Advocates to act for all the defendants in the instant suit. That the said law firm confirmed via an email correspondence dated 9/7/2019 that it had instructions to act for all the defendants save for service of summons.

6. It was averred that the defendants entered appearance but failed to file a defence and therefore, judgment in default was entered. That the said law firm remained on record for the defendants and all the notices was served upon it. That the principal sum guaranteed was Kshs. 72,000,000/- exclusive of interest.

7. That however, the decretal sum of Kshs 211,248,361.79 was inclusive of interest. That the two properties provided as security were sold for Kshs. 13,720,000/- and Kshs. 12,010,000/-, respectively. The respondent contended that the defendants did not have a tenable defence as she had expressly admitted to owing the plaintiff.

8. The application was canvassed by way of written submissions. The applicant did not file any submissions by the time of writing this ruling. The respondent submitted that the defendants had admitted their indebtedness to the plaintiff and the applicant being a director of the plaintiff signed the said letters. That the defence did not raise any triable issue and had failed to explain the delay since September, 2019.

9. I have considered the rival contestations and the submissions on record. Before me is an application to set aside a judgment in default. Order 10 rule 11 of the *Civil Procedure Rules 2010* gives the court discretion to set aside an interlocutory judgment. It provides that: -

   > "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."

10. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede* (1982-1988) KAR, the Court of Appeal held that: -

    > "The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Conmell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

11. Further, in *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 count

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."

12. The reasons advanced by the applicants was that there was no proper service of process upon the applicant. That she was not aware of the suit. That she was only summoned to court and upon attendance, she was committed to civil jail. The respondent's rejoinder was that, the applicant was served through the firm of C M Ngugi Rebiro & Co advocates who was the advocate on record and who had never ceased appearing for the defendants.

13. The record shows that the summons were served upon the advocate who entered appearance but failed to file a defence. As a result, judgment in default was entered against the defendants on 23/10/2019. The present application was made on 2/11/2023. It is not clear why the defendants' advocate on record did not inform the applicant about the proceedings.

14. While the long delay has not been explained, it is not clear how the whooping sum of Kshs 211,248,361.79 was arrived at particularly having in mind that two securities had already been realized. The applicant has intimated that only Kshs. 70,000,000/- was guaranteed. If that be the case, the claim for Kshs. 211,248,361.79 is untenable. It will be in breach of the in duplum rule. Even if interest is to be levied, the law is that the amount recoverable cannot be in excess of twice the amount lent. On that ground alone, I will grant the applicant an opportunity to challenge the plaintiff's claim.

15. The applicant had already spent time in civil jail and it would be in the interest of justice to allow her to defend the suit and have the court interrogate the issues on merit. Any prejudice that occasioned to the respondent herein for the delay in conclusion of its case can be compensated by way of costs.

16. In this regard, the application is allowed and the judgment in default entered on 23/10/2019 against the 2nd defendant and the consequent decree are hereby set aside. The 2nd defendant is to file her defence within 14 days from the date of this ruling. The 2nd defendant shall bear the costs of the application.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024

A. MABEYA, FCIArb

JUDGE