



**KCB Bank Kenya Limited v Northern Construction Company
Limited & 3 others (Commercial Civil Suit E302 of 2023)
[2024] KEHC 14790 (KLR) (Commercial and Tax) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14790 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E302 OF 2023**

**A MABEYA, J
NOVEMBER 27, 2024**

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

NORTHERN CONSTRUCTION COMPANY LIMITED 1ST DEFENDANT

HIMA PRODUCTS ENTERPRISES LIMITED 2ND DEFENDANT

MOHAMED KORIOW NUR 3RD DEFENDANT

AISHA ABDULAH I 4TH DEFENDANT

RULING

1. Before Court is the application dated 22/1/2024 which was brought under order 22 rule 52, order 10 rule 11 and Order 51 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 34 of the *Civil Procedure Act* Cap 21 Article 159 of *the Constitution* of Kenya 2010. The application sought to set aside the ex-parte judgment and consequential orders issued by this Court with further orders granting the 1st 2nd and 3rd defendants leave to defend the suit.
2. The application was based on the grounds set out in the body of the Motion and in the affidavit of MOHAMED KURIOW NUR sworn on 22/1/2024. The deponent is the director of the 1st and 2nd defendants. The defendant admits being served with summons to enter appearance on 17/10/2023. That the defendants resorted to source for an advocate and this took time.
3. The defendants urge that they intended to respond to the suit and are still willing to respond to the matter within such reasonable period that the Court may allow. That they face threat of execution and stand to suffer irreparable damage if orders sought in the application are not granted.



4. That hearing or mention notices has never been served on them and the plaintiff failed to serve notices to circumvent due process and fair administrative justice. That defendants stand to be condemned unheard. That the ex-parte judgment was irregular and ought to be set aside ex-debito justitiae having been issued in breach of the principles of natural justice.
5. The application is contested through the affidavit of FRANCIS KIRANGA sworn on 27/2/2024 and the grounds of opposition of even date. The plaintiff contends that the default judgment was regularly entered pursuant to order 10 rule 4 of the Civil Procedure Rules.
6. That the defendants entered appearance and the failure to file defence is not explained. That no draft defence has been annexed. That the defendants were represented in court during case management on 27/11/2023. That if the Court was minded to grant the orders sought, it should direct that the defendants do deposit in a joint interest earning account the entire sum claimed.
7. Parties filed their respective submissions which I have considered. The defendants urged the Court to exercise its discretion to avoid hardship or injustice resulting to the defendants from mistake. That the defendants had explained reasons for failure to file defence. That there was justification for unseen events that led to the ex-parte judgment. Several cases including James Kanyiita vs. Marlos Philotas Ghikas 2016 eklr were cited in support of the submissions.
8. On its part, the plaintiff submits that there was delay in bringing the application and that the reason for delay is not supported by evidence. It is inexcusable and the application is meant to obstruct justice. Further, that there is no requirement for the plaintiff to serve mention notices on the defendants. The plaintiff relies on the cases of Patel Cargo vs East Africa Cargo Handling Services Ltd (1974) E.A, Philip Chemwolo vs. Augustine Kubende [1986] KLR 472 and James Kanyiita vs. Marlos Philotas Ghikas 2016 eklr. That the defendants must demonstrate that they have an arguable defence. Finally, that the Court cannot set aside a regular judgment.
9. The application together with the grounds of opposition and submissions of parties have been duly considered. The issues for determination are two-fold, to wit, whether the default judgment was properly entered and whether the defendants have made a case for its setting aside.
10. The provisions of Order 10 of the Civil Procedure Rules set specific steps to be taken by parties after summons to enter appearance has been served. The defendant is required to enter appearance and file defence within 14 days from the date of his appearance.
11. In the absence of a defence where summons have been properly served, entry of an interlocutory judgment is as a matter of course. These provisions apply in mandatory terms. Parties are bound by the rules of procedure which are the hand maiden justice.
12. Where a claim is for a liquidated sum only, judgment is entered and there is no requirement to serve notices. However, where matter proceeds for formal proof, the defendant is entitled to service of hearing notice to protect its right to fair trial. See Inland Beach Enterprises Ltd vs. Sammy Chege & 15 Others (2012) eklr.
13. In the present case, the plaintiff's claim was based on a demand for liquidated amount as itemized in the plaint and annexed documents. The amount accrued after the defendants allegedly neglected to settle credit facilities taken out with the plaintiff. The defendants do not dispute service of summons and that they failed to file defence within 14 days. In this regard, the plaintiff was entitled to file requests for judgment against each defendant and to obtain interlocutory judgment.



14. The distinction between regular and irregular judgment was addressed in the case of Fidelity Commercial Bank Ltd vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR) where Njagi J (he then was) held that: -

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right.”

15. Later, in James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR, the Court of Appeal held: -

“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. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

16. The defendant filed the present application after 57 days from the entry of judgment. No reasons were advanced for failure to file the defence. The reasons for delay in bringing the application was alleged to be the indisposition of the director. That indisposition was never demonstrated by way of evidence. In this regard, the judgment was a regular judgment.

17. This being a regular judgment, it was mandatory for the defendants to attach a draft defence or at the very least, demonstrate that they have a valid defence. In the view of this Court, this omission is fatal to the defendants' application.

18. The failure and hardship to instruct an advocate is not a ground to set aside default judgment. In this case, the defendants had enough opportunity to put their house in order but failed to do so.

19. Section 1A and 1B of the Civil procedure Act also forms part of the overriding objectives and call upon parties to civil disputes to act expeditiously and abide by the rules.

20. In Karuturu Networks Ltd & Another vs Dally Figgis Advocates, Nairobi Court of Appeal CA NO. 293/2009, the court held that: -

“The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made thereunder, the



court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals”.

21. In view of the foregoing, there is no material that has been presented to Court to enable the Court exercise its discretion in favour of the defendants. The application therefore lacks merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

