KCB Bank Kenya Limited v Signature Tours and Travel Limited & 2 others (Commercial Case E413 of 2018) [2023] KEHC 2743 (KLR) (Commercial and Tax) (29 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E413 OF 2018

DAS MAJANJA, J

MARCH 29, 2023

BETWEEN

KCB BANK KENYA LIMITED .... PLAINTIFF

AND

SIGNATURE TOURS AND TRAVEL LIMITED .... 1ST DEFENDANT

KOOME MUNENE .... 2ND DEFENDANT

ALFETTA WARUIRU MUNGAI .... 3RD DEFENDANT

RULING

1. The Defendants have moved the court under the Order 12 rule 7 of the *Civil Procedure Rules* seeking an order that the, "*exparte* judgment entered against the defendants be set aside and or varies and reviewed and the defendants be allowed to defence the suit on merit". The application is supported by the deposition of the 2nd defendant sworn on November 3, 2022. The Plaintiff ("the Bank") opposes it through the affidavit of its Head Counsel, Civil Litigation, sworn on November 25, 2022. At the hearing, counsel made brief oral submissions in support of their respective positions along the lines set out in the parties' depositions.

2. The defendants' case is that it engaged the firm for JAB Orengo and Company Advocates ("the Advocates") to defend them in this suit. That the Advocates filed the defence and witness statement in accordance with their instructions. Thereafter their Advocates previously on record did not communicate to them regarding any hearing dates, mentions or anything regarding the suit. That they were never called to defend the case and only learnt about the case and the judgment from one of the Bank's officers.

3. The 3rd defendant depones that since he learnt about the judgment, he has not met the Advocates to find out what transpired in the matter and the circumstances under which the judgment was entered. He states that he is aware that, "JAB Orengo & Co Advocates went for campaigns and was elected as Governor of Siaya County and that may explain why he was not actively in the office". That had the defendants been notified of the hearing, they could have attended court and adduced evidence.

4. The defendants urge that they have a good defence to the suit which raises serious triable issues which should be heard. They therefore urge the court to set aside the judgment as the bank will not suffer any prejudice save for costs incurred in prosecuting the suit.

5. The bank opposes the application. It states that according to the record, once the defendants filed their pleadings, they abnegated their responsibility to attend court proceedings as they never attended any mention or hearing date despite being served with the requisite notices. The bank rejects the defendants' justification for failure to attend to their case as it was their responsibility to follow up their case. That the fact that their advocate was engaged in political campaigns or elections is not an excuse particularly since it is a matter of public knowledge that elections took place in August 2022 and the same cannot justify non-attendance by the advocates since 2019. The bank urges that the court should not condone the application as the court's business should be conducted efficiently.

6. It is common ground that this suit was heard in the absence of the defendants and or their Advocates. The defendants therefore invoke Order 12 rule 7 of the Rules which empowers the court to set aside or vary judgment entered in the absence of a party at the hearing on such terms as are just. Our courts have stated that the jurisdiction to set aside judgment is unfettered and is intended to be exercised to do justice and to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice (see for example *Patel v E A Cargo Handling Services* [1974] EA 75, *Shah v Mbogo* [1967] EA 116 and *Pithon Waweru Maina v Thuku Mugiria* [1982-88] 1 KAR 71).

7. It is not in dispute and the record supports the position that apart from filing the statement of defence and witness statements, neither the defendants nor their advocates participated in the proceedings until the application under consideration was filed. Likewise, the defendants do not controvert the fact that the advocates were duly served with process at each stage of the proceedings.

8. The defendants seem to suggest that their failure to attend court is because the advocates failed to inform them of the progress in the suit including informing them of the hearing dates. I would accept this reason if it was well founded. Indeed, the courts have exercised discretion in cases where failure to attend court was the result of a mistake, accident or inadvertence on the part of the advocates. In *Philip Chemwolo and Another v Augustine Kubede* [1982-88] KAR 1039, 1040, Apaloo JA, observed that, "Blunders will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose deciding the rights of the parties and not for the purpose of imposing discipline."

9. But this is not a case where the advocates simply failed to attend court on the date of the hearing, they simply failed to attend court proceedings since pleadings closed. Likewise, the defendants failed to attend to their matter despite having instructed an advocate. There is no indication either through correspondence of any kind that they sought out the Advocates to find out what happened to their matter or inquired about the progress of the suit from the court. They only realised that their suit had been determined once they were notified of the judgment. The only conclusion I can draw from the defendants' conduct is that they were never keen to pursue their defence in the matter. In *Savings and*

Loans Limited v Susan Wanjiru Muritu NRB ML HCCS No 397 of 2002 (UR), Kimaru J, explained that a litigant's duty to prosecute its suit as follows:

> Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. [emphasis added]

10. The duty of a party to assist in and participate in court processes is anchored in statute. Section 1A(b) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which provides that, "A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court." The overriding objective under the *Civil Procedure Act*, requires the court to conduct proceedings justly, expeditiously and efficiently. It is consistent with the duty of the court under Article 159 of the *Constitution* to administer justice, inter alia, without delay and without regard to undue technicalities. Long before the *Constitution* was promulgated, Trevelyan J, spoke about expeditious disposal of cases in *Sheikh v Gupta and Others* [1969] EA 140 as follows, "Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition."

11. There is no evidence to show that the defendants took any active steps to defend the suit even when their Advocates failed to inform them over a period of three years the position in the suit. They do not deserve the court's discretion. They all along had the opportunity to present their defence but they failed to take advantage of it. They cannot now complain that they have been denied the right to a fair hearing.

12. The application dated November 3, 2022 is dismissed with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Mbabu instructed by Mwaniki Gachoka and Company Advocates for the Plaintiff.

Mr Omwenga instructed by Jackson Omwenga and Company Advocates for the Defendants.