Stanbic Bank Kenya Ltd v Kipsigis Stores Limited & 2 others (Civil Case 3B of 2017) [2023] KEHC 4159 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 4159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL CASE 3B OF 2017

RL KORIR, J

APRIL 27, 2023

BETWEEN

STANBIC BANK KENYA LTD ..... PLAINTIFF

AND

KIPSIGIS STORES LIMITED ..... 1ST DEFENDANT

ALFRED KIPKORIR MUTAI ..... 2ND DEFENDANT

SAMWEL CHERUIYOT MUTAI ..... 3RD DEFENDANT

RULING

1. Through a Plaint dated 19th July 2017, the Respondent herein (Stanbic Bank Kenya Ltd) prayed that a Judgment be entered against the Applicants herein (Alfred Kipkorir Mutai and Samwel Cheruiyot Mutai) jointly and severally for:-

    a. The outstanding sum of KES 69,444,104.56 being the loan amount due and outstanding as at 14th July 2017 together with the interest accruals thereof until the date of payment in full.

    b. A declaration to the effect that pursuant to the provisions of the thereof, the Plaintiff is entitled to repossession of the various assets being Trailers ZE 6541, ZE 6542, ZE 6543, ZE 6544 and ZE 6545, Prime Mover Registration No. KBY 900Y, KBY 400Z, KBY 500Z, KBY 900B and KBY 600B and Nissan Navara Pick up Registration No. KBY 800J to be sold and the proceeds applied towards liquidation of the outstanding amounts and or part thereof as the case may be.

    c. An order compelling the Defendants jointly and severally to deliver to the Plaintiff within such period as may be directed by court the various assets being Trailers ZE 6541, ZE 6542, ZE 6543, ZE 6544 and ZE 6545, Prime Mover Registration No. KBY 900Y, KBY 400Z, KBY 500Z, KBY 900B and KBY 600B and Nissan Navara Pick up Registration No. KBY 800T.

    d. Costs of the suit.

e. Interest on (a) above at contractual rates.

2. Stanbic Bank Kenya Limited (Respondent) made a request for Interlocutory Judgment dated 5th July 2018 stating that the Defendants had failed to enter appearance and file their defences despite being served with the Summons to Enter Appearance and the Plaint. Interlocutory Judgment was entered on 6th July 2018.

3. The 2nd and 3rd Defendants (now Applicants) thereafter filed a Notice of Motion dated 10th December 2018 where they sought the following Orders:-

   I. Spent.

   II. That the Honourable Court be pleased to grant a stay of execution of the Judgment entered against the 2nd and 3rd Defendants on 6th July 2018 and all subsequent orders against made thereto pending the interparties hearing and/or the determination of this application.

   III. Spent.

   IV. That the Honourable Court be pleased to set aside the default Judgment entered against the 2nd and 3rd Defendants on 6th July 2018 together with all subsequent proceedings and Orders made thereto.

   V. That the 2nd and 3rd Defendants be granted leave to file their Defence out of time.

4. The Application was based on Sections 1A, 1B, 3A, 63(e), 75(1) and 95 of the *Civil Procedure Act*, Order 10 Rule 10 and 11, Order 43 Rules 1(2) & (3), Order 50 Rule 6, Order 51 Rule 1, Order 22 Rule 22 of the *Civil Procedure Rules* and Article 159 (2) (d) of the *Constitution*. It was supported by the grounds on the face of the Application and further by the Supporting Affidavit sworn by the second Defendant Alfred Kipkorir Mutai.

The Applicants' Case.

5. The Applicants stated that they were served with the Plaintiff's Notice of Motion Application dated 19th July 2017 and they instructed the firm of Amutullah Robert & Co. Advocates to defend the suit and oppose the Application. That the said law firm filed a Replying Affidavit on 21st September 2018.

6. It was the Applicants' case that this court issued a Ruling on 7th June 2018 in respect to the Notices to Show Cause. That they were aggrieved by the said Ruling and filed a Notice of Appeal. It was their further case that while their advocate, Mr. Kurgat was collecting a copy of the proceedings from the court on 30th November 2018, he discovered that an ex-parte Judgment in default of Defence had been entered on 6th July 2018.

7. The Applicants contended that they had never been served with Summons, the Plaint or even a Notice of Entry of Judgment and thus they were not aware of the existence of the Judgment. That they were advised by their advocate that Summons had been served upon their former advocates who neither entered appearance nor filed a Defence.

8. It was the Applicants' case that the Interlocutory Judgment should not have been entered against them because prayers b, c and d of the Plaint sought a declaratory relief, a mandatory order and costs of the suit. That there was no claim for a liquidated demand or for pecuniary damages. It was their further case that the request for Judgment was defective, illegal, null and void and the Interlocutory Judgment ought to be set aside.

9. The Applicants stated that they visited their former advocates to inquire why they had failed to enter an appearance or file a defence on their behalf. That upon being dissatisfied with their explanation, they instructed the firm of Kipngeno & Associates Advocates to take over the conduct of the matter. The Applicants further stated that they had been locked out of the proceedings through the mistake of their advocate and that a litigant should not suffer for the mistake of his advocate.

10. It was the Applicants' case that it was the cardinal principal of natural justice that no one should be condemned unheard and that this court had discretion to issue the orders. That they had a meritorious defence to the claim and that it would be just if they were allowed to prosecute the same. It was their further case that no prejudice would be suffered by the Plaintiff.

The Response.

11. The Plaintiff/Respondent filed a Replying Affidavit dated 26th February 2019 that was sworn by Hamilton Suba. The Respondent stated that the Applicants were guilty of latches as it was served with the Application on 21st February 2019 despite it being filed on 10th December 2018. That the Applicants did not deserve any discretionary orders as they had failed to comply with the orders of this court issued on 7th June 2018. The Respondent further stated that the Applicants were in contempt and that they ought to purge the contempt before any remedy was sought. That they should surrender the motor vehicles before being heard.

12. It was the Respondent's case that it was able to trace and serve the 3rd Applicant (Samwel Cheruiyot Mutai) with the Pleadings. That having failed to trace the 1st and 2nd Applicants, it applied for leave to effect service through substituted service and when the leave was granted, it placed the advertisement in the newspaper. It was the Respondent's further case that at the time of the advertisement, Summons had not been issued but when they were issued, the same was served upon the Applicant's advocates on record.

13. The Respondent stated that the Summons were issued on 25th September 2017 and no action had been taken for over a year necessitating the request for Interlocutory Judgment. That the Applicants were served with the hearing notice for formal proof but failed to take any steps to set aside the Judgment.

14. It was the Respondent's case that the Applicants deliberately failed to file their defences on time and that there had been no valid reason or explanation given as to why the Judgment should be set aside. That the Applicants had not provided security for the setting aside of the Judgment. It was the Respondent's further case that the Applicants became aware of the Judgment before November 2018 as they had been served with hearing notices for formal proof hearing.

15. Pursuant to my Ruling dated 22nd June 2022, I directed that the present Application be set down for directions. On 12th October 2022, I directed that the present Application be canvassed by way of written submissions.

The Applicants' Submissions.

16. The Applicants submitted that the court had discretion to set aside a default judgment. They relied on the cases of *Patel v EA Cargo Handling Services Ltd* (1974) EA 75 and *K-Rep Bank Limited v Segment Distributors Limited* (2017) eKLR. That even though the courts had discretion to set aside a default judgment, the discretion was subject to certain factors. They relied on *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* (2018) eKLR to buttress this submission.

17. It was the Applicants' submission that they had a real prospect of successfully defending their claim. The 2nd and 3rd Applicants submitted that they had made consistent payments in satisfaction of

their obligations to the tune of Kshs 60,270,600.19/=. That the Respondent overcharged the interest payable by Kshs 4,588,772/= by unlawfully varying the interest rate from 8.86% to 15% and further varied the penalty interest chargeable from 15% to 33% based on IRAC interest recalculation reports.

18. The Applicants submitted that the intended repossession of vehicles based on the incorrect and unlawful accounts was unfair and oppressive. They relied on *Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited* (2017) eKLR. That repossession of the said vehicles would prejudice them as it would lead to the collapse of their transport business thereby leading to the loss of livelihoods for the hundreds of its employees.

19. It was the Applicants' submission that they were never served with the Summons to Enter Appearance, Notice of Entry of Judgment and that they were not aware of the existence of the judgment until 9th December 2018. It was the Applicants' further submission that the 2nd Applicant was never personally served and that the 3rd Applicant did not receive any Pleadings at his place of business.

20. In response to the Respondent's arguments that they were guilty of latches, the Applicants submitted that there had been no Judge in Bomet for close to two years and that they could not reasonably proceed with the matter. That they should not be punished for something they could not control.

21. The Applicants submitted that a court had discretion to grant leave to file a defence out of time and that such discretion ought to be applied judiciously. They relied on the cases of *Richard Murigu Wamai v Attorney General & Another* (2018) eKLR and *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) eKLR.

22. It was the Applicants' submission that the Respondent would not suffer injustice if they were allowed to file their Defences out of time. That allowing them to file their Defences out of time would further justice. It was their further submission that they were unable to defend themselves due to the mistake of their previous advocate on record.

The Respondent's Submissions.

23. The Respondent submitted that the issue of service was not in dispute as the Affidavit of Service had detailed the service. That the said service was directed by the court and that the Applicants' counsel directed that the service of the Summons to be done at the firm of Amutulla Robert & Co. Advocates who acted on behalf of the Applicants. The Respondent further submitted that the Applicants expressly admitted to the service of the Summons through their appointed agent. It directed the court to paragraphs 10 (b), 13 and 15 of the Applicants Supporting Affidavit.

24. It was the Respondent's submission that service was effected once the advertisement was placed in the Newspaper. That proof of the advertisement would be sufficient to warrant entry of judgment in default of appearance of defence. It was the Respondent's further submission that the default judgment was regular. It relied on the case of *Signature Tours and Travels v National Bank of Kenya Limited* (2018) eKLR.

25. The Respondent submitted that pursuant to Order 10 Rule 11, the court may set aside the said judgment on just terms. That such terms must not be unjust or prejudice it as it had gone through all the require motions to obtain a judgment.

26. It was the Respondent's submission that the Applicants filed the present application 11 months after they had been served with Summons and that the explanation that their advocate failed to file a defence was not satisfactory as cases belong to the parties and not their advocates. That it was therefore the Applicants' responsibility to follow up with their advocates to ensure that their defences had been filed.

27. The Respondent submitted that even after filing the present Application, the Applicants went to slumber for 3 years and only woke up when the Respondent began enforcing orders of arrest that arose from the Applicants' failure to comply with the interim orders granted by this court.

28. It was the Respondent's submission that the default Judgment was regularly entered and should the court be inclined to set it aside, then it should be conditional. That the court ought to take into account the circumstances of the case, the Applicants' conduct of failing to comply with court orders specifically when they failed to deliver the assets as ordered. It was the Respondent's further case that the Applicants could be granted leave on condition that they comply with the orders that were delivered on 7th June 2018 or they deposit the Judgment amount in court as security. It directed the court to the case of *Elizabeth Kavere & Another v Lilian Atho & Another* (2020) eKLR.

29. I have considered the Notice of Motion Application dated 10th December 2018, the Replying Affidavit dated 26th February 2019, the Applicants Written Submissions dated 18th August 2022, the Respondent's Written Submissions dated 3rd October 2022. I sieve two issues for my determination as follows: -

    i. Whether the default Judgment entered on 6th July 2018 ought to be set aside.

    ii. Whether the Applicants deserve grant of leave to file their defences out of time.

i. Whether the default Judgment entered on 6th July 2018 ought to be set aside

30. The relevant law governing default Judgments is found in Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules*, 2010 which provides that:-

    (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

    (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

31. However, Order 10, Rule 11 of the *Civil Procedure Rules* 2010 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.

32. From the reading of these provisions, a court has the discretion to set aside a default judgment. In the case of *CMC Holdings Ltd v. Nzioki* [2004] KLR 173, the Court of Appeal laid down the applicable principles as follows: -

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates

such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.....The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. .....What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

33. The exercise of such discretion should always be done to avoid injustice and hardship to any party. In the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, the Court of Appeal 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."

34. Regarding the service of Summons and the pleadings, the Respondent stated that it located the 3rd Applicant (Samwel Cheruiyot Mutai) and served him the pleadings. The Respondent attached an Affidavit of Service sworn by Julius Kilei Mbunge marked as HS1 which indicated that the 3rd Applicant had been served with the Application and Plaint. The Respondent further stated that after it had failed to trace the 2nd Applicant (Alfred Kipkorir Mutai) it applied for leave to serve him by way of substituted service. The Respondent attached a copy of the Court Order, an extract from the newspaper indicating service to the 2nd Applicant and an Affidavit of Service sworn by Chrispine Maondo all marked as HS2.

35. The Respondent stated that at the time of serving the 2nd Defendant by substituted service, Summons had not been issued by the court. That when they were later issued, he served the same upon the firm of advocates on record for the Applicants. The Respondents produced Summons to Enter Appearance and the same were marked as HS3.

36. The Applicants on the other hand seem to contradict themselves on this issue. On one hand, they stated that they were never served with Summons to Enter Appearance and the Plaint and on the other hand, they admit that they visited their former advocate's office to inquire why they never entered any

appearance on their behalf. That they were informed by their current advocates that the Summons were served upon their old advocates who did not enter appearance or file a Defence.

37. I have gone through the pleadings and I have noted that the Summons to Enter Appearance to the three Applicants were all dated 21st September 2017. A Memorandum of Appearance dated 5th October 2017 was filed by the firm of Amutallah Robert & Co. Advocates on 30th October 2017 indicating that the firm represented the 1st, 2nd and 3rd Applicants in the main suit. In light of the above, I am satisfied that the Respondent duly effected the service of Summons to the 1st, 2nd and 3rd Applicants.

38. The Applicants contended that the default judgment was defective, illegal, null and void because there was no liquidated claim. That the prayers sought were in the nature of a declaratory relief, a mandatory order and costs of the suit. As earlier stated, Order 10 Rule 4 (2) of the *Civil Procedure Rules* provides that where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

39. The Plaint has three prayers and in my view, prayer (a) fell within the aforementioned scope of Order 10 Rule 4 (2) of the *Civil Procedure Rules*. The Respondent in prayer (a) prayed for Judgment against the Applicants for the outstanding sum of Kshs 69,444,104.56 being the loan amount due as at 14th July 2017. The *Black's Law Dictionary*, 10th Edition defines a liquidated demand as a demand for money, property or legal remedy to which one asserts a right. The liquidated demand has to be specific as to what the amount of money being demanded was. I find that prayer (a) was specific in nature as the Respondent sued the Applicants for Kshs 69,444,104.56/=.

40. The Applicants asserted that the Interlocutory Judgment was defective and irregular, assertions that I dismiss. As I have already stated, the Summons were served upon the Applicants which then makes the orders sought in the Plaint valid and proper. I therefore find that the default Judgment entered on 6th July 2018 as regular. I am guided by the Court of Appeal case of *James Kanyiita Nderitu & Another* (2016) eKLR, where it held:-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another – v- Shah* (1968) EA 98, *Patel – v- E.A. Cargo Handling services Ltd* (1975) E.A. 75, *Chemwolo & Another – v- Kubende* (1986) KLR 492 and *CMC Holdings – v- Nzioka* [2004] I KLR 173.
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> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court

will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

41. The Applicants stated that they were locked out the hearing because of their former advocate's mistake. It is trite that an Applicant should not suffer due to a mistake of its Counsel. In *Philip Chemowolo & Another v Augustine Kubede* (1982-88) KAR 103, the Court of Appeal held that:-

> " Blunders will continue to 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 of deciding the rights of the parties and not the purpose of imposing discipline."

42. Similarly, the Court of Appeal in *Murai v. Wainaina* (1982) KLR 38 held that: -

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

43. In a case with similar circumstances, the Court of Appeal in *CFC Stanbic Limited v John Maina Githaiga & Another* (2013) eKLR held that: -

> " On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant."

44. In this case, the Applicants stated that when they did not get a satisfactory answer from their former advocates as to why they did not enter appearance or file a Defence, they withdrew their instructions from them (Amutullah Robert & Co. Advocates) and immediately instructed the firm of Kipngeno & Associates to take over the conduct of the matter. By a Consent dated 4th November 2018 and filed in court on 5th December 2018, the 2nd and 3rd Applicants changed their advocates from the firm of Amutallah Robert & Co. Advocates to Kipngeno & Associates Advocates. Under these circumstances, the Applicants will benefit from the mercy of the court. I am persuaded that the mistakes of the Applicants' previous advocates should not be visited upon them.

45. The Applicants have stated that they were not issued with a Notice of Entry of Judgment. The Respondent has not addressed or submitted upon this issue. Order 22 Rule 6 of the *Civil Procedure Rules* provides that:-

> Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:
>
> Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.

46. My understanding of the above section is that it is the Notice of Entry of Judgment that kicks in the execution stage once a party has extracted a Decree. In the present case, the matter had not even proceeded for formal proof hearing.

47. The duty of this court is to ensure justice to both parties. Both parties deserve their chance before the seat of justice so that each party can ventilate and prosecute their cases on merits. In *Dyson v. Attorney General* (1911) KB 418 it was held that:-

> "……..to my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

48. The right to be heard was also appreciated in the case of *Richard Nchapai Leiyangu v IEBC & 2 others* (2013) eKLR where the Court of Appeal held that:-

> "The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

49. I associate myself with the sentiments of Mativo J. (as he then was) in *Republic v Public Procurement Administrative Review Board & 2 others* (2018) eKLR, where he stated that: -

> "The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justiciae, to have any determination which affects him set aside."

50. With respect to this court's discretion in setting aside an Interlocutory Judgment, I am guided by the English case of English case of *Evans v. Bartlam* [1937] A.C. 473, where the House of Lords held: -

> " The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. [T]he reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard, in exercise of its discretion..... The principle is that unless and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure." (Emphasis mine).

51. The Respondent submitted that if the court was inclined to set aside the judgment, that it should take into account the circumstances of the case and the conduct of the Applicants who had failed to comply with this court's Orders. It urged the court that if it were to grant the Applicants leave to file their defences out of time, it should do it on the condition that they comply with this court's Order dated 7th June 2018 or in the alternative, order the Applicants to deposit the judgment amount in court as security for setting aside the judgment.

52. The Ruling dated 7th June 2018 was a determination for the Notice of Motion Application dated 19th July 2017 where Muya J. directed the 1st Applicant to deliver the assets (motor vehicles) to the Respondent within 45 days of the Ruling or in the alternative deposit the sum of Kshs 69,444,104.56 pending the hearing and determination of the suit.

53. The Interlocutory Judgment entered on 6th July 2018 was in the Respondent's favour. The net effect was that the Applicants/ Defendants were ordered to deliver to the Respondent/Plaintiff Trailers ZE 6541, ZE 6542, ZE 6543, ZE 6544 and ZE 6545, Prime Movers Registration No. KBY 900Y, KBY 400Z, KBY 500z, KBZ 900B, KBZ 600B and Nissan Navara Pick Up Registration No. KBY 800T. Judgement was also entered against the outstanding sum of Kshs 69,444,104.56.

54. It is my understanding that the Ruling of the court dated 7th June 2018 was spent as it had been superseded by the Interlocutory Judgment entered on 6th July 2018. It is this Judgment that the Applicants sought to have set aside.

55. Having said that, I must consider the circumstances of this case. Firstly, I am alive to the fact that the Respondent validly got an Interlocutory Judgment against the Applicants. Secondly, I also consider the length of time that this matter has taken, most of which has been taken up by numerous Applications; the most recent being the Respondent's Notice of Motion dated 2nd October 2022 which is still pending. It is my view that this matter ought to proceed expeditiously.

56. I am inclined to grant the Applicants an opportunity to be heard on merits. Justice however cuts both ways and considers the competing interests of the parties. The Applicants must therefore deposit some security in court as a condition for this court to set aside the Interlocutory Judgment and grant leave to file their defences.

57. I am guided by the case of *Nduhiu Gitahi v Warugongo* (1988) KLR 621; 1 KAR 100; (1988-92) 2 KAR 100, where the Court of Appeal expressed itself on the issue of security as follows: -

> " .....the process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a

way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial....."

58. Consequently, I set aside the Interlocutory Judgement entered on 6th July 2018 with conditions that to be stated at the end of this Ruling.

ii. Whether the Applicants deserve grant of leave to file their defences out of time

59. It is trite that the court is clothed with the discretion of granting leave to file a defence out of time. In the case of *Chemwolo & Another v Kubendi*, (1986) KLR 492, the Court of Appeal held:-

> " The concern of the court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go for trial." (Emphasis mine)

60. I am persuaded by the Waweru J. in *Morris & Company Limited v Victoria Minerals & Chemicals Limited & Another* (2007) eKLR where he held as follows: -

> " .....With regard to the test of whether or not the Applicants have arguable defences, in the context of the present application, I am not required to evaluate whether or not the points of defence raised will upon subjecting the matter to trial succeed. I am only required to establish that the points are ex facie reasonable points of defence to the claim. This approach was laid down in the case of *Tree Shade Motors Limited V. D.t. Dobie & Another* (1995-1998) EA317 (CAK) Where the Court of Appeal held as follows:
>
> > "Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex parte judgment aside".

61. Similarly, the Court of Appeal case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR defined what a triable issue was thus:-

> " A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

62. I have gone through the court record and the present Application and there is no draft Defence attached by the Applicants. However they have raised pertinent issues in their submissions i.e. they claim to have paid Kshs 60,270,600/= to the Respondent in satisfaction of their loan obligations and that the Respondent had raised the interest rate chargeable and the penalties too. These issues in my view require a substantial examination by the court. I am satisfied that they are prima facie triable issues.

In the case of *Mrao Ltd v First American Bank Of Kenya Ltd* (2003) eKLR, the Court of Appeal stated that:-

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

63. Considering the huge sums of money involved in this matter, it is only just to allow the parties to bring out all issues for the court to determine after hearing both sides.

64. There is a pending Notice of Motion Application dated 2nd October 2022 by the Respondent herein (Stanbic Bank Kenya Limited) which sought a Review against this court's Ruling dated 22nd June 2022 where I ordered that Alfred Kipkorir Mutai and Samwel Cheruiyot Mutai should not be arrested pending the hearing and determination of their Application dated 10th December 2018 which is the present application.

65. Having set aside the Interlocutory Judgment, it is my finding that the Notice of Motion Application dated 2nd October 2022 has been overtaken by events. This Court's Ruling dated 7th June 2018 which was the subject of numerous Applications in this matter had been superseded by the Interlocutory Judgment which has now been set aside. In any event, setting aside of the Interlocutory Judgment dated 6th July 2018 made the subsequent consequential Orders and Rulings null and void.

66. In the end, I make the following Orders:-

    i. The Interlocutory Judgment entered on 6th July 2018 is set aside on condition that the Applicants/Defendants deposit into court security of five hundred thousand shillings (Kshs 500,000/=) in the form of Cash or Bank Guarantee within 30 days of today.

    ii. The Defendants/Applicants shall pay the Plaintiff/Respondent five hundred thousand shillings (Kshs. 500,000/=) being thrown away costs within 30 days of today.

    iii. The Applicants/Defendants are granted leave to file their Defences within 14 days from the date of this Ruling. Such defence shall be deemed properly on record upon fulfilment of (i)and (ii) above.

    iv. The Plaintiff's Notice of Motion dated 2nd October 2022 seeking Review of this Court's Ruling dated 22nd June,2022 is, by virtue of this Ruling, overtaken by events and is consequently hereby dismissed without costs.

    v. Though successful in the present Application, the Applicants are denied costs of this Application for reason that they occasioned the Application, delay and the attendant costs.

    Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 27TH DAY OF APRIL, 2023

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of Mr. Maondo for the Plaintiff/Respondent, Ms. Jepleting holding brief for Mr. Kurgat for the 2nd and 3rd Defendants and Siele (Court Assistant).