



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC E260 OF 2019

GULF AFRICAN BANK LIMITED.....PLAINTIFF

VERSUS

GARGAR CONSTRUCTION COMPANY LTD.....1ST DEFENDANT

ABDIWAHAB ALI ABDI2ND DEFENDANT

YUSUF ABDIWAHAB ALI3RD DEFENDANT

RULING

1. Before Court is the defendant's Motion on Notice dated 27/11/2020 brought under *sections 3A & 95 of the Civil Procedure Act 2010, Order 10 Rule 11, Order 12 of the Civil Procedure Rules*.

2. The application seeks orders for the firm of **Angaya, Nasimiyu & Associates** to come on record for the defendants/applicants, the setting aside of the interlocutory judgment entered against the defendants on 25/11/2019 and consequently that the defendants be granted leave to file their statements of defence out of time. It also sought that the draft statement of defence annexed to the application be deemed to be duly filed upon payment of requisite court fees.

3. The grounds for the application are set out in the body of the Motion and in the supporting affidavit of **Yusuf Abdiwahab Ali** sworn on 27/11/2020. The grounds are that; the defendants' advocates were served with the summons to enter appearance and the plaint on the 3/09/2019, the defendants entered appearance on 23/09/2019 but were unable to obtain the necessary documents from the plaintiff to be able to file their defence. That since the amount claimed was substantial, it was necessary for the defendants to get the bank statements, copies of the contracts and other relevant documents from the plaintiff before mounting their defence. That due to the bulk documentation, they were unable to file their statements of defence on time.

4. That they were not aware of any interlocutory judgment until they were served with the decree through an email dated 15/06/2020. They contended that the annexed draft statement of defence raises substantial issues of law and fact which the Court should consider.

5. The plaintiff opposes the application vide a replying affidavit of **Lawi Sato**, its legal officer, sworn on 7/12/2020. He avers that after service of summons and consequent appearance on 23/09/2019, the defendants were required to file their defence on or before 7/10/2019 but they failed to do so. The plaintiff requested for judgment which was entered on 25/11/2019 and a certificate of costs issued on 15/09/2020 after which execution proceedings commenced.

6. He depones that the defendants have not explained the reason for failure to file the defence within the mandatory timeline. There was no evidence that the defendants requested any documents from the plaintiff and were denied. In any event, the bank had furnished all the necessary documents pertaining to this matter and in its possession in its List of Documents dated 22/08/2019. Finally, that the draft defence does not raise any triable issue.

7. I have carefully considered the depositions and the submissions on record. This is an application to set aside an interlocutory judgment entered in default of a defence.

8. *Section 95 of the Civil Procedure Act* which was invoked by the defendants provides: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

9. On the other hand, **Order 10 Rule 11 of the Civil Procedure Rules** provides: -

“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. From the foregoing, what is sought is the exercise of the Court’s discretion. In **Shah v. Mbogo [1967] EA 166**, the Court of Appeal set out the principles governing the exercise of the judicial discretion to set aside an ex – parte judgment obtained in the absence of appearance or defence by a defendant.

11. Firstly, the Court’s discretion is perfectly free. There are no limits or restrictions to a judge’s discretion except that if the judge does vary the judgment, he does so on terms that may be just. The main concern for the court is to do justice. Secondly, the discretion to set aside an interlocutory judgment is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It is not meant to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

12. The defendants’ case is that they were unable to file a defence because the plaintiff, as their banker, failed to provide them with the documents they needed for their defence.

13. That reason is not convincing. Firstly, there was no evidence to show that there was any request for supply of the alleged documents. Secondly, it is not denied, as asserted by the plaintiff, that most if not all the necessary documents in relation to this claim had been supplied in the plaintiff’s bundle of documents at the time of filing the suit. Thirdly, the defendants should have come to Court to seek the necessary orders, if needed, to compel the plaintiff to supply particulars including the required documents provide the documents required, if any.

14. In any event, if it were documents that the defendants were waiting for, why wait for over a year without making any inquiries on the suit whose notice they were aware of. In my view, the defendants were least concerned with the suit. They went to slumber only to be jostled by the threatened execution.

15. The timelines set in the Civil Procedure Rules are important in the administration of justice. They are not to be dismissed as mere technicalities under **Article 159 of the Constitution**.

16. In the authority relied on by the plaintiff of **Jumbo Commodities Limited v Fahari Trading Limited & 2 others [2018] Eklr**, it was held: -

“It is not an answer to the application for the 1st defendant to submit that the court can invoke article 159 (2) of the constitution to permit the late filing of its pleading. Such an argument in my view would make a mockery of the Rules which require a party, after close of pleadings, to seek leave of the court to amend its pleading. If all the court needed to do was to invoke Article 159 of the constitution to permit pleadings to be filed at any time, there would be no need for Order 8 of the Rules. Further there is a need for procedure to be followed for orderliness of the court process.”

17. Further, in **Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] Eklr**, the Supreme Court of Kenya held: -

“This Court has on a number of occasions remarked upon the importance of procedure in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

18. In an application for setting aside a default judgment, it is imperative for a court to satisfy itself if the proposed defence is arguable. In the present case, the defendants annexed a draft defence. I have carefully considered the same. To my mind, it contains mere denials. It raises no triable issues that deserve to be tried.

19. The subject matter of the suit is a loan facility. The plaintiff extended a facility of Kshs .20,000,000/- to the 1st defendant. The 2nd and 3rd defendant guaranteed the said facility. Default is not denied. Demand has also been proved. To my mind, the proposed defence is but a mere sham. There is evidence that the sum of Kshs.4 million paid was credited to the account of the 1st defendant.

20. In my view, the defendants failed to file their defence on time or at all and have no reason for that failure. The plaintiff is entitled to realize the fruits of its judgment. That judgment was lawful.

21. Accordingly, I find that the application dated 27/11/2020 has no merit and dismiss the same with costs to the plaintiff.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 18th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE