



**Stichting Medical Credit Fund v SBM Bank Kenya Limited (Civil Case E142 of 2020) [2021] KEHC 78 (KLR) (Civ) (24 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 78 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL**  
**CIVIL CASE E142 OF 2020**  
**MW MUIGAI, J**  
**SEPTEMBER 24, 2021**

**BETWEEN**

**STICHTING MEDICAL CREDIT FUND ..... PLAINTIFF**

**AND**

**SBM BANK KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The Defendant vide application of 23<sup>rd</sup> September 2020 sought the setting aside of the Interlocutory judgment entered in default of entering appearance and filing Defense.
2. The Defendant had been trying to file its Defense dated 18<sup>th</sup> June 2020 and only managed to file it on 23<sup>rd</sup> June 2020 due to unprecedented technical hitches experienced on the online system implemented due to Corvid19 pandemic.
3. The Defendant learnt that on the same date that the Plaintiff filed and obtained default judgment on 19<sup>th</sup> June 2020. The Defendant Applicant has a good Defense to the suit and seeks leave to file the same and are ready to comply with any conditions the Court may set. A stay of execution of formal proceedings was granted on 30<sup>th</sup> September 2020.
4. By Supporting Affidavit by Counsel for the Defendant, he deposed that he was instructed by the Defendant in May 2020, and filed and served Notice of Appointment on 19<sup>th</sup> May 2020 to the Plaintiff via email.
5. Due to unprecedented and unpredictable state of turmoil, apprehension and instability from the onset of Corona Virus pandemic nationwide, the normal operations were adversely affected and reached the peak in the months of May & June 2020. The National Executive Order is annexed as KK2.



6. The Defendant Applicant made efforts to file pleadings amid technical hitches to file Court Process on line and on enquiry found out the default judgment was entered.
7. The Defendant filed Preliminary Objection which the Court dismissed it vide Ruling of 31<sup>st</sup> May 2021, as the Court considered the issue one of the issues for determination at the hearing of the matter.
8. The Plaintiff Respondent vide a detailed Replying Affidavit opposed the Defendants application and the Plaintiff's advocate on record also filed Grounds of Opposition and stated that the default judgment is a regular and valid judgment as the service of the Court process is not challenged.
9. Secondly, the Respondent took the view, that the Defendant is undeserving of the Court's exercise of discretion due to lack of candor, no credible explanation is given for delay and the Defense does not raise any triable issue (s) .

#### DETERMINATION

10. The Court considered parties' pleadings and submissions and the issue is whether the Court should set aside the default judgment.

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.”

11. In *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another* the court held:

“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 defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense 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...”

12. The default judgment is a regular judgment as the service of Court process is not contested and the Plaintiff complied with Order 5 CPR 2010 and served the Defendant.
13. The Defendant /Applicant explained the delay in filing defense was/is due to Corvid 19 pandemic that paralyzed normal operations of the Court. The Court confirms and takes judicial notice of the adverse effect of Corvid 19 pandemic and Courts shut down for almost 4 months and resumed and operate virtually online.
14. The Defendant filed the application on 23<sup>rd</sup> September 2020, and the default judgment was/is of 19<sup>th</sup> June 2021 within a span of almost 3 months. This was not inordinate delay given the circumstances of new Court operations.



15. In the case of *Shah v. Mbogo & Anor.* the Court set down the criteria for setting aside a judgment as follows:

“In setting aside judgment, the court must establish: -

1. That there is a reasonable explanation for any delay;
2. That there is a defence on merit;
3. That it is just to do so. “

The Court finds the explanation given in Court for not timely filing Defense plausible and reasonable in the circumstances and the Defense raises triable issue(s) more so the issue regarding the Plaintiff's status which in dismissing the Preliminary Objection this Court took the view it is an issue to be canvassed at the hearing of the matter.

#### DISPOSITION

1. Therefore, for these reasons, the Defendant's Application to set aside the default judgment is granted.
2. The Defendant will file and serve the Defense
3. After close of pleadings parties through Counsel shall attend CMC before DR Commercial & Tax
4. The matter be placed before the HOD/PJ for allocation to any other Court as the Court is on transfer.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 24<sup>TH</sup> SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17<sup>TH</sup> APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**MR WEPO H/B MR ECHESSA FOR PLAINTIFF**

**MR MUTISYA H/B MR KARUNGO FOR DEFENDANT**

**COURT ASSISTANT - TUPET**

**MR. MUTISYA: We need to have copies of the Ruling and proceedings to appeal.**

**COURT: The parties shall be availed certified copies of proceedings and Ruling upon payment of requisite Fees.**

