



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL SUIT NO. 4 OF 2019

FIRST COMMUNITY BANK.....PLAINTIFF/RESPONDENT

VERSUS

READY CONSULTANCY LIMITED.....1ST DEFENDANT/APPLICANT

MOHAMED ISSA DUCALE.....2ND DEFENDANT/ APPLICANT

MOHAMMED HASSAN ALI.....3RD DEFENANDANT/APPLICANT

COUNTY GOVT OF GARISSA.....4TH DEFENDANT/APPLICANT

RULING

1. Coming before this Court for determination is a notice of motion Application dated 15th August, 2019, filed by the 1st, 2nd and 3rd defendants (hereinafter referred to as the applicants) seeking orders *inter alia* that:-

1) Spent

2) Spent

3) THAT the court be pleased to set aside the Judgment entered herein on 3rd June, 2019 in its entirety and the Applicants be granted leave to file and serve their joint statement of Defence out of time.

4) THAT the draft annexed joint statement of defence be deemed as duly filed and served with the leave of court when requisite fees is duly paid.

5) THAT the costs of this application be provided for.

2. The application is expressed under the provisions of Sections **1A, 1B** and **3A** of the Civil Procedure Act **Order 10 Rule 11, Order 36 Rules 7 and 10** and **Order 51 Rule 1 and 15** of the Civil Procedure Rules 2010.

3. The grounds upon which the application is based are stated on the face of the application and the annexed affidavit **of Mohammed Issa Ducale**. Essentially the grounds relied upon by the applicant are *inter alia* that:-

- i. THAT summons to enter appearance and pleadings thereon were not served upon the applicants.**
- ii. THAT the draft annexed defence raises triable issues.**
- iii. THAT this Application has been made without undue delay.**
- iv. THAT the summary Judgment is extremely prejudicial to the applicants**
- v. THAT it is in the interest of Justice that the orders sought herein are granted and that no prejudice will be occasioned to any of the parties herein.**

4. The affidavit of **Mohamed Issa Ducale** reiterates the above grounds, and in regard to the issue of service he avers that sometimes in July, 2019 he was served with a plaint and notice of motion application both dated 29th April, 2019 and that is when he found out that the Respondent had filed the instant suit and obtained a summary judgment for a liquidated sum of Kshs 28,180,000/= without having been served with summons to enter appearance and pleadings therein and they subsequently instructed their advocates herein act for them.

5. In opposition to the application, the Plaintiff filed two replying affidavits. The first affidavit is one sworn on 13th September, 2019 by Claris Ajwang Ogombo their legal officer and filed on 28th September, 2019. She avers that the 2nd applicant was served with the summons to enter appearance and he received and endorsed the same on behalf of the 1st and 3rd applicant. In addition, she avers that the applicants are indebted to the plaintiff Respondent and the security they hold is not enough to satisfy the outstanding debt and thus the Respondent is suffering financial prejudice. Further, the Respondent avers that the applicants defence does not raise any triable issues but a waste of court time and ought to be dismissed.

6. The other affidavit is by one Jackson Mutinda sworn on 13th September, 2019 and filed on 29th September, 2019 where he avers that he is a court process server and that he served the 2nd Defendant herein with summons to enter appearance herein and that his otherwise allegations are false.

7. Both parties filed their respective written submissions in support of their opposing positions. The applicants reiterated their above case, and that the respondent has failed to acknowledge that they have paid a sum of Kshs. 6.5 Million as part of the settlement of the subject loan and therefore the allegation that the outstanding loan is Kshs 28,190,000/= is not true. And that the affidavit of the process server herein only indicates that he only served the 2nd defendant and therefore the 1st and 3rd defendants would be condemned unheard. Further they submitted that their defence raises pertinent issues especially on the securities held herein by the Plaintiff and thus their defence is triable. Furthermore, they argued that if leave is granted the defendant can defend the suit and plaintiff adequately compensated by way of damages. They urged the court to allow the application.

8. The Respondent vide their submissions reiterated their above position. They submitted that the applicants herein were duly served with all the pleadings in this suit and their allegations to the contrary is false, and that they ought to have cross examined the process server herein whose evidence stand unchallenged. Additionally, the respondent submitted that the applicants defence does not raise any triable issue, and that the motor vehicles alluded to as security therein does not belong to them and that they have provided a counter valuation report on the security tendered herein. In this they rely in the cases of *Job Kilach vs Nation Media Group & Others(2015) Eklr* and *Nairobi Flour Mills Limited vs Johnson Kithete t/a Framers General Stores (2005) eKLR*. Further, they submitted that the continued non-payment of the outstanding debt is prejudicial to them, and urged the court to dismiss the application with costs.

ISSUES AND ANALYSIS

9. After going through the pleadings, affidavits filed and parties' submissions, the court finds that the main issue for determination is as to whether the applicants' application meets the threshold for setting aside *ex parte* judgments.

10. **Order 10 Rule 11 of the Civil Procedure Rules** provides that;

“Where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

11. In *Patel vs E.A. Carge Handling Services Ltd [1974] EA75* at page 76 C and E the court held as follows: -

‘There are no limits or restrictions on the Judge’s discretion to set aside or vary an *ex-parte* judgement except that if he does vary the judgement, 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 conditions on itself to fetter the wide discretion given it by the rules.’

12. The court further held as follows: -

“That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a *prima facie* defence which should go to trial for adjudication.”

13. Further, in *Shah vs Mbogo [1967] EA166 at page 123B* the court stated as follows: -

‘this discretion to set aside an *ex-parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.’

14. Furthermore, in *Tree Shade Motors Ltd -vs- DT Dobie &Anor [1995-1998] 1EA 324* it was held that: -

‘Even if service of summons is valid, the judgement will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, 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* judgement aside.’

15. It is apparent from the foregoing that the principles and tests for setting aside an *ex-parte* judgement can be summarized as follows: That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex-parte* judgement. That the tests for setting aside an *ex-parte* judgement are:- first, whether there is a defence on the merits, secondly, whether there would be any prejudice to the plaintiff and finally what is the explanation for any delay.

DETERMINATION

16. In conclusion, and having considered the facts of this case, the affidavits filed by both parties, the submissions by both counsels and the relevant laws and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant. The applicant raises a triable defence which this court ought to give it a hearing even though it may not succeed.

17. The applicants have disputed the amount of loan outstanding, there is also a clear dispute on the value and ownership of the securities tendered herein, and in my view these are issues which can be sorted after hearing of the parties herein. The Respondent can be compensated with costs for the prejudice suffered if

any.

18. Accordingly, it is my view that this is inclined to set aside the *ex parte* judgement delivered on 3rd June, 2019 and thus make the following orders;

(i) The exparte judgement and all the consequential orders and order are set aside.

(ii) That the suit to proceed for hearing afresh as a defended case.

(iii) The Respondent to be paid throw away costs assessed at Ksh. 50,000 by applicants no 1, 2 and 3 in any event.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE