



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 185 OF 2017

BETWEEN

GROFIN AFRICA FUND.....PLAINTIFF

AND

UNIFORM SHOP EAST AFRICA LIMITED.....1ST DEFENDANT

KENNETH NYAGA MWINDI.....2ND DEFENDANT

PHILIP COLLINS NGILA.....3RD DEFENDANT

FREDRICK MURUNGA.....4TH DEFENDANT

SPORTS SHOP EAST AFRICA LIMITED.....5TH DEFENDANT

GOLF SHOP EAST AFRICA LIMITED.....6TH DEFENDANT

RULING

1. The plaintiff filed a suit against the defendants by the plaint dated 26th April 2017 seeking judgment for Kshs. 30,279,298.00 together with interest thereon and costs against the defendants. The basis of the claim is that the plaintiff, a finance and lending company, advanced to the 1st defendant Kshs. 14,487,200.00 under a facility agreement dated 7th February 2012. The facility was secured by a guarantee and indemnity issued by Richard Boro Ndung'u, the 2nd, 3rd, 4th, 5th and 6th defendants. The 1st defendant also provided an all asset debenture dated 23rd February 2012 for Kshs. 20,000,000.00 over its existing and future moveable property in favour of the plaintiff.

2. Upon service of the plaint and summons to enter appearance, the defendants filed their defence and counterclaim dated 20th July 2017. The defendants denied the Agreement and in the alternative, contested the interest charged by the plaintiff. They also urged that the plaintiff was regulated under the **Banking Act (Chapter 488 of the Laws of Kenya)**, Central Bank Regulations and common law hence it not only lacked capacity to lend money but it did so outside the provisions of the aforesaid laws. In the defence and counterclaim, the defendants' counterclaimed as against the plaintiff for:

a. Unlawful, illegal and unauthorized money laundering business contrary to Central Bank of Kenya Regulations on interest and penalties.

b. Loss of business by the defendants.

3. The matter was set down for hearing on 19th November 2019 and despite being served with a hearing notice, neither the defendants nor their advocates appeared in court. The matter proceeded for hearing and on the same day I delivered an ex-tempore judgment where I entered judgment for the plaintiff against the defendants jointly and severally for the sum of Kshs. 30,279,298.00 together with interest at 12% per annum from the date of filing suit until payment in full and costs of the suit.

4. Following the judgment, the defendants have now moved the court by a Notice of Motion principally under **Order 10 rule 11** of the **Civil Procedure Rules** (“the **Rules**”) seeking that ex-parte judgment entered against the defendants on 19th November 2019 be set aside.

5. The application is supported by the affidavit of Kenneth Nyaga Mwindi, the 2nd defendant, on behalf of the other defendants, sworn on 6th February 2020. In the grounds on the face of the application, the defendants state that they were never served with summons to enter appearance. They further stated that the plaintiff received a Notice of Appointment and Statement of Defence on 1st June 2017 but received the same under protest as it had already applied for judgment in default of appearance. That the defence and counterclaim raised serious triable issues, that is whether in fact there was any lending agreement and whether the agreement violates Central Bank Regulations. That the defendants are likely to suffer substantial loss and damage if the judgment is not set aside. The defendants also cite **Article 23(1)** of the Constitution to argue that this court has the jurisdiction to hear and determine an application for violation or infringement of the applicants’ fundamental rights and freedoms and that the defendants have a right to a fair hearing including a right to be heard on their defence and counterclaim.

6. In his deposition, Mr Mwindi states, inter alia, as follows:

[2] THAT, we instructed our lawyers on 20th June 2017 and subsequently appointed M/S Kerongo Bosire & Co. Advocates in this matter as shown by the true copies of the Notice of Change of Advocates which I mark as K1.

[3] THAT we filed a Statement of Defence and Counterclaim on 20th June, 2017 and upon serving the Plaintiff on 21st June, 2017 they received it under protest alleging that a request for judgment in default of defence had already been filed on 15th and 16th June 2017. We attach a true copy of the Statement of defence and a Counterclaim which we mark as K2.

[4] THAT the Statement of Defence and Counterclaim raises serious triable issues on the Agreement for lending money which issues include violation of Central Bank Regulations.

[5] THAT we are now exposed to execution, harassment, embarrassment, loss and damages if the Honourable Court fails to intervene.

[6] THAT whatever I have stated herein is true to the best of my knowledge and information.

7. Mr Wachakana, counsel for the defendants, reiterated the grounds of the application set out in the application. He also accepted that the firm on record for the defendants was served with the hearing notice but failed to attend court and all that had taken place was due to the mistake of counsel. He urged the court to consider that the defendant has a good defence and counterclaim which should be ventilated by setting aside the judgment.

8. The plaintiff opposed the application through the replying affidavit of Rita Odera, its Investment Executive, sworn on 21st February 2020. The thrust of the affidavit is that the defendants had given materially misleading facts to the court. She pointed out the defendants were duly served with summons to enter appearance and that they did enter appearance and file their defence and counterclaim. That they failed to participate in the court processes throughout and that their advocates on record had failed to attend court for the hearing despite being served. She depones that the defendants have not shown interest in the proceedings and that they do not have a defence in the matter as the court, in its judgment, dealt with the issues they now purport to raise as triable issues.

9. Counsel for the plaintiff, Mr Mitto, submitted that the application was incompetent as the defendants had entered appearance and filed a defence. He stated that the issue of the advocate failing to appear in court was not raised in the application. Counsel added that the defendants had not established sufficient cause for the court to set aside judgment and in the event the court was minded to set aside judgment, the court ought to impose conditions as to security.

10. I agree with counsel for the plaintiff that the application is defective in so far as the defendants invoked **Order 10 rule 11** of the **Rules** which applies where the defendant fails to enter appearance and file defence. In this case, there is no dispute that the defendants entered appearance and filed defence. The matter proceeded for hearing after I was satisfied that the defendants’ advocates were duly served under the provisions of **Order 12 rule 2(a)** of the **Rules** which provides:

2. If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is satisfied —

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

Where the matter proceeds ex-parte, the defendant is entitled to apply to set aside judgment under **Order 12 rule 7** of the **Rules** which provides:

7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

11. Despite the fact that the defendants invoked the wrong provision of the law, I will consider the substance of the application as it concerns whether this court should set aside its judgment. The principles under which the court exercises its jurisdiction to set aside ex-parte judgment are well settled. In **Shah v Mbogo and Another [1967] EA 116**, it was held that:

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

More recently the Court of Appeal in **Richard Nchapai Leiyangu v IEBC & 2 others** expressed itself as follows:

We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

12. Since the defendants invoke the court's discretion, they have a duty to be candid. As the court stated in **Kimani v McConnell [1966] EA 545**, the court ought to consider all facts and circumstances both prior and subsequent and of the respective merits of the parties' cases. In exercising discretion, the court ought to consider whether the applicant has explained the reasons for non-attendance, the prejudice to be suffered by the respondent and in particular whether such prejudice may be compensated by an award of costs and whether the applicant has a defence that raises triable issues (see **Mohammed and Another v Shoka [1990] KLR 463**).

13. As counsel for the plaintiff pointed out, the defendants' application contains misleading facts. It was not correct to state, as the defendants' advocates, stated in the grounds of the application that the defendants were not served with summons to enter appearance. They were served and they entered appearance and filed defence through the firm of *L. M. Kinuthia and Associates Advocates* on 21st June 2017. On 28th June 2017, the firm of *Kerongo Bosire and Company Advocates* filed a Notice of Change of Advocates.

14. On 12th September 2019, the court, instead of dismissing the matter directed that the matter be fixed for pretrial directions. When the matter was fixed for pre-trial directions on 14th October 2019 and on 6th November 2019, the defendants' advocates did not attend court despite service. When the matter came up for hearing on 19th November 2019, I proceeded with the hearing having been satisfied that the defendants' advocates on record had been served with a hearing notice.

15. What is apparent from the deposition of Mr Mwindi, whose contents I have set out above, is that he has not explained why their advocate on record did not attend court on 19th November 2019 despite being served with the hearing notice. In short, the defendants have failed to explain the reason for non-attendance. Although, Mr Wachakana, stated from the bar, that the non-attendance was a mistake of his advocates, there was nothing in the supporting deposition of Mr Mwindi, suggesting the non-attendance by the advocates on record was as result of a mistake by the advocate.

16. It is accepted that the court may excuse mistakes and blunders by advocates (see **Kiptoo Chemwolo and Another v Augustine Kubende [1986] KLR 492**). On the other hand, a party bears responsibility for the conduct of his or her case. Although, it may be argued that the defendants' advocate failed to participate in the proceedings, the defendants by themselves do not appear to have taken any steps to see to it the suit was properly defended over the three years when their defence and counterclaim was on record.

17. Even where the ex-parte judgment is regular on its face, the court is still obliged to consider whether the defence put forward by the defendant raises triable issues (see **Tree Shade Motors Limited v D. T. Dobie and Company (K) Limited and Another NRB CA Civil Appeal No. 38 of 1990 [1998] eKLR**). The defendant has denied the plaintiff's claim and put forth a counterclaim. Although I dealt with the issues raised in the defence and counterclaim, I may yet be convinced to take a different position on the application of the **Banking Act** to the transaction between the parties. What is clear though is that transaction between the parties was affirmatively established by the plaintiff.

18. At the end of the day, the court has discretion to set aside the ex-parte judgment on such terms and conditions as it deems fit and just to grant. The judgment entered against the defendant was regular. The defendants have not explained why their advocate did not attend court. They have given misleading information. Although their defence raised issues that may go to the extent of the indebtedness, I am not convinced that it is entirely a bona fide defence.

19. I therefore allow the application dated 6th February 2020 on terms that the judgment dated 19th November 2019 is hereby set aside on the following conditions:

(a) The defendant shall deposit the sum of **Kshs. 5,000,000/-** in court or in a joint interest earning account in the names of the advocates for the parties within 30 days from the date hereof.

(b) The defendant shall pay costs of the application assessed at Kshs. 30,000/- within 14 days from the date hereof.

(c) In default of (a) and (b) above, the judgment dated 19th November 2019 shall be reinstated and the plaintiff shall be at liberty to enforce the same.

DATED and DELIVERED at NAIROBI this 13th day of MARCH 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mitto instructed by Daly and Inamdar Advocates for the plaintiff.

Mr Wachakana instructed by Wachakana and Company Advocates for the defendants.