



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 91 OF 2018**

**SPIRE BANK LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GLADYS NJERI WAINAINA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SIMON GATHU NJOGU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The notice of motion dated 5<sup>th</sup> July 2019 is filed by **Gladys Njeri Wainaina** (*Gladys*). Gladys is the 1<sup>st</sup> defendant in this case. By the application Gladys seeks the setting aside interlocutory judgement entered against her in default of filing an appearance. By her affidavit in support of the application Gladys stated that she was not serviced with the summons in this matter. In summary this is what Gladys said-

- *That on 24<sup>th</sup> June 2019 she was accosted as she drove her car KAC 905 D by people who said they were police officers and auctioneer. They took her car away.*
- *The auctioneer handed to her the notification of sale of her vehicle which notification bore the case number HCCC 21 of 2018.*
- *She was unable to trace the case file because the auctioneer had deliberately given her the wrong case number.*
- *It is on tracing the correct court file, that is this case, she found that it was alleged she took a loan which she failed to repay and because the property used to secure her loan was found to have been fraudulently used without the owners permission the plaintiff sued her for the debt.*
- *The summons were according to the court filed served through a Nairobi box number and not her correct address in Kikuyu.*

2. The plaintiff **SpireBank Limited** (The Bank) through the affidavit of John Wageche, the Bank's Senior Legal officer opposed the application.

3. It is unfortunate that with the very serious allegations made by Gladys the Bank would choose to respond in such a flippant manner. Gladys denied having taken a loan and denied that her address was the one used to send the summons. Gladys admitted that the plaintiff was her Banker and that her Bank opening forms would show her correct address as being in Kikuyu. The plaintiff, at least would have tried to disprove Gladys by showing what address is reflected in her account opening forms. It was not enough for the Bank to simply respond to such a serious allegation against it, an allegation that touches on fraud, by simply saying Gladys was served.

4. Gladys has raised extremely serious allegation against a Bank and the Bank failed to adequately respond to those allegations. Gladys stated that she has already reported the matter to the police, the Banking Fraud Unit.

5. I make a finding that Judgment entered against Gladys was irregular and it should be set aside *ex debito justitiae* (as of right). A case in point on what the court should do when judgment is irregularly entered is **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another** (2015) eKLR. The Court of Appeal had this to say:

“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 justitiae*, 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. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

*“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”*

The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:

*“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”*

6. In the end, the Notice of Motion dated 5<sup>th</sup> July 2019 I grant the following orders:

- a. *Judgment against the 1<sup>st</sup> defendant is hereby set aside.*
- b. *The 1<sup>st</sup> defendant shall within 15 days from the date the courts resume normal operations after being suspended because of COVID-19 pandemic, file her defence.*
- c. *The 1<sup>st</sup> defendant is awarded costs of that Notice of Motion dated 5<sup>th</sup> July 2019.*
- d. *This case is fixed for Case Management Conference on 29<sup>th</sup> July, 2020.*

DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this 30<sup>th</sup> day of **April, 2020**.

MARY KASANGO

JUDGE