



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

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E304 OF 2019**

**BETWEEN**

**KHALID YAMIN KHAN & ABDUL WAHEED KHAN T/A**

**HIGHLAND DISTRIBUTORS VENTURES.....PLAINTIFFS**

**AND**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**ANTIQUA AUCTIONS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 20<sup>th</sup> September 2019 the plaintiffs filed suit against the defendants. They sought a permanent injunction directed at the defendants restraining them from selling House No. 3 on LR No. 209.9771 situated in Kileleshwa Nairobi (“the suit property”) which had been charged to the 1<sup>st</sup> defendant (“the Bank”) to secure certain facilities. They also prayed for an order directed at the Bank to re-calculate the interest applied on its loan account subjecting the interest to a rate of 14.5% per annum and not 24% per annum from the date of inception of the loan and upon recalculation of the amount due, the Plaintiffs be at liberty to redeem the loan before 31<sup>st</sup> December 2019.
2. In exercise of its statutory power of sale, the Bank advertised the suit property for sale by public auction on 4<sup>th</sup> October 2019 precipitating the Plaintiffs to file this suit and the Notice of Motion dated 20<sup>th</sup> September 2019. The application was placed before Muigai J., on 23<sup>rd</sup> September 2019. The learned judge issued, *inter alia*, an ex-parte injunction restraining the defendants from selling the property pending inter parties hearing of the application on 3<sup>rd</sup> October 2019. On 3<sup>rd</sup> October 2019, the parties duly represented by their advocates, appeared in court and agreed to adjourn the matter for hearing on 22<sup>nd</sup> October 2019. The interim orders were extended to that date.
3. In the meantime, the Plaintiffs’ advocates filed a Request for Judgment dated 17<sup>th</sup> December 2019 under **Order 10 rule 4** of the **Civil Procedure Rules** seeking judgment in default of appearance and defence. According to the affidavit of service of Samuel Kinyua Ndege, a Process Server, sworn on 17<sup>th</sup> December 2019, the Summons to Enter Appearance dated 4<sup>th</sup> November 2019 was served on the Bank on 14<sup>th</sup> November 2019. On the same day, the 2<sup>nd</sup> defendant declined to accept service on the ground that the matter was being dealt with by the Bank. The Summons to Enter Appearance was duly acknowledged by the Bank. Based on this service, the Deputy Registrar entered judgment on 20<sup>th</sup> January 2020 and fixed the matter for formal proof on 16<sup>th</sup> April 2020.
4. The notice of formal proof triggered the defendants to file the Notice of Motion dated 31<sup>st</sup> March 2020 made, *inter alia*, under **Order 10 rule 6, 19 and 11** of the **Civil Procedure Rules** to set aside the default judgment and deem the statement of defence dated 10<sup>th</sup> January 2020 and filed on the same day as duly filed. In the same application the defendants also applied to strike out and dismiss the plaintiffs’ suit. The application was supported by the affidavit of Kariuki Kingori, the Bank’s Manager for Legal Services, sworn on 31<sup>st</sup> March 2020.
5. The application is opposed by the replying affidavit of Abdul Waheed Khan sworn on 15<sup>th</sup> May 2020. The thrust of the affidavit is that the Summons to Enter Appearance were valid and properly served and that it is the defendants who failed to enter appearance and file defence within the prescribed time.
6. Although the defendants have raised several issues in support of the application, for reasons that will be clear, I propose to deal with the singular issue whether I should set aside judgment entered in default of appearance and defence. In this case the following facts are not in

dispute:

(a) That the Summons to Enter Appearance was served on the defendants on 14<sup>th</sup> November 2019.

(b) The defendants filed defence on 10<sup>th</sup> January 2020. This is confirmed by payment made on 10<sup>th</sup> January 2020 (Transaction No. OAA5A7BCUZ).

(c) The Deputy Registrar entered judgment on 20<sup>th</sup> January 2020.

7. It is apparent that the default judgment was entered in error as the defendants had already entered appearance and filed defence. They cannot be blamed for an oversight by the court. I take judicial notice of the fact that at this time physical and online filing and payment were proceeding side by side thus while the statement of defence had been for paid for and therefore filed, it was not on the court file when the Deputy Registrar had entered judgment.

8. Under **Order 10 rule 11** of the **Civil Procedure Rules**, the court has unfettered discretion to set aside judgment but where judgment is irregular, as it is apparent in this case, the court shall set aside the judgment *ex debito justitiae*. I allow the Notice of Motion dated 31<sup>st</sup> March 2020 and order as follows:

(a) The default judgment be and is hereby set aside and the defendants statement of defence dated 10<sup>th</sup> January 2020 shall be deemed as duly filed.

(b) Cost of the application shall be in the cause.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of AUGUST 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Sagini instructed by Otieno Okeyo and Company Advocates for the Plaintiffs.

Mr Obok instructed by Prof. Albert Mumma and Company Advocates for the Defendants.