REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E291 OF 2019

THUO MATHENGE.....1ST APPLICANT/DEFENDANT

RAWLINGS MATHENGE THUO.....2ND APPLICANT/DEFENDANT

VERSUS

FAMILY BANK (K) LIMITED.....RESPONDENT/PLAINTIFF

RULING

(1) Before this Court is the Notice of Motion dated **20th January 2020** by which **THUO MATHENGE (**the 1st Defendant/ Applicant) and **RAWLINGS MATHENGE** (2nd Defendant/ Applicant) seek the following orders:-

"1. SPENT

2. SPENT

3. THAT the judgment entered in default of Defence on 25th November 2019 as well as the decree and Certificate of Cost issued on 2nd December 2019 and 6th November 2019 together with all other consequential orders be set aside.

4. THAT the Court be pleased to grant the Defendant/Applicant unconditional leave to defend the suit.

5. THAT the annexed draft Statement of Defence be deemed to be duly filed and served upon payment of the requisite court fees.

6. THAT the costs be provided for."

(2) The application was premised upon **Section 1A,1B and 3A** of the **Civil Procedure Act (Cap 21) laws of Kenya and Order 10 Rule 11, Order 12 Rule 7, Order 40 Rule 1 and Article 159(1)(d) of the Constitution of Kenya 2010** and all other enabling provisions of law, and was supported by the Affidavit of even date sworn by **JOHN KABIRA KIONI** an Advocate of the High Court of Kenya.

(3) **FAMILY BANK LIMITED** the Plaintiff/Respondent opposed the application through the Replying Affidavit dated **31st January 2020** sworn by **SYLVIA WAMBANI** a legal officer with the Plaintiff Bank. The application was canvassed by way of written submissions. The Applicants filed their written submissions on **2nd March 2020** whilst the Respondents filed their submissions on **10th March 2020**.

BACKGROUND

(4) The basis of this application is the judgment in Default of Defence which was entered against the Applicants on **25th November 2019**. The Plaintiffs had filed the suit herein on **18th September 2019** seeking judgment against Defendant for:-

"(a) The sum of Kshs.164,548,679.09 due and owing to the Plaintiff from the 1st and 2nd Defendant as at 31st July 2019 under the Personal Guarantee and indemnity dated 24th February 2016.

(b) Costs of the suit.

(c) Interest on (a) and (b) above.

(d) Any other or further relief that the Honourable Court may deem fit and just to grant."

(5) Summons to enter Appearance were extracted which summons together with the Plaint were served upon the Defendants sometime in **October 2019**. However, the Defendants failed to enter appearance or to file a Defence within the time specified by law. Following a Request for judgment dated **14th October 2019** by the Plaintiff judgment in Default was entered on **25th November 2019** and subsequently a Decree dated **2nd December 2019** was issued. The Applicants state that they only became aware of the judgment against them on **15th January 2020,** when they were served with a Notice of Entry of Judgment.

(6) The Applicants plead that their failure to enter Appearance and Defence within the time provided by law was not deliberate but was due to error of the Advocate whom they had instructed. The Applicants submit that they stand to suffer great prejudice if this application is not allowed as prayed.

(7) As stated earlier the Respondent opposes this application and submits that no valid and/or persuasive grounds have been advanced to warrant the grant of the orders being sought.

ANALYSIS AND DETERMINATION

(8) **Order 10 Rule 11 of the Civil Procedure Rules 2010** provides:-

"11 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."

A distinction is drawn in law between a regular and irregular judgment. In the case of **JAMES KANYIITA NDERITU & another –Vs- PHILOTAS GHIKAS & Another [2016] eKLR,** the Court of Appeal stated as follows:-

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence 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. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

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……."

(9) In the case of **PITHON WAWERU MAINA VS THUKA MUGIRA [1983] eKLR** the Court of Appeal held as follows:-

"(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment 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. (PATEL V EA CARGO HANDLING SERVICES LTD [1974] EA 75 at 76C and E b). secondly, this discretion is intended so 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 course of justice.

The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court."

(10) There is no dispute that the Judgment in Default entered against the Applicants on **25th November 2019** was in fact regular. The Applicants concede that they had been served with a summons to enter appearance. Vide an Affidavit of Service dated **14th October 2019** sworn by one **MARTIN MUNENE MUCHENI**, an Advocate of the High Court, it is proved that service of the summons to enter appearance together with a copy of the Plaint were duly served on the Applicants on **14th October 2019.**

(11) The Applicants concede that they failed to enter appearance and/or file a Defence within fifteen (15) days of service of the summons. Therefore, it is clear that the judgment in default was regular.

(12) The Applicants state that upon receiving the summons they instructed the firm of **Kabira Kioni & Company Advocates** to enter appearance on their behalf and file their Defence but to their surprise this was not done. The Applicants state that they had all along labored under the mistaken belief that a Defence had been filed in the matter.

(13) It is averred for the Applicants that the failure to enter appearance and to file defence was occasioned by the fact that the file could not be traced in the Registry. However, no letters addressed to the Registrar seeking assistance in tracing the Court file have been exhibited. Further it is hard to believe that it was missing for the purpose of filing Defence yet it was readily available on **14th October 2019** when the Request for Judgment in Default was filed.

(14) I do not believe that the file was missing. Rather it is clear that the Advocate who had been instructed to enter appearance and file Defence negligently failed to act as per instructions. The reasons for this omission are not persuasive at all.

(15) Having said that I note that the error/omission lies squarely at the feet of the Advocate. This should not cause the Defendant to be shut out of the Court. In the case of **Philip Chemowolo & Another Vs Augustine Kubede [1982-88] KAR** it was stated thus:-

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for purpose of deciding the rights of parties and not the purpose of imposing discipline."**

(16) Further in **Belinda Murai & 9 others –Vs- Amos Wainaina, CA NO NAI 9 of 1978** it was held:-

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip…The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and ad option of a legal point of view which court of appeal."**[own emphasis]

(17) The Court is required to consider whether the Defence raises triable issues. In **SHAH –VS- MBOGO [1969] E.A 116** it was held that:-

> **"The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by cost for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court."** [own emphasis]

(18) The claim in this suit is for **Kshs.164,548,679.09** which is a colossal amount by any standards. It would not be just to deny the Defendant an opportunity to defend the suit. In the case of **SEBEI DISTRICT ADMINISTRATION –VS- CASYALI & OTHERS [1968] E.A 300,** the Court observed as follows:-

> **"In my view the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny a subject a hearing should be a last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A Defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defend**."[own emphasis]

(19) I have perused the Draft Defence and I find that it raises triable issues. Accordingly, I do allow the Notice of Motion dated **20th January 2020** and grant **prayers (3), (4)** and **(5)** as prayed. I further order the Defendant to pay to the Plaintiff Getting Up Costs of **Kshs.30,000/=** (Thirty Thousand only). Costs of this application will be met by the Defendant/Applicant.

Dated in Nairobi this 29th day of September 2020.

.....

Justice Maureen A. Odero