REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

COMMERCIAL CASE NO 60 OF 2018

BETWEEN

JOSEPH PHILEMON OWINO...PLAINTIFF/RESPONDENT

AND

EQUITORIAL COMMERCIAL BANK ....**1ST DEFENDANT/APPLICANT**

J.M. GIKONYO t/a Garam Investments.......................................2ND DEFENDANT/APPLICANT

RULING

1. By a notice of motion amended on 18th February, 2016 brought under Sections 1 A (1) – (3); 1B and 3A and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 10 Rule 11 and Order 50 Rule 6 of the Civil Procedure Rules; the defendants/ applicants seek orders that

> ***1) The Honourable Court be pleased to extend time for the Applicants to file their defence and that the annexed defence be deemed duly filed upon payment of the requisite court fees***
>
> ***2) The Honourable Court be pleased to set aside the default judgment entered against the applicants***
>
> ***3) THAT the costs of this application be provided for***

2. The application is based on the grounds among others that the defendants due to an oversight did not file their defences and further that the order sought will not prejudice the Respondent. The application is also supported by an affidavit sworn on 23rd February, 2016 by Mitchell J.B.Menezes advocate for the Applicants who reiterates the grounds on the face of the application and takes the blame for failure to file the defences. He avers that he discovered the default on 6th June, 2013 and proceeded to lodge the application dated 11th June, 2013 for extension of time to file the defences annexed and marked ***MJBM-1***. Annexed to the affidavit is a proposed written defence marked ***MJBM-1*** which it is averred will enable the court to effectually and completely adjudicate upon and settle all questions involving this suit.

3. The application is opposed by way of a replying affidavit sworn by the Respondent on 25th June, 2016. According to the respondent, the Applicants did not exercise diligence having moved the court 3 years after being served with the plaint and another 3 years to file the amended application. The Defendant urged the Court to find that the delay of 6 years has not been explained and commended the court to find that thus application is an abuse of the court process and accordingly reject it.

4. Further to the supporting affidavit, the Applicants on 18th January, 2018 filed written submissions. The applicants urge the court not to visit the mistake of their advocate on them. Reliance was placed on the Ugandan Supreme Court case of **BANCO ARABE ESPANOL VS BANK OF UGANDA (1999) 2 EA 22** where the court held that mistaken belief of counsel ought not to be visited on the client.

5. The Applicants submitted that they have a good defence and placed reliance on **OLYMPIC ESCORT INTERNATIONAL CO. LTD & 2 OTHERS –VS- PERMINDER SINGH SANDHU & ANOTHER (2009) eKLR** where the Court of Appeal held that for an issue to be triable, it has to be *bona fide*. The court stated as follows:

> **"It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona**

fide."

6. The Applicants contend that the respondent challeges their right to legally exercise the statutory power of sale and that the default judgment entered was irregular, and ought to be set aside *ex debito justitiae* since there exists sufficient grounds on which the court can exercise its discretion. In support thereof, the Applicants rely on **Remco Ltd v Mistry Jadva Parbat & Co. Ltd and Others [2002] 1 EA 233**.

ISSUES FOR DETERMINATION

7. I have considered the affidavits on record and submission by the Applicants and I have summarized the issues for determination as follows:

i. Is the *exparte* judgment a regular one?

8. The basis of approach in setting aside an *exparte* judgment is that if service of summons to enter appearance has been served, then the court will have before it a regular judgment. The applicants concede that the plaint and summons to enter were served and the judgment on record is therefore a regular one.

ii. Has the delay been explained?

9. It has not been denied that the plaint and summons to enter appearance were served on the Applicants on 30th September, 2010. It is not clear when the firm of L.G.MENEZES filed its notice of appointment but it filed two affidavits, one of 27th October, 2010 and the other on 27th October, 2010 in opposition to the Respondent's application dated 30th September, 2010 seeking an injunction to restrain the Applicants from selling his land KISUMU.KONYA/3354 (***hereinafter referred to as the suit property***).

10. From the foregoing, it is not disputed that the Applicants were aware of the existence of this suit since 30th September, 2010 when the plaint and summons were served on them. Close to 3 years later and more specifically on 15th July, 2013, the applicants filed the application dated 11th June, 2013 seeking extension of time to file their defences. The court record shows that the said application was not prosecuted for close to 3 years. On 01st April, 2016, the Applicants filed the current application dated 18th February, 2016 and that urge the court not to punish them for mistakes of counsel.

11. There has been a misconception in recent times that compliance with rules of procedure goes against the overriding objective principle of sections **1A, 1B, 3** and **3B** of the **Civil Procedure Act**. That in my considered view is far from the truth for the reason that procedure is a hand maiden of just determination of cases.

12. The general trend, following the enactment of **Sections 1A**, **1B, 3** and **3B** of the **Civil Procedure Act** and **Article 159(2) (d)** of the **Constitution**, is that courts today place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice. This application was filed close to 6 years from the date of service of summons and the plaint. The delay in filing the defence is inordinate and has not been explained. That procedural lapse on the part of the applicants, deplorable as it is, is however excusable under the provisions of aforementioned provisions of the Constitution and the Civil Procedure Act.

iii. Does the draft defence raise triable issues?

13. A regular judgment such as the one in this matter would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. In **Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd versus Augustine Kubede (1982-1988) KAR** the Court of Appeal while discussing discretion to set aside an interlocutory judgment stated:

> **"The discretion is unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence."** (Emphasis added).

14. The discretion is unfettered and is to be used with reason. (See **Philip Kiptoo Chemwolo case**). In **Mbogo v Shah [1968] EA 93,** the court held that:

> **"…..discretion for setting aside 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 party which has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice". (See Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) e KLR CA 217/2009)**.

15. I have considered the application *vis a vis* the affidavits and annexures on record. I have also considered the submissions by the Applicants' advocates and the authorities which were cited in support thereof. This court has a duty to consider whether the proposed defence raises triable issues. In so doing, I will endevour to address issues raised in the proposed defence as hereunder.

16. The 1st issue for consideration is to be found at paragraph 5 of the proposed defence where the Applicants accuse NARENDRAKUMAR MOTIBHAI JADAV of defaulting in repaying the financial facility advanced to him and which was secured by a charge over the suit

property owned by the Respondent. Consequently, the Applicants at paragraph 8 (a) and (b) of the proposed defence contend that the Respondent is not wholly or fully discharged from obligations created by the legal charge over the suit property and is therefore not entitled to an order of injunction restraining the Applicants from exercising the statutory power of sale.

17. From the foregoing, this court is satisfied that there is a defence on its merits.

iv. Is the Respondent likely to suffer any prejudice if the orders sought are granted?

18. The court record makes it evident that an order restraining the Applicants from disposing off the suit property was granted on 30th September, 2010 and has to date not been set aside. It's been 9 years since the order of injunction was granted and the Respondent's property is therefore not in any danger of being disposed off. Consequently, I find that the Respondent is not likely to suffer any prejudice if the orders sought are granted.

DISPOSITION

19. As a result, I have found that the notice of motion amended on 18th February, 2016 has merit and is allowed in the following terms:

a. ***The default judgment entered against the Applicants is hereby set aside***

b. ***Time for the Applicants to file their defences is hereby extended by 30 days from today's date within which time the Applicants shall file and serve the Respondent***

c. ***The Applicants are condemned to pay to the Respondent Kshs. 20,000/- thrown away costs within 30 days from today's date***

DATED, DELIVERED AND SIGNED THIS *20th* **DAY OF** *June* **2019**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Leah

For the Defendants/Applicants - Mr. Njoga

For the Plaintiff/ Respondent - Ms. Omollo