REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 14 OF 2011

RAYAT TRADING CO. LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BANK OF BARODA.....1ST DEFENDANT/RESPONDENT

TETEZI HOUSE LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 27TH March 2017, brought under the provisions of Order 10 Rule 11, Order 2 of the Civil Procedure Rules 2010 and Section 1A, 1B & 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

2. The Applicant is seeking for orders that;-

i. The Honourable Court be pleased to make an order setting aside the interlocutory judgment entered on the 12th October 2015;

ii. The Honourable Court be pleased to grant leave to the Plaintiff herein to file the defence to the Counter claim out of time;

iii. The draft defence to the Counterclaim attached be deemed as properly filed and served upon payment of the requisite court fees;

iv. Costs of this Application be in the main cause

3. The Application is supported by the grounds thereon and an Affidavit dated 27th March 2017, sworn by Gurubhash Singh Rayat, a director of the Plaintiff/Applicant Company.

4. He averred that the Plaintiff/Applicant is the registered owner of the property known as LR No. 209/4460, which was charged to the 1st Defendant Bank to secure a financial facility of an aggregate of Kshs. 17,700,000. That, the property was fraudulently sold to the 2nd Defendant/Respondent by way of private treaty without notice to the Plaintiff Company, necessitating the suit herein.

5. That subsequently, the 1st Defendant/Respondent sought for leave to file a counter-claim and was allowed, whereupon the counter-claim was filed on the 25th May 2015 and served on the 26th May 2015 but it was not brought to the attention of their advocate herein on record, Mr. Francis Moriasi by his Secretary.

6. That he only became aware of it when the same was attached to the 1st Defendant's Replying Affidavit sworn by David Ogega Nyaboga dated 25th July 2015, in support of the request for judgment and subsequently, while preparing for the hearing of the main suit, when it came to their knowledge that, there was an interlocutory judgment on the counterclaim in the sum of Kshs 7,329,014.

7. The Applicant argues that the failure to file the defence to the counter claim was therefore inadvertence on the part of the Advocate office and the mistake of the Advocates should not be visited upon the Applicant's Company, as no notice was brought to it. As such if the suit proceeds to hearing without its defence to the counterclaim and with the judgment in default in place, the Company will be condemned unheard to pay the disputed amount in the counterclaim for Kshs 7,329,014, which will prejudice it in the main claim and suffer irreparable injury.

8. Hence the prayer that the judgment in default of defence granted by the court be set aside and leave be granted to the Plaintiff to file its defence to the counter-claim out of time and the defence to the counter-claim attached herein and marked as "GSR 2" be deemed as filed and served upon payment of the requisite court fees.

9. However the 1st Defendant/Application opposed the Application based on a Replying Affidavit dated 22nd May 2017, sworn by David Ogega Nyaboga on behalf of the 1st Defendant.

10. He averred that the Application has not been brought in good faith. That the Applicant has been and continues to be guilty of laxity in prosecuting the suit, including filing a defence to the Counter-Claim. It is attempting to set-aside the interlocutory judgment through this Application filed almost a year and a half after judgment in default was entered, to the prejudice of the 1st Defendant.

11. The Applicant is seeking to exploit the goodwill of the Court as the firm of Ombachi, Moriasi & Company Advocates has acknowledged receipt of service of the amended defence and Counter-claim by the copy of the same annexed to their supporting affidavit.

12. The 1st Defendant/Respondent averred that, the law dictates that an Applicant, in his or her application to set aside an exparte judgment entered against it, ought to show to the Honourable Court that it has a good and genuine defence to the Counter-claim. But the Plaintiff has failed, refused and/or neglected to file or annex draft defence to the Application.

13. It was further argued that the reasons advanced for the failure to file the defence namely, inadvertence by the Plaintiff/Applicant's Counsel are unsatisfactory, for the reason that the conduct in prosecuting this matter clearly shows lack of commitment, in the same, as the Applicant continues to occasion injustice to the 1st Defendant by holding it in suspense at their whims.

14. That the alleged mistake of the advocate is a smokescreen created by the Plaintiff to hide from its duty to prosecute its case as it is the duty of the litigant to constantly check with her Advocate the progress of its case and insist on due diligence when complying with statutory timelines as the case belongs to a litigant and not his/her advocate which duty the Plaintiff has not been keen to uphold.

15. The wheels of justice demand that there be an end to litigation and therefore injustice shall be occasioned if this counterclaim is to be re-opened given that the Applicant had previously been given adequate opportunity to prosecute the suit within the statutory prescribed timelines under the Civil Procedure Rules 2010.

16. Therefore the entire Application is an abuse of the Court process, a total disregard of due process, smirks of impunity, trivializes the nature of Application and fails to disclose any valid and legal reason for grant of orders for setting aside the judgment in default as prayed for and ought to be dismissed with costs.

17. However, should the Honourable Court in any way accede to the Application, the Applicant should furnish the Court with security pending the determination of the matter.

18. The 2nd Defendant/Respondent on its part opposed the Application through grounds of opposition dated 25th April 2017 arguing that the Application is based upon a misleading affidavit which distorts the facts and deliberately fails to disclose all material facts and that the Applicant is guilty of indolence, laches, inordinate and inexcusable delay in prosecution of the suit herein.

19. 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.

20. That the allegations that the Applicant got to learn of this court order recently is a blatant falsehood and intended to mislead the Honourable Court. The Applicant has not been duly and promptly advised but has a clearly statutorily stipulated obligation to file its defence to the counter-claim within 15 days upon service. Therefore the Applicant has not come to court with clean hands and is economical with the truth.

21. The 2nd Defendant/Respondent argued that the Application and the prayers sought are draconian and intended to delay and derail the hearing of the substantive suit on a matter which is straightforward as there is no evidence and proof of any payments made by the Plaintiff to the 1st Defendant on record.

22. That it is the duty and right of any litigant to put pressure on his counsel to file a defence within time and have the suit prosecuted earliest possible. If counsel cannot rise to the task, the Plaintiff has the power and the right to dismiss such an advocate and get the services of another competent advocate.

23. In this matter the Plaintiff was ordered to prosecute the main case within a stipulated period or have the same automatically dismissed and no steps have been exhibited, to prove compliance with the said order, therefore delay is inexplicable.

24. The 2nd Respondent termed the Application as mischievous, bad in law, ill-advised and intended to create some unwarranted obstacles, delay and also increase costs on a matter that is otherwise clear and direct. That it is a waste of judicial time and ought to be dismissed with costs.

25. In response to the averments by the Respondents, the Applicant filed a further affidavit dated 6th July 2017, sworn the same deponent of the 1st Affidavit un support of the Application, Mr Gurubhash Singh Rayat.

26. He reiterated that the secretary of Mr. Moriasi who is his advocate received the defence and counter claim but did not bring it to the attention of the Advocate Mr. Moriasi who is handling this case.

27. It is the unfettered discretion of the court to allow a party a day in Court to ventilate its case to avoid the injustice or hardship resulting from excusable mistake or error as herein, of failing to file a defence to counter claim within time.

28. That the Applicant's draft defence to counter claim was omitted from the attachment to the Affidavit in support of the Application, due to the mistake caused by the Advocate's filing clerk but is excusable.

29. After filing the respective documents in relation to the Application, the parties agreed to dispose of the Application by filing written submissions.

30. The Applicant reiterated the factual matters in the two Affidavits in support of the Application and raised the following issues for determination;-

i. Whether the Court ought to set aside the exparte interlocutory judgment entered on the 12th October 2015?

ii. Whether the Court ought to allow the defence to the counterclaim out of time?

iii. Whether the fault of the Advocate to file a defence to counterclaim within time ought to be burdened on the Plaintiff?

iv. Whether the Plaintiff's intended defence to counterclaim raises any triable issues?

31. The Applicant submitted that, the Court has the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail and it is evident from case law that, the Court is not required to consider the merits of a defence in an Application of this nature, although the Applicant has a defence to the counter-claim which it should be allowed to be heard on merit. Therefore the Court ought to look at the *"draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as the Applicant's Defence raises triable issues"*.

32. Even then the Plaint in essence, is an answer to the counter-claim and if the exparte judgment is set aside, the Respondents will not be prejudiced. Reference was made to two cases of; *Patel vs E.A. Handling Services Ltd (1974) EZ 75* and *Tree Shade Motor Ltd vs D.T. Dobie Co. Ltd CA 38 of 1998* and *Maina vs Muriuki (1984) KLR 407* where the Court held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error..

33. The Applicant should not suffer due to a mistake of its counsel. The case of; *CFC Stanbic Limited vs John Maina Githaiga & Another (2013) eKLR* was referred to. Further reference was held to the case of; *Lee G. Muthoga vs Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009* where it was held that:-

"it is widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."

34. Finally the case of; *Winnie Wambui Kibinge & 2 Others vs Match Electricals Limited Civil Case No. 222 of 2010* was cited where it was held that:-

"it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.."

35. The Court was further invited to consider the case of; *Thayu Kamau Mukigi vs Francis Kibaru Karanja (2013) eKLR* and allow the defence to be filed out of time.

36. The Applicant concluded by referring to the provisions of Article 159(2)(e) of the Constitution and Section 1A and 1B of the Civil Procedure Act and invited the court to consider substantive justice.

37. The 1st Defendant/Respondent submitted that, the Court should exercise its discretion to set aside a judgment with caution by gauging the explanation afforded the Applicant which is seeking to set aside a default judgment. Thus, the setting aside of the judgment should not be tantamount to setting back the progress of the case.

38. The 1st Defendant/Respondent referred the Court to the case of ***Mohamed & Another vs Shoka (1990) KLR 463*** and submitted that, the tenets the Court should consider are;-

i. Whether there is a regular judgment;

ii. Whether there is a defence on merit;

iii. Whether there is a reasonable explanation for any delay;

iv. Whether there would be any prejudice.

39. On the issue of regular judgment, the 1st Respondent submitted that, the regularity of the judgment is not controverted and therefore the Judgment was entered regularly in accordance with the Civil Procedure Rules and the threshold incapacitated in the law. Reliance was placed on the case of; *Mwala vs Kenya Bureau of Standards EA LR (2001) 1 EA 148*, where the court stated;

> "to all that I should add my own views that a distinction is to be drawn between a regular and unirregular exparte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justiciae for a court should never countenance an irregular judgment on its record."

40. On the issue of whether there is a defence on merit, the 1st Respondent submitted that, since the Applicant's Supporting Affidavit of Gurubash Singh Rayat dated 27th March 2017 purports at paragraph 14, to have annexed a draft defence, marked "GSR2" and yet the same has not been attached, the Applicant has denied the Court the benefit of determining whether the "Defence" has merit or not. In that regard, the omission is fatal to the Plaintiff's Application *in toto* and ought to be dismissed on that ground.

41. The 1st Defendant/Respondent referred to the cases of *Patel vs E.A. Handling Services Ltd (1974) EZ 75* and *Tree Shade Motor Ltd vs D.T. Dobie Co. Ltd CA 38 of 1998* and the case of; *Thayu Kamau Mukigi vs Francis Kibaru Karanja (2013) eKLR* , where the Court stated;

> "on the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Limited vs DT Dobie Co. Ltd. CA 38/98 where the court held that when an exparte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence."

42. In further submissions, the 1st Respondent argued that, the provisions of section 1A, 1B of the Civil Procedure Act and Rules of procedure have been set in place to guide the expeditious, efficient and just disposal of cases, and Applicant's conduct "smirks" of the impunity and flagrant disregard of, these rules.

43. The 1st Respondent argued that, the Applicant's allegation that the Counsel's secretly received the Amended defence and Counter claim and failed to bring it to his attention is unsubstantiated, in the absence of an Affidavit sworn by the secretary. The cases of; *Savings & Loans Ltd vs Susan Wanjiru Muritu Nairobi HCCC 397 of 2002* and the case of; *Ruga Distributors Limited vs Nairobi Bottlers Limited HCCC 534 of 2011*, where court stated;

> "…it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter."

44. That an Advocate's failure to execute his client's instructions amounts to professional negligence. Reference was made to the case of; *Water Painters International vs Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR,* where the Court stated;

> "in the words of justice Ringera in Omwoyo vs African Highlands & Produce Co. Ltd (2002 J) KLR, time has come for the legal Practitioners to should the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence or the defendant's Advocates. This is a proper case where the Defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment."

45. Finally, the 1st Respondent reiterated that, if the Application is granted, it will suffer prejudice as it has been stopped from exercising its statutory power of sale. Reference was made to the case of; *Jomo Kenyatta University of Agriculture and Technology vs Musa Ezekiel Oebal (2014) eKLR CA 217/2009.*

46. The 2nd Defendant/Respondent submitted that, Order 10 Rule 11 of the Civil Procedure Rules lays down the conditions under which an interlocutory judgment will be set aside. That the Court's power to set aside a Judgment is exercised with a view of doing justice between the parties. Reliance was placed on the case of; ***Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-1988) KAR,*** where the Court held;

> **"The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"**

47. In the case of; ***Kimani V MC Conmell (1966) EA 545,*** the Court held that where a regular judgment has been entered the Court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues.

48. Further reference was made to the case of; ***Jomo Kenyatta University of Agriculture and Technology V Musa Ezekiel Oebal (2014) e KLR,*** where the Court stated that the purpose of clothing the Court with discretion to set aside ex-parte judgment is:

> **"To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."**

49. The 2nd Respondent further relied on the case of ***Patel V EA Cargo Handling Services Ltd (1974) EA (supra),*** where the Court stated that the main concern of the Court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given

to it by the Rules.

50. Finally, the 2nd Respondent relied on the case of; ***Habo Agencies Limited V Wilfred Odhiambo Musingo (2015) eKLR*** where the Court stated that it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation.

51. I have considered the Application in total and I find that the issue to determine is whether the Applicant has met the threshold of grant of the orders sought. The relevant law is found under the provisions of Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010 which provide as follows:

> **"4(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**
>
> **(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.**

52. However, Order **10 Rule 11** of the Civil Procedure Rules, provides that exparte interlocutory judgment in default of appearance or defence may be set aside, It reads as follows:

> **"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."**

53. Thus the court has the discretion to set aside a default judgment. In the case of; ***Patel vs EA Cargo Handling Services Ltd*** **(1974) EA 75,the Court held that;**

> "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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."(emphasis mine)

54. In the case **of;** ***Kenya Commercial Bank Ltd – V- Nyantange &Another (1990) KLR 443*** Bosire J, (as he then was) held that:-

> "1. Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.
>
> 2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

55. In the exercise of this discretion the Court will consider inter alia if:

> (a) the defendant has a real prospect of successfully defending the claim; or
>
> (b) it appears to the court that there is some other good reason why;
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim

56. Similarly in the case of; ***Thorn PLC v Macdonald [1999] CPLR 660,*** the Court of Appeal stipulated the following guiding principles:

> (a) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
>
> (b) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
>
> (c) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
>
> (d) prejudice (or the absence of it) to the claimant also has to be taken into account.

57. The Court in the case of *Rahman v Rahman (1999) LTL 26/11/99* , the court considered the nature of the discretion to set aside a default judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay (i.e., why the

application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

58. In ***Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede (1982-1988) KAR page 1036,*** the Court of Appeal held that;

> " The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. Kimani V MC Conmell (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue". (emphasis added)

59. One of the key factors to consider is whether the Defendant has a defence on merit. **In the case of; *Sebei District Administration V Gasyali & others (1968) EA 300*** Sheridan J observed that:

> "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 the subject a hearing should be the last resort of the court"

60. In the case of; **Tree Shade Motor Limited Vs DT Dobie Co Ltd CA** *38/98, the court held that even when exparte judgment was lawfully entered, the Court should look at the draft defence* **to see if it contained a valid or reasonable defence."**

61. In *International Finance Corporation v Utexafrica sprl [2001] CLC 1361* , it was stated that the test of a defence having a real prospect of success means that the prospects must be better than merely arguable.

62. The other matter to consider as whether to set aside or vary a judgment entered include whether the person seeking to set aside the judgment made an application to do so promptly and the reasons advanced for the setting aside the default judgment.

63. In the case of; *Law v St Margarets Insurance Ltd [2001] EWCA Civ 30, LTL*, the Court of Appeal allowed judgment in default to be set aside despite the defendant's solicitors' procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person. The overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined.

64. If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.

65. In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the defendant indicating a risk of dissipation of assets (see ***; Creasey v Breachwood Motors Ltd [1993] BCLC 480)***. As to the amount, this is in the court's discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside.

(see***; M. V. Yorke Motors v Edwards [1982] 1 WLR 444 and Training in Compliance Ltd v Dewse (2000) LTL 2/10/2000).***

66. In the instant case, there is no dispute that the Plaintiff/Applicant was properly served with a counter-claim and that at time the interlocutory judgment was entered, the Plaintiff had not filed a reply and/or a defence thereto. Therefore the interlocutory judgment entered on 12th October 2015, in favour of the 1st Defendant in the sum of Kshs 7,329,014.15, is valid and regular.

67. The reason advanced by the Applicant is that the Counsel forgot to file the reply and defence, due to the negligence his Secretary who failed to bring the counterclaim to his knowledge. In my considered opinion, this reason has no merit, in view of the fact the Applicant has the primary duty to follow up on the progress of its case and should have made an inquiry on the progress of the case.

68. I note from the record that the Amended defence and the Counter-claim were filed on 25th May 2015 and judgment thereon entered on 12th October 2015. The Applicant filed this Application on 25th March 2017, which is a period of two years after the service of the Counter-claim. This is no doubt an inordinate delay, in view of the reasons advanced for the same.

69. It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality.

70. In the same vein the provisions of Section 1A and 1B of the Civil Procedure Act obligates the parties assist the Court in the expeditious disposal of cases.

71. However, I note that that the claim by the Plaintiff/Applicant and 1st Defendant and arise from the same subject matter. This is informed by the prayers in the Plaint, dated 24th January 2011 where the Plaintiff is seeking for a permanent injunction to restrain the Defendants from

disposing of the suit property and a declaration order that the sale and transfer of the property to the 2nd Defendant was fraudulent and should be cancelled. Whereas, the 1st Defendant is seeking for inter alia, a sum of Kshs 7,329,014.15, as the outstanding amount on the loan facility.

72. If the 1st Defendant is allowed to execute for this sum, then the case between the Plaintiff/Applicant and the 2nd Defendant/Respondent will be prejudiced, in the sense that, the connection between the Plaintiff and the 2nd Defendant is the private sale of the suit property between the 1st Defendant and the Plaintiff. If the 1st Defendant is paid and leaves the arena, where will that leave the claim of the 2nd Defendant?

73. I also note that the Plaintiff is still to prosecute its claim and if the counterclaim is allowed to stand, the Plaintiff maybe prejudiced as part of his claim may be rendered nugatory in that the suit property is in the hands of the 2nd Defendant/Respondent.

74. I have also had the benefit of reading through the draft defence and I realize that the Plaintiff is disputing the averments in the counter-claim. In particular, the Plaintiff denies being in arrears in the sum claimed in the counterclaim and/or the allegation that the 1st Defendant consolidation all its accounts.

75. It also denies the sum of Kshs 22,165,026 as the accrued loan amount and that the balance due and payable is 7,329,014.15. Further the Plaintiff under paragraph 12 of the draft reply and defence to the counter-claim denies receipt of the statutory notice prior to the sale notice of the property. It that case, it will be in the interest of justice, if the parties were heard fully on the merit of their respective claims.

76. However, the matter should be heard expeditiously as the record indicates that on the 27th January 2011, a temporary order of injunction was issued to restrain the Respondents from disposing of suit property or dealing with it in a manner prejudice to the rights of the Applicant.

77. To achieve this expediency and in the interest of justice and the parties, I order that the interlocutory judgment entered herein, be and is hereby set aside on the following conditions;

a. The draft reply and defence to the counter-claim annexed to the further Affidavit, sworn by the Applicant, shall be deemed to be properly filed and served upon payment of the prerequisite Court filing fees;

b. The Applicant will serve the said Reply and defence to the counterclaim within 48 hours of this order;

c. In default of compliance with order given in (a) and (b) above then, the order vacating the interlocutory judgment shall automatically lapse without further reference to the to Court;

d. In view of the fact that this Application arose out of the professional negligence of the Law Firm representing the Applicant, it is only fair that they bear the consequences thereof; In that regard, I order that the Firm of Ombachi Purporting to conduct an Moriasi & Company Advocates will pay the 2nd Defendant/Respondent's costs of this Application and the 1st Defendant/Respondent, who are the beneficiary of the interlocutory judgment, set a sum of Kenya Shillings Thirty Thousand only (Kshs 30,000), as throw away costs.

e. The matter be set down for case management conference on priority basis.

78. Those then, are the orders of the Court.

Dated, delivered and signed in open Court this 23rd day of January, 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Moriasi……..……for the Plaintiff/Applicant

No Appearance (though aware) ….for the 1st Defendant/Respondent

Mr. MacRonald……..……for the 2nd Defendant/Respondent

Mr. Lang'at ……..….....……Court Assistant