



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 332 OF 2015

CFC STANBIC BANK OF KENYA LIMITED.....PLAINTIFF

-VERSUS-

BLACKSTONE MINING GROUP.....1ST DEFENDANT

WILSON KASHONGA SARONI.....2ND DEFENDANT

CAROLINE WANJIKU KAGO.....3RD DEFENDANT

RULING

[1] Before the Court for determination is the Defendants' Amended Notice of Motion, filed on **23 June 2017**, which was filed pursuant to the Court Order dated **26 May 2017**. The application was filed under **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Order 10 Rule 11 of the Civil Procedure Rules, and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] Spent

[c] That the warrants of arrest issued on **20 April 2017** be unconditionally lifted;

[d] That the interlocutory judgment entered herein on **3 February 2016**, the final judgment dated **11 November 2016** and all consequential orders be set aside upon such terms as are just;

[e] That the Draft Statement of Defence annexed to the application as **Exhibit "WKS 4"** be deemed as duly filed.

[f] That the costs of the application be provided for.

[2] The application was supported by the affidavit of the 2nd Defendant, **Wilfred Kashonga Saroni**, sworn on **25 April 2017**. He averred that on **20 April 2017**, he received a call from his Advocates, **M/s Osoro Omwoyo & Co. Advocates**, notifying him that this case had been cause-listed before the Deputy Registrar; and that upon perusal of the court file, his Advocate got to learn that interlocutory judgment

had been entered in the matter on **3 February 2016**. He averred that none of the Defendants was ever served with court process; and that they were unaware that Summons to Enter Appearance had been served by way of advertisement in the Daily Nation newspaper. It was further averred by the 2nd Defendant that since they had an Advocate on record, they ought to have been served with mention and hearing notices through the office of the said Advocate.

[3] In support of the application the 2nd Defendant annexed a Draft Defence as **Annexure "KWS 4"** to demonstrate that the Defendants have a plausible defence to the Plaintiff's claim; and therefore it was deposed that it would only be fair for the default judgment to be set aside to pave way for a merit hearing. In paragraph 3 of the Draft Defence, it was admitted that the parties entered into a hire purchase agreement dated **27 December 2013** for the purchase of a **Doosan Crawler Excavator Registration Number KHMA 985C**. It was however denied that the 2nd and 3rd Defendants were guarantors of the 1st Defendant as alleged; or that the agreed interest rate was 5.57% per annum as alleged. It was further averred in the proposed Defence that the 1st Defendant complied fully with the terms and conditions of the agreement dated **27 December 2013** and had since fully paid for the asset; and therefore that the Defendants would be greatly prejudiced if the Judgment and the Decree passed herein and all the subsequent orders are not set aside.

[4] In response to the application, the Plaintiff relied on the Replying Affidavit sworn by **Elijah Gathua Muhoro**, Advocate, sworn on **9 November 2017**, in which a chronology of the events herein have been restated. **Mr. Gathua** averred that the Plaintiff filed this suit on the **9 July 2015** together with a Notice of Motion under Certificate of Urgency dated **8 July 2017**. That the Notice of Motion was dispensed with at an interlocutory stage when **Kamau, J.** ordered that the same be served by way of advertisement for *inter partes* hearing on **15 July 2015**. The application was ultimately determined on **20 November 2015**; and although the Defendants entered appearance, they did not file a Defence for over two months. Consequently, the Plaintiff filed a Request for Judgment dated **22 January 2016** on **25 January 2016**. That request was allowed, Interlocutory Judgment was entered and the case listed for formal proof on **8 June 2016**. Thus, Final Judgment was recorded herein on **11 November 2016**. It was accordingly averred by **Mr. Gathua** that the instant application is not merited, and is only designed to deny the Plaintiff the right to recover the monies owed to it by the Defendants.

[5] The 1st Defendants' application was filed **Order 10 Rule 11 of the Civil Procedure Rules**, which provides that:

"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."

Thus, the Court has unfettered discretion to set aside or vary any default judgment upon such terms as are just. However, the exercise of such discretion must be warranted and for good cause. In **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** this principle was expressed thus:

"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 to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

[6] In determining whether good cause has been shown for the invocation of the discretion of the Court in such matters, it is often helpful to make a distinction and determine whether the default judgment is a regular judgment or an irregular judgment, as was done in the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**, by **Njagi, J.** (as he then was) thus:

"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is

obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."

[7] A perusal of the court record shows that, despite his best efforts, Counsel for the Plaintiff was unable to trace and serve the Defendants with process as their whereabouts were unknown. Accordingly, an application was made for leave to serve by way of substituted service through advertisement in a newspaper with nationwide circulation as well as by registered mail. That application was allowed on **31 July 2015** and orders issued accordingly on **14 August 2015**. The court record further shows that service was thereafter effected by **Gragory Oriaro Nyauchi**, by way of advertisement in the Daily Nation newspaper of **Monday 31 August 2015** as well as by registered post. Additionally, the 3rd Defendant was served via her email address, being carolekago@yahoo.com. This evidence is in the Affidavit of Service sworn by **Gragory Oriaro Nyauchi**, sworn on **22 December 2015**. Copies of the List of Registered Postal Parcels, the newspaper advertisement as well as email to the 3rd Defendant were annexed to that Affidavit of Service in proof of service.

[8] Although there is no copy on the file, the parties are in agreement that the Defendants entered appearance as required under **Order 6 Rules 1 and 2** of the **Civil Procedure Rules**, but failed to file a Defence within 14 days as required by **Order 7 Rule 1** of the **Civil Procedure Rules**. Accordingly, an Interlocutory Judgment was entered herein on **3 February 2016** against the Defendants pursuant to **Order 10 Rule 10** of the **Civil Procedure Rules**. The matter was then listed for formal proof, which was done on **8 June 2016** and Final Judgment passed on **20 November 2016**. Clearly therefore, what was recorded herein was a regular judgment.

[9] It is now trite that a regular judgment can only be set aside if there is a defence on merit. In **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs Augustine Kubende [1986] eKLR**, the Court of Appeal restated the applicable principles thus:

"The discretion is in terms 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...obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[10] One of the issues raised in the Draft Defence is that the 1st Defendant complied fully with the terms and conditions of the agreement dated **27 December 2013** and had since fully paid for the asset. This in my view is a valid triable issue that is worth reopening the case for, bearing in mind the words of **Duffus, P.** in **Patel V East Africa Cargo Handling Services Ltd (supra) Duffus, that:**

"...defence on the merits does not mean ... a defence that must succeed, it means as SHERIDAN J put it "a triable issue", that is, an issue which raises a prima facie defence and which should go to trial for adjudication"

[11] Additionally, in the **Philip Chemwolo Case (supra)** it was observed that:

Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case determined on its merits...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 the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

[12] It is noted that at Ground (f) of the Amended Notice of Motion, the Defendants indicated that it was ready to pay any thrown away or such other costs as the Court may order. Thus, I would allow the Defendants Amended Notice of Motion filed herein on 23 June 2017 and grant orders as follows:

[a] That the default judgment entered herein against the Defendants on 11 November 2016 be and is hereby set aside, thereby giving the Defendants leave to defend this suit;

[b] That the Decree dated 11 December 2016 and all its consequential orders herein, including the **warrants of arrest issued on 20 April 2017 be and are hereby lifted** and/or set aside;

[c] The Defendant are hereby condemned to bear the costs of the application; including thrown away costs.

[d] The Defendants Defence be filed and served within 14 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE