



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.296 OF 2017

ECOBANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

MINOLTA LIMITED.....1ST DEFENDANT/APPLICANT

JOSEPH MICHAEL ADEDE.....2ND DEFENDANT/APPLICANT

CAROLINE MLALE MBELA ADEDE.....3RD DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is the Defendants/Applicants' Notice of Motion dated **28 September 2017**. The application was filed under **Sections 1A and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 10 Rules 2 (a)** and **11** of the **Civil Procedure Rules, 2010** as well as **Article 159 (2) (d)** of the Constitution for Orders that:

[a] Spent

[b] Spent

[c] An order be issued setting aside the interlocutory judgment entered herein on the **14 September 2017** together with all its consequential orders.

[d] An order be issued granting leave to the Defendant to file a Memorandum of Appearance and the Notice for Further and Better particulars out of time.

[e] Costs of the application be provided for.

[2] The application is based on the grounds stated on the face of the application. It is supported by the affidavit of the 2nd Defendant, **Michael J. Adede**, sworn on **28 September 2017** together with the documents annexed thereto. It was the averment of **Mr. Adede**, who is also a Director of the 1st Defendant, that the 1st Defendant was served with Summons to Enter Appearance on **28 July 2017**. It thereupon engaged the law firm of **KMK Law LLP** to enter appearance and file a Statement of Defence on its behalf. The said firm of advocates proceeded to file a Notice of Appointment of Advocates rather than a Memorandum of Appearance; and to be in a better position to respond to the averments made in the Plaint, the Advocates filed a Notice for Further and Better Particulars, which was duly served on Counsel for the Plaintiff.

[3] It was further the contention of the Defendants that, having requested for particulars, it was irregular and premature for the Plaintiff to file a Request for Judgment before complying with the Request for Particulars; and that it is in the interest of justice that further particulars be provided to them to enable them file their respective Defences. **Mr. Adede** further averred, on his own behalf and on behalf of the 3rd Defendant, that neither of them was served with Summons to Enter Appearance. Hence, it was averred that it was imperative for each of the Defendants to be separately served with Summons to Enter Appearance and Plaint; more so because the 2nd and 3rd Defendants were sued on the basis of the Personal Guarantees that they issued on behalf of the 1st Defendant.

[4] The Plaintiff opposed the application vide the Replying Affidavit sworn by **Elizabeth Hinga**, the Head of the Plaintiff's Early Warning

and Remedial Unit, sworn on **17 October 2017**. It was deposed on behalf of the Plaintiff that:

[a] **Order 2 Rule 1 (2)** of the **Civil Procedure Rules** provides that a request for particulars should be made before the time to enter appearance lapses;

[b] The Defendants were served on **28 July 2017** with summons requiring them to enter appearance within 15 days thereof;

[c] The time for entering appearance lapsed on **12 August 2017**;

[d] The Defendants filed their request for better and further on **17 August 2017** after the time for entering appearance had lapsed;

[e] The import of **Order 2 Rule 1 (3) of the Civil Procedure Rules** is that once the request is made within the lawful period for entering appearance, time stops until the request is satisfied;

[f] Time did not stop herein since by the time the Defendants filed the request for the particulars the time to enter appearance had lapsed; and

[g] Further, the request for particulars filed on **17 August 2017**, is defective as a witness statement is not a pleading for purposes of **Section 2 of the Civil Procedure Act** and therefore not a proper subject of a request for further and better particulars.

[5] It was the contention of the Plaintiff that the Defendants had not controverted any of the admissions of the debt set out in paragraph 7 of the Plaintiff and specifically the email correspondence of **26 October 2016** where they promised to clear the arrears on their account by **28 October 2016**. The Plaintiff further averred that the Defendants had not annexed any Draft Defence to their application for the Court's consideration. The Plaintiff placed reliance on the case of **Tree Shade Motors Limited vs DT Dobie & Anor [1995-1998] 1 EA 324** for the proposition that a court hearing an application to set aside an interlocutory judgment must consider whether the Defence raises triable issues; and posited that this can only be done if there is a Draft Defence exhibited as an annexure to the application.

[6] It was further the averment of the Plaintiff that it is seeking to recover an admitted liquidated debt which the Defendants have not serviced since **2016**; and that it would be significantly prejudiced if the Defendants were allowed to prolong the proceedings without disclosing a reasonable defence. In view of the foregoing, the Plaintiff's posturing was that the instant application has failed the mandatory test for setting aside interlocutory judgment and should consequently be dismissed with costs.

[7] The application was canvassed by way of oral submissions on **29 January 2018**. Learned Counsel for the Defendants, **Mr. Irungu**, reiterated the contention that neither 2nd Defendant nor the 3rd Defendants were served with summons. The Affidavit of Service was annexed to the application as **Annexure 3** and was relied on to demonstrate that only the 1st Defendant was served. Counsel further argued that, since directors of companies do change from time to time, it would be wrong to assume that at the time the 1st Defendant was served, its directors were the 2nd and 3rd Defendants. According to him, it was imperative that a current **CR12 Form** be availed to show who the directors were at the time of service.

[8] Counsel further submitted that looking at the Request for Particulars, it was of paramount importance that the same be provided as sought, to enable the Defendants prepare and file their Defence. According to him, the entry of Interlocutory Judgment herein was not only premature but was also irregular. **Article 159(2)(d)** of the **Constitution** was also cited for the submission that issues of form should not be elevated above merit and substance; and that no prejudice will be suffered by the Plaintiff should the default judgment be set aside.

[9] Counsel for the Plaintiff, **Mr. Mueke**, was however of the view that service of Summons having been duly effected on **28 July 2017**, the Defendants were under obligation to enter appearance within 14 days thereof, which expired on **12 August 2017**. He therefore posited that the default judgment was a regular judgment. **Mr. Mueke** further argued that, by dint of **Order 2 Rule 4** of the **Civil Procedure Rules**, the Defendants had only 4 days after service to lodge a Request for Particulars; and that in any event, a party ought not to be compelled to provide particulars of evidence before the hearing; as sought by the Defendants.

[10] Regarding the provisions of **Article 159(2)(d)** of the **Constitution**, it was the submission of **Mr. Mueke** that that provision was never intended to oust the Rules of Procedure as the handmaidens of justice. He relied on the case of **Abdalla Mohamed & Another vs. Mbaraka Shoka [1990] eKLR** and **Philip Keipto Chemwolo & Another vs. Augustine Kubende [1986] eKLR** on the need for the Defendants to exhibit a draft Defence to enable the Court make an inference as to whether or not they have a merit defence. Counsel further urged the Court to give attention to the admissions of indebtedness made by the Defendants via the emails which were exhibited at pages 23-25 of the Plaintiff's List and Bundle of Documents. His postulation was therefore that the application is merely intended to buy time and delay the inevitable. He accordingly urged the Court to dismiss it with costs.

[11] The Defendants' application was filed pursuant, inter alia, to **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."

There is no gainsaying, therefore, that the Court has unfettered discretion to set aside or vary any default judgment so long as it is done upon such terms as are just on the basis of the evidence placed before the Court, but always bearing in mind that such discretion must be exercised judiciously and in accord with the principle set out in the case of **Mbogo Vs. Shah [1968] EA 93**, namely, that the discretion is intended to be exercised **"...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error,"** but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

[12] Similarly, 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."

[13] In determining whether good cause has been shown for the exercise 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 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."

[14] A perusal of the court record confirms that the 1st Defendant was duly served with Summons to Enter Appearance and Plaintiff. The Affidavit of Service sworn on **30 August 2017** by **Mr. Emmanuel Mueke**, Advocate, confirms this and more. It shows that service was accepted by the 1st Defendant for and on behalf of the 2nd and 3rd Defendants. Whereas each of the three Defendants are distinct and separate for purposes of service of court process, all indications are that the 1st Defendant willingly accepted service for and on behalf of the 2nd and 3rd Defendants when it had the option to decline service in respect of its co-defendants. Under those circumstances it would be mischievous for the 2nd Defendant, who incidentally swore the Supporting Affidavit on behalf of all the Defendants, to deny such service. Thus, I take the view that, in the circumstances, there was no obligation on the part of the Plaintiff to make further inquiries as to exactly who the directors of the 1st Defendant were at that particular point in time; the suit having been filed in the name of the individuals who were deemed liable by the Plaintiff as at the time when the cause of action arose.

[15] Having been duly served, the Defendants had 15 days from the **28 July 2017** to enter appearance, in response to the Summons to Enter Appearance. That period lapsed on **12 August 2017**. There was no appearance entered by any of the three Defendants or on their behalf. It is noted however that instead, what was filed on **17 August 2017** was a Notice of Appointment to show that the three Defendants, and not just the 1st Defendant, had appointed the law firm of **KMK LAW LLP** to act for them in this matter; and that all future correspondence in respect of this suit be henceforth directed to the aforesaid firm of Advocates. That was another unequivocal acknowledgment of service on behalf of not only the 1st Defendant, but also the 2nd and 3rd Defendants. I would thus agree with the decision of **Mutava, J.** in the case of Uncle Sam's Githurai Ltd & Another –vs- Samuel Mureithi Muriuki & 3 others that:

"...the purpose of summons to enter appearance is to bring to the notice of the Defendant of the fact of the institution and to require them to respond to the plaintiff's claim. Where therefore the Defendants on their own motion file appearances and defence to the claim, it becomes superfluous to still insist that summons should be served upon them..."

[16] Since the Notice of Appointment was filed along with a Notice for Further and Better Particulars, Counsel for the Defendants argued that time stopped running by dint of **Order 2 Rule 1(2)** of the **Civil Procedure Rules**. That provision reads:

"... if the defendant considers that the pleading does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the summons for appearance has expired, by notice in writing to the plaintiff, request further information as specified in the notice." (Emphasis supplied)

[17] It is manifest however that even that Notice for Request for Particulars was made way out of time. It ought to have been filed at any time before the time limited by the summons for appearance expired. Accordingly, it could not have stopped time from running, because effluxion of time had already taken place. Hence, that Notice cannot serve to provide the requisite justification for the failure by the Defendants to enter appearance herein. Accordingly, the default judgment that was entered herein on **14 September 2017** is, to my mind, a regular judgment which can only be set aside if there is a defence on merit. In this regard, the Court of Appeal had the following to say in Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs Augustine Kubende [1986] eKLR:

"...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.

[18] A careful consideration of the grounds set out in the Notice of Motion and its Supporting Affidavit does show that, quite apart from the fact that no explanation has been given for the failure by the Defendants to enter appearance, no draft Defence was exhibited to give the Court an inkling as to the nature of their defence, in the light of the clear admissions of their indebtedness as per the email communication at pages 23-25 of the Plaintiff's List and Bundle of Documents. Thus, in Abdalla Mohamed & Another vs. Mbaraka Shoka [1990] eKLR, wherein the Appellants applied for the setting aside of default judgment on the grounds, inter alia, that though they were actually served with summons the proper formalities in respect thereof were not followed, the Court of Appeal held thus:

"...this contradiction is a pointer that the appellants were aware of the action filed against them by the respondent long before the interlocutory and final judgments were entered against them. This was notwithstanding that the aforesaid returns of service were drawn in a manner that was irregular. It was for the appellants to establish on a balance of probabilities that even with the irregular returns of service, they were never served with the summons. This they did not do as they rested their application on these returns of service. That per se, as the learned judge rightly observed, would not have been sufficient ground upon which the interlocutory and final judgments could be set aside considering that the said judgments were not clearly shown to have

been entered irregularly..."

[19] In the instant matter, the Defendants placed reliance on **Mr. Mueke's** Affidavit of Service which does confirm that the Defendants were duly served. There is no explanation as to why no appearance was entered within the prescribed period. Similarly there is no draft Defence from which a merit defence can be inferred, noting that this is a case for recovery of monies lent by the Plaintiff Bank, and it has not been suggested that the monies have been repaid. Accordingly, although **Article 159(2)(d)** of the **Constitution** was waved in the face of the Court as an excuse for the omission, it bears repeating, and it is trite, that the Court's discretion under **Order 10 Rule 11** of the **Civil Procedure Rules** is not meant to assist those who, by deliberate omission or otherwise have sought to obstruct the course of justice (see **Mbogo vs. Shah [1968] EA 93**). Hence, I would fully endorse the words of **Kiage, JA** in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."

[20] The foregoing being my view of the matter, I would dismiss the Defendant's Notice of Motion dated **28 September 2017** with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2018

OLGA SEWE

JUDGE