



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1 OF 2011

STEPHEN WANYEE ROKI.....PLAINTIFF

-VERSUS -

K-REP BANK LIMITED.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

DAVID WAWERU.....3RD DEFENDANT

RULING NO. 4

1. The application dated 16th February 2017 seeks the setting aside of the default judgement granted on 9th October 2014. The said judgement was entered against the 2nd defendant, **CITY COUNCIL of NAIROBI**, after it failed to Enter Appearance or to file a Defence.
2. The applicant acknowledges that it was duly served with the Plaint and Summons to Enter Appearance.
3. After it had been served, the applicant instructed the Law Firm of **T.M. KURIA & COMPANY ADVOCATES** to represent it. However, the applicant attributes its failure to file a Defence due to the oversight, inadvertence and omission on the part of its said advocates.
4. Therefore, the applicant believes that its failure to file its defence was explainable and excusable.
5. The applicant also pointed out that it had a good, solid and meritorious defence, together with a Counter-claim against the plaintiff, **STEPHEN WANYEE ROKI**.
6. The court records show that the applicant changed its advocates from **T.M. KURIA & COMPANY ADVOCATES** to that of **MUSYOKI MOGAKA & COMPANY ADVOCATES**.
7. Through their new advocates, the applicant filed an application dated 10th February 2015, seeking to set aside the default judgement.
8. That application was, apparently, not worded as well as it ought to have been. On 20th March 2015, the applicant filed an Amended Notice of Motion, seeking the setting aside of the default judgement.
9. On 7th July 2015, the applicant filed a third application, which was also seeking to set aside the default

judgement. When this latter application was scheduled for hearing, the Court file went missing.

10. Meanwhile, the plaintiff extracted a Decree and then took steps to have it executed. He did so by filing a Garnishee application dated 2nd March 2016.

11. In the light of the imminent threat of execution of the Decree, the Garnishee application was accorded priority.

12. Secondly, the plaintiff had made an application for Mandamus, to compel the applicant to pay the decretal amount.

13. On 23rd February 2016, Odunga J. declined the plaintiff's application for Mandamus. The learned Judge noted that;

“...it would make sense to await the determination of the application seeking to set aside the judgement which gave rise to these proceedings, before continuing with these proceedings?”

14. In the considered view of Odunga J., the plaintiff could be at liberty to seek the orders for Mandamus, if the application to set aside the default judgement failed.

15. The court records reflect very active proceedings in this case. On 7th June 2016, the court delivered a Ruling on an application to set aside, review or vary the orders dated 7th March 2016.

16. The court had, on 7th March 2016, ordered the Garnishee to ensure that the funds in the account of the City Council of Nairobi were not paid out. However, the said order lapsed on 6th April 2016, and therefore the court did not need to make any further orders.

17. On 3rd November 2016, the court delivered a Ruling, in which it upheld the Preliminary Objection which had been raised by the City Council of Nairobi. The court held that the County Government is a government, as envisaged under the Government Proceedings Act and also under the provisions of Order 29 Rule 2 (2) of the Civil Procedure Rules. Accordingly, the court could not order for the attachment of funds which the garnishee was holding in the account of the County Government.

18. On 9th February 2017 the court delivered a Ruling in which it rejected the plaintiff's application to strike out the 3 applications dated 10th February 2015; 18th March 2015 and 7th July, 2015. All those applications had sought the setting aside of the default judgement.

19. The main reason for rejecting that application was that there is no provision in law for the dismissal of pending applications, simply because the applicants had not taken steps in the said applications, for a period of over 12 months.

20. The 2nd defendant has now decided to abandon the 3 applications.

21. In accordance with the orders made in my Ruling on 9th February 2017, the costs of those 3 applications are awarded to the plaintiff, whilst the applications are now marked as withdrawn.

22. From the chronology particularized above, it is clear that the case has not been dormant at all. The parties have been actively engaging each other.

23. In the circumstances, I find and hold that the explanation tendered by the 2nd defendant, for not prosecuting its application to set aside the default judgement, is reasonable and excusable.

24. I have also given due consideration to the draft Defence and Counter-claim. The same raise triable issues.

25. In the circumstances, it is only fair and just that the 2nd defendant be allowed an opportunity to put forward its said Defence and Counter-claim.

26. In order to have that opportunity, the court hereby sets aside the default judgement against the 2nd defendant.

27. However, even though the application is successful, the 2nd defendant will not be awarded the costs of the application dated 16th February 2017. I so order because the application would never have been necessary if the 2nd defendant and its advocates had filed the Defence when they ought to have done.

28. In other words, it is the fault of the advocates for the 2nd defendant that gave rise to the entry of the regular judgement against the said defendant. The costs incurred in setting aside the default judgement cannot be passed over to the plaintiff. Instead, it is the 2nd defendant who will pay to the plaintiff, the costs of the application, together with all thrown-away costs.

29. For the avoidance of any doubt, the costs incurred by the plaintiff when he was taking steps to execute the judgement, are deemed to be thrown-away costs. I so order because if the 2nd defendant had lodged its defence, there would have been no default judgement against it; and therefore, the plaintiff would not have incurred costs in executing the Decree which was extracted from the said default judgement.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Plaintiff in person for the Plaintiff

No appearance for the 1st Defendant

Mokua for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the Garnishee

Collins Odhiambo – Court clerk.