REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCICAL AND TAX DIVISION

CIVIL SUIT NO. 188 OF 2016

WILLIAM KEELING WOOD...……..1ST PLAINTIFF/RESPONDENT

JO ANNE PAULINE WOOD.....2ND PLAINTIFF/RESPONDENT

VERSUS

AZHAR Z. CHAUDRY.....DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion dated **26 August 2016** was filed herein on **29 August 2016** by the Defendant/Applicant, **Azhar Z. Chaudry**, for orders that:

[a] Spent

[b] Spent

[c] That the Court be pleased to set aside the ex parte judgment entered herein on **17 August 2016** against the Defendant in default of defence;

[d] That the Court be pleased to admit the Defendant's Defence dated **23 August 2016** that is on the Court's record out of time;

[e] That the Costs of the application be in the cause.

[2] The application was filed pursuant to **Sections 1A and 1B** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, **Order 10 Rule 11** of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the law, and is predicated on the affidavit of **Elizabeth Fundi** annexed thereto, sworn on **26 August 2016** and the grounds set out on the face of the Notice of Motion.

[3] The brief background of the matter is that this suit was filed by the Respondents on **18 May 2016** for recovery of a sum of **Kshs. 26,753,249.45** that was due and owing from the Defendant on account of a loan that had been advanced to **Pegrume Limited** (hereinafter, the Company) of which the Defendant was a director. It was the case of the Respondents that the Applicant had furnished them with a Personal Guarantee in respect of the loan and that the Company made partial payments in settlement of the loan until **April 2012** when without notice, and in breach of the loan agreement, it shut down its operations

before full repayment. It was thus the contention of the Respondents that, owing to the sudden liquidation of the Company without notice to them, they had no option but to pursue the Applicant on the foot of the Personal Guarantee that he gave to secure the borrowing by the Company.

[4] The Court record shows that the Plaint along with Summons to Enter Appearance was duly served on the Applicant, and that through his lawyers, **Rachier & Amollo Advocates**, he filed a Memorandum of Appearance on **26 July 2016**; but that no Defence was filed within the period stipulated by the law, and consequently, a default judgment was entered herein on **17 August 2016** in favour of the Respondents. Thereafter, on the **25 August 2016**, the Defendant purported to file a Defence dated **23 August 2016**; which was clearly unprocedural from the standpoint of **Order 7 Rule 1** of the **Civil Procedure Rules**. In her Supporting Affidavit, Counsel for the Applicant, **Ms. Fundi,** deponed that at the time of filing the Defence their firm was unaware that judgment had already been entered; and that the instant application was filed as soon as they learnt of the same.

[5] It is the Applicant's case that failure to file Defence within the prescribed period was not as a result of indolence or recklessness, but was due to unavoidable circumstances, namely that it took him a long time to access information and records held by the Company, that would assist him in filing his response to the claim. It was further the contention of the Applicant that he is keen to defend this suit and that his Defence does raise several weighty issues that deserve to proceed to hearing for a determination on the merits. He further urged the Court to take into consideration that the claim is enormous and that he stands to suffer extreme prejudice should he compelled to pay the judgment sum without having the opportunity to present his defence in a full trial. It was on the basis of the foregoing that the Applicant urged the Court to allow his application and set aside the default judgment and to admit his Defence dated **23 August 2016** out of time.

[6] The application was opposed by the Respondents, to which end a Replying Affidavit sworn by their Counsel, **Philip Nyachoti**, on **9 September 2016.** It was the averment of the Respondents that no plausible explanation has been given by the Applicant to explain the failure to file Defence within the time required by the law; and that the Defendant's explanation, that he took time to access certain information which would enable him prepare his Defence, was a mere falsehood as it was not backed by evidence. Counsel further deponed that the Defence filed is a sham on account of its vagueness and failure to raise any bona fide triable issues; and that it is accordingly intended only for the purpose of delaying this matter further and hindering the course of justice. In the alternative, and without prejudice to the aforestated grounds, the Respondents urged that, should the Court be inclined to allow the application, then it should be on terms requiring the Applicant to deposit the full decretal amount in court as security for the judgment.

[7] Mr. Nyachoti's affidavit was responded to by the Applicant, vide the Further Affidavit of **Ms. Elizabeth Fundi**, sworn on **15 September 2016,** in which it was reiterated that the Applicant does have a meritorious defence to the Respondents' claim and ought therefore to be given an opportunity to defend the suit. It was further averred that the failure by the Applicant to file Defence within the prescribed 14 day window was not due to indolence or lack of interest, but because he did not have all the information in respect of the alleged loan agreement and guarantee allegedly given by him in favour of **Pegrume Limited**; a company that ceased operations sometime in the year **2012.** It was further deponed that the Respondents stand to suffer no prejudice, should the application be allowed, as they will have an opportunity to present their case; whereas the Applicant stands to suffer immensely should he be denied the opportunity to ventilate his claim, given the enormous claim he is faced with.

[8] I have carefully considered the Notice of Motion and the Affidavits filed in respect thereof as well as the written submissions filed herein by learned Counsel. The 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."**

Accordingly, the Court has unfettered discretion to set aside or vary any default judgment upon such

terms as are just on the basis of the evidence placed before the Court, but always bearing in mind the principle set out in the case of **Mbogo Vs. Shah [1968] EA 93**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.

[7] It is instructive to note that the default judgment sought to be disturbed is a "regular" as opposed to "irregular" judgment, a distinction that was well-explained 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 *exparte* judgment entered in default is regular. But where *exparte* 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."**

[8] It is now trite therefore that, to benefit from the discretion of the Court, where there is an otherwise regular judgment on the record, an Applicant must not only proffer a good explanation for the delay, but must also show the prejudice it stands to suffer should the application be refused. More importantly, an Applicant must demonstrate that there is a merit defence to the claim; a point made in the case of **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** in the following words:

> "**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."**

[9] It is not in dispute herein that the Applicant responded to the Plaint and Summons to Enter Appearance by filing a Memorandum of Appearance on **26 July 2016**. In terms of **Order 7 Rule 1** of the **Civil Procedure Rules**, the Plaintiff was obliged to file a Defence within 14 days thereafter. This was not done; instead the Applicant purported to file his Defence on **25 August 2016**, a period of about one month later. By that time, the Respondents had obtained a judgment in default dated **17 August 2016**.
It is evident therefore that, in the aforesaid circumstances, the entry of default judgment herein was altogether regular; and as stated in **the Patel Case** aforementioned, where it is shown that the judgment is a regular one, the court will not usually set it aside unless it is satisfied that there is a defence on the merits.

[10] A consideration of the proposed Defence filed herein out of time by the Applicant shows that the Applicant does admit that he was a director of **Pegrume Limited,** and that the Respondents did advance the Company a loan as claimed by them in the Plaint. He however denied that he furnished a Personal Guarantee for the loan, contending that the signature shown in the alleged contract of Guarantee/Indemnity is a forgery. It was further the contention of the Applicant that, to the best of his knowledge, the Company had repaid the loan in full and that no monies were outstanding as at 2012 when it ceased operations. As to the reason for the delay, it was the contention of the Applicant that he was preoccupied searching for information and supporting documents to enable him mount his defence.

[11] In their submissions however, Counsel for the Respondents urged the Court to dismiss the aforestated explanation contending that it was not backed by evidence. He further urged the Court to disregard the Defence on the file for the reason that it is not properly on the record owing to the absence of leave to file the same or extensio of time for the filing thereof; and that in any event the Defence is a sham for it raises no triable issues. The cases of **Kenya Commercial Bank vs. Suntra Investment Bank Ltd [2015] eKLR, Shanzu Investments Ltd vs. Commissioner of Land [1993] eKLR** and **Sameer Africa Ltd vs. Aggarwal & Sons Ltd [2013] eKLR,** were relied on by the Respondents in support of their aforesaid arguments. Having carefully considered the facts and the relevant law, including the submissions made by Counsel and the authorities relied on by them, I take the following

view of the matter:

[12] First and foremost, from the standpoint of **Article 159(2)(d) of the Constitution of Kenya**, I would not consider the delay by the Applicant of 15 or so days in filing Defence to be so inordinate as to be inexcusable. It is noteworthy too that as soon as the Applicant became aware of the judgment it took steps towards its being set aside by filing the instant application. In any event, the Decree is yet to be drawn and a Certificate of Costs issued for execution. Secondly, I am satisfied that the Applicant's explanation for the delay, namely that he was searching for information and documents, is plausible, granted the indubitable fact that the Company had since ceased operations. Thirdly, there are valid issues raised both in the Supporting Affidavit and the proposed Defence worth proceeding to hearing for; key of which is whether the Applicant provided a Personal Guarantee as alleged by the Plaintiff and whether or not the loan had been repaid. In arriving at the foregoing conclusions I have taken into account the following expressions of **Ainley, J.** in **Jamnadas V. Sodha vs. Gordhandas Hemraj [1952] 7 ULR 7** which I find pertinent:

> **"...I yet think that insufficient attention was paid by the lower court to the fact that the appellant had a defence to put forward, and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs had been made ... it seems to me that he has concentrated solely upon the poverty of the appellant's excuse. In my view that is not the sole matter which must 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 a court..."** (Emphasis supplied)

[13] In the premises, I am satisfied that sufficient cause has been shown to warrant the setting aside of the ex parte judgment entered herein on **17 August 2016**. Thus, the Applicant's Notice of Motion dated **26 August 2016** is hereby allowed and orders granted as follows:

> **[a] The default judgment entered herein on 17 August 2016 be and is hereby set aside;**
>
> **[b] The Applicant's Defence dated 23 August 2016 be and is hereby admitted and deemed properly filed;**
>
> **[c] The Applicant be and is hereby condemned to pay the Respondents costs of the application.**

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26th DAY OF MAY 2017

OLGA SEWE

JUDGE