



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 513 OF 2013

JAMII BORA BANK LIMITED.....1ST PLAINTIFF

-VERSUS-

DAGEN FREIGHT LIMITED

DANIEL WAGUCHU NGANGA

LUCY NJERI WAGUCHU.....DEFENDANTS

RULING

1. The Application before the Court is the Defendants' Notice of Motion dated **18th November, 2015** and filed on even date. It is expressed to have been brought under the provisions of **Section 3A** of the **Civil Procedure Act**, **Order 9 Rule 9**, **Order 22 rule 22** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**.

2. The Defendants sought for the following orders:-

1. *(Spent)*
2. **THAT** the firm of **Mercy W. Njogu & Co. Advocates** be granted leave to come on record on behalf of the Defendants in place of **S.W Ndegwa & Co. Advocates**.
3. **THAT** pending the hearing and determination of this application *interpartes* the Court be pleased to stay the execution of the decree herein and all the consequential orders thereto. *(Spent)*
4. **THAT** the Court be pleased to set aside the judgment and decree herein plus all consequential orders and allow the Defendants to canvass their case.
5. **THAT** the costs of this application be provided for.

3. The application is based on the several grounds set out therein and is supported by the Affidavit of **DANIEL WAGUCHU NGANGA**, the 2nd Defendant herein, sworn on **18th November, 2015**.

4. The Defendants' case is that when Summons To Enter Appearance was served upon them, they instructed the firm of **S.W. Ndegwa & Co. Advocates** to act herein on their behalf. Thereafter they were informed that a Defence had been filed on their behalf on 16th January 2014, which Defence had been served upon the Plaintiff's Advocates. That they were advised to wait for any updates in regard to their

case.

5. The 2nd Defendant further averred that he had been to the offices of **S.M. Ndegwa & Co. Advocates** on numerous occasions to check on the progress of the case and had always been told to await advice on the hearing date. That he was surprised to learn on the morning of 12th November 2015 from Chardor Auctioneers that warrants of attachment had been issued against them for **Kshs. 12,343,420.70**, and that it was then that he learnt that the case had been finalized and judgment entered against the Defendants for which the execution had been sanctioned by the court.

6. The Defendants contend that they have an arguable Defence that they should be allowed to canvass on the merits, and that their former Advocates kept them in the dark as regards the progress of the case. To this end, it was the Defendants' position that the mistakes of their Advocates aforementioned, in failing to progress the case or to inform them of the progress thereof, should not be visited upon them as innocent litigants.

7. It was further the Defendants' case that they brought the present application without delay as they filed it immediately the existence of the default Judgment was brought to their attention. They further averred that they would suffer irreparable loss should execution be proceeded with, as opposed to the Plaintiff that stands to suffer no loss if execution is stayed as they can be compensated by way of costs. In view of the foregoing, the Defendants urged the Court to grant them the prayers sought in the Notice of Motion dated 18th November 2015.

8. In response to the application, the Plaintiff filed the Replying Affidavit sworn on **23rd November, 2015** by its Head of Legal Services, one **JAMES MURAGE**, in which it was averred that the Plaintiff had been unable to proclaim the Defendants' goods as they had persistently hidden the said properties from them, thereby frustrating the execution process. It was further averred that despite obtaining an order from the Court on **16th April, 2015** compelling the **National Transport and Safety Authority (NTSA)** to disclose all motor vehicles owned by the Defendants, and despite **NTSA** complying with the said order, the Defendants continue to conceal the said vehicles.

9. It was the Plaintiff's position that the Defendants had always been represented by their Advocates who were on record then and that it was not until the **12th March, 2015** when **Miss Rambugu, Advocate** holding brief for **Mr. Ndegwa** for the Defendants, informed the Court that the said Advocate was not ready to proceed as he had no instructions from the Defendants. That the said Advocate accordingly requested the Court for time to file an application to cease acting for the Defendants, which request was granted.

10. The Plaintiff further averred that since the Defendants' Advocates failed to file the said application, the Plaintiff continued serving them with the relevant Court documents. The Plaintiff therefore refuted the Defendants' allegation that their Advocates kept them in the dark. According to the Plaintiff, it is the Defendants who had, at some point refused to issue instructions to their Advocates on record then.

11. It is the Plaintiff's further assertion that the Defendants have no arguable defence and that going by their conduct, they have no intention to defend the suit and are only interested in delaying the case further with the intention of denying the Plaintiff the fruits of his Judgment. In the circumstances foregoing, it is the Plaintiff's prayer that the Defendants' application be dismissed to pave way for execution of the decree.

12. The application proceeded by way of written submissions. The Defendants filed their written submissions dated **30th November, 2015** on **2nd December, 2015** while the Plaintiff filed its submissions dated **3rd December, 2015** on **4th December, 2015**.

13. I have considered the Notice of Motion dated 18th November 2015, the affidavits filed in respect thereof as well as the pleadings, proceedings to date and the written submissions filed by Learned Counsel in support and opposition to the application. The Defendants' Prayer No. 2, that the firm of

Mercy W. Njogu & Co. Advocates be granted leave to come on record on their behalf in place of **S.W Ndegwa & Co. Advocates** is not contested and therefore the same is hereby granted. It is noted though, that the tidier way of doing things would have been for an application for leave for counsel to come on record to have preceded the application for setting aside of judgment, which application ought to have been dealt with upfront, so as to provide counsel with the legitimacy for filing and prosecuting the application for setting aside judgment.

14. With regard to the prayer for setting aside the default judgment entered herein on **19th February 2014**, the law is now well settled and is to be found in **Order 10 Rule 11 of the Civil Procedure Rules** namely, that the Court has discretion to set aside or vary any default judgment upon such terms as are just. In the case of **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** it was stated that:

"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."

15. And, as pointed out in the case of **Mbogo Vs. Shah [1968] EA 93** 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.

16. It is not disputed that a default Judgment in this case was entered on **19th February, 2014** and a decree issued on **17th April, 2014**. The Defendants' cause for seeking the judgment and decree herein to be set aside is based on the ground that their former Advocates S.W Ndegwa & Co. Advocates completely kept them in the dark as regards the progress of the case, and therefore that they were not aware that judgment had been entered. The Defendants averred that their former Advocates assured them that a Statement of Defence had been filed on **16th January, 2014** on their behalf, and that all that they needed to do was to await further updates as to the hearing of the matter. It was further the Defendants' contention that they were not even aware that there was an order requiring disclosure of all the motor vehicles they owned as the same was never brought to their attention by their former Advocates. They further averred that the fact that their former Advocates intended to cease acting for them should be treated as an indication that communication between them had broken down at some point. They therefore urged the Court not to visit the mistakes of their previous Advocates on them.

17. It is noteworthy that according to the Plaintiff, the Defendants entered appearance but failed to file their Defence and that it was on this basis that they filed a Request for Judgment upon which the default judgment of **19th February, 2014** was entered. On perusing the Court record, however, this Court noted that there is indeed a Defence on the file dated 14th January 2014 whose purport, from the court stamp thereon, is that it was filed by the Defendants' former Advocates on **16th January, 2014**. This was the same date that the Plaintiff also filed a Request for Judgment against the Defendants for failing to file a Defence.

18. It is evident therefore that, in the aforesaid circumstances, the entry of default judgment while there was a Defence on record was irregular. In the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**, Njagi J (as he then was) drew attention to the need to distinguish between regular and irregular judgments 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."

19. By parity of reasoning, where as in this case, the default judgment was entered on the basis that the Defendant had failed to file a Defence to the suit, when the record shows that there was a Defence on the record, filed on the date that the request for judgment was made, it follows then that the default Judgment of **19th February, 2014** is irregular and cannot be countenanced. That judgment clearly lends itself to setting aside *ex debito justitiae* and unconditionally. In view of the foregoing, this Court finds it superfluous to address the issue of whether or not the Defendant's Defence raises triable issues.

20. In the premises, the default Judgment herein entered on the **19th of February, 2014** and the subsequent decree dated **16th April, 2014** are hereby set aside and so are all consequential orders. The Defendants will however pay the Plaintiff the costs of this application as well as the thrown away costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

OLGA SEWE

JUDGE