REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 420 OF 2015

BANK OF AFRICA KENYA LTD ……….……………………….. PLAINTIFF

VERSUS -

JOHN KARANJA NJENGA .... DEFENDANT

RULING

1. The Ruling herein relate to the Notice of Motion Application dated 9th February 2016. The Application is brought under section 1A, 1B, 3A, and 63 (c) of Civil Procedure Act, Order 40 Rules 1, 2, 3 and 9 and Order 51 Rule 1 and 3 of Civil Procedure Rules 2010 and all the enabling provisions of the Law.

2. The Application is seeking for orders that;

- ***That this Honourable Court be pleased to set aside/lift the decree/interlocutory judgment in this matter and any consequential orders thereof.***
- ***That interim orders of stay of execution of the warrants of attachment if any be stayed pending the hearing and determination of this application.***
- ***That an order do issue that the matter be heard denovo upon filing the draft defence annexed herein.***
- ***That costs of this application be in the cause.***
- ***Any other relief this Honourable Court may deem fit to grant.***

3. The Application is based on the grounds on the face of it and the supporting affidavit sworn by **JOHN KARANJA NJENGA** dated 9th February, 2016. However, it is opposed vide a Replying Affidavit sworn by **MONICA KAMAU** dated 16th February, 2016.

4. The Applicant's case is that when the Defendant received summons to enter appearance, they instructed **Stephen Njau Ng'ang'a,** an Advocate of the High Court to enter Appearance on their behalf. That was in the months of November 2015, the summons having been served in the months of October 2015. That the said Advocate assured them that he had filed a defence. Unfortunately he did not. As a consequence of failure to enter Appearance and or file a Defence, an interlocutory judgment was entered in favour of the Plaintiff. The Applicant told the Court that the failure to defend the suit was as a result of the negligence of the Advocate, who was properly instructed even paid a legal fees of fifty thousand (Kshs.50,000).

5. The Applicant denied being indebted to the plaintiff as alleged and pleaded for an opportunity to put in a Defence and defend the suit. He argued that, the amount claimed is colossal and it is only fair and just that the matter be heard on merit. Hence, a prayer that, the Judgment/Decree and any consequential orders herein be set aside and an order of interim stay of execution to issue pending the determination of this Application.

6. The Respondents in opposing the Application argued that it is fatally defective and should be struck out as the same is not brought under Order 10 Rule 11 of Civil Procedure Rules, which empowers the Court to set aside judgment entered in default of appearance and filing of defence. That, it is based on material misrepresentation and flimsy excuses. They argued that, the Defendant were properly served with summons and acknowledged the existence of the suit vide paragraph 19 of an affidavit sworn by the Applicant, dated 20th November 2015 in Hccc No. 577/2015. That, the Judgment was entered on 17th November 2015 and Notice thereof, was served on the Defendants on 15th January 2016. By 15th February 2016 the Defendants had not filed a memorandum of appearance nor Defence.

7 That although the Defendant purport to have instructed a counsel who was struck off the roll of Advocates (a fact which could easily be established from Law Society of Kenya website) there is no evidence to support the instructions to the said Advocate or even the alleged payment of Kshs.50,000. More so, they tendered the instructions more than 15 days required to enter appearance. That, he just feigning ignorance of the financial accommodation requested for and granted by the plaintiff yet, he has admitted indebtedness in vide letters dated 30th January 2014, and 6th November 2013, seeking for restructuring of the facility after acknowledging the same The Respondent submitted that the Draft defence contains mere denials and contradictions, it's a mere sham and intended to frustrate the plaintiff. As such, the Application lacks merit and should be dismissed with costs.

8. The Applicant's filed a further Supporting Affidavit and denied that he has never been served with a Notice of entry of judgment. He told the court, he did not instruct a non-practicing Advocate knowingly. That, it is a genuine mistake to most of the litigants. He denied even being advanced the sum claimed in the Plaint and the letter dated 30th January 2015, in which he is alleged to have admitted the debt claimed. He maintained that the Defence raised weighty and fundamental issues which ought to be heard and determined.

9. The parties subsequently filed written submissions to dispose off the Application. In a nutshell, the Applicant submitted that the blame in this matter lies on the instructed Advocate. On the issue of failure to include order 10 Rule 11 of Civil Procedure Rules 2010, the Applicant submitted that it is not fatal. He relied on Article 50 of the Court of Kenya 2010, and the cases of

- ***Shah -vs- Mbogo [1967] E. A 116,and***
- ***Peter Kiria & Another Vs. Pauline Kagwira [2013] eKLR.***

In conclusion, the Applicant submitted that he has a prima facie case based on the annexed draft Defence.

10. The Respondents told the Court in their submission that a regular judgment should not be set aside unless the Court is satisfied that the Defence has merit. They relied on the case of **Patel Vs. East Africa Cargo Handling & Services Ltd [1974] E.A 75**. That, the question of indolence by client and a mistake by advocate was addressed in the case of **B1-mach Engineering Ltd Vs. James Kahoro Mwangi [2011] e KLR** where Waki J, stated inter alia that:

> ***"That is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter?.***

The Respondents also relied on the cases of **Josphat Nderitu Kariuki –vs- Pine Breeze Hospital Ltd (2006) eKLR** where Martha Koome J, held

> ***"The advocate should bear the consequences of their own profession and negligence of failure***

to attend Court on behalf of their client. Similarly the Client should bear the consequences for the choice of his legal counsel…?.

They further submitted that the case of: **Three ways Shipping Services (group) Ltd Vs. Mitchell Cotts Freighters (K) Ltd 2005 e KLR**, the court held that;

"In our view, it is too late to reverse the process?.

11. On the merit of the Defence, the Respondent cited the case of **Beena K. Khambita Vs.Talvinder Salgoo [2012] eKLR**, which stated that the Court has to consider whether the Applicant has a reasonable Defence that raises triable issues and the cases of **Dancan Njathi Macharia Vs. Richard Murigu Wamai (2012) eKLR** and **Sameer Africa Ltd Vs. Aggarwal & Sons Ltd [2013] e KLR and Onoka Vs. KCB Ltd LLR No. 5152 (CAK).**

They dealt with the issue of acknowledgment of the debt by a defendant and subsequent denial thereof.

12. I have considered the prayers in the Application, the grounds and Affidavit in support thereof, the Replying Affidavit and all the annexures thereto, the submissions filed by both parties and the authorities cited.

13. I find the following issues require determination:

- ***Is the Application herein is fatally defective for failure to invoke order 10 Rule 11 of Civil Procedure Rules.***
- ***Has the Applicant has offered a reasonable explanation for failure to enter Appearance and or file a defence.***
- ***Does the draft Defence annexed to the application raise triable issues.***

14. On the 1st issue I find that Article 159 of the Constitution of (Kenya), provides that justice shall be administered without due regard to procedural technicalities. In that regard I shall give the Applicant the benefit of doubt. But that is not a licence for parties to ignore procedural requirements under the Civil Procedure Rules 2010. The Applicant's in their submissions have regretted the mistake.

15. As for the reasons advanced for the failure to enter appearance and/or file a Defence, I agree with the Respondents submissions that, the explanation given is casual. There is no independent evidence to back the Applicant's averments or disposition that, they instructed the alleged "Advocate" and/or paid him. Under normal commercial transaction, payments are evidenced, acknowledged and/or confirmed by issuance of receipts. I therefore find that, in that regard, the explanation lacks merit. The Applicants pleads ignorance of the deregistration of the said "Advocate?, He says he is a layperson. Although both parties require protection of their respective rights under the law, I shall give him the benefit of the doubt as is possible that he may not have had access to the LSK website.

16. I now turn to the determining factor in this matter: the merit of the draft Defence annexed to the supporting affidavit of the Applicant. I have carefully considered the defence therein. I am warning myself that at this interlocutory stage, the Court should not go into the merits of the case. I however, find under paragraph 8 of the defence, the Defendants states that, they are strangers to the contents of paragraph 10 of the Plaint, and in particular the figures quoted therein. The figures quoted under paragraph 9 and 10 of the Plaint are figures made up of the amount in the loan account amount, the current account, and the Loan arrears, totaling Kshs. 19,574.312.05. Equally, the Defendants denies the contents 11 paragraph of the Plaint and states that contrary to what is deponed under paragraph 11 of the Plaint to the effect that there is no other suit pending nor there been previous proceedings, in any court between the Plaintiff and the Defendants over the same subject matter", there is an ongoing case between the Plaintiff and the Defendants in Civil suit No 577 of 2015. However, I note the case number **HCCC No 577 of 2015** was filed after HCCC No. 420 of 2015, so there was no other suit when the current was filed and that may justifies the contents of paragraph 11 of the Plaint.

17. Be it as it were, I find that the entire Defence is not just a mere denial and/or a sham, although the draft Defence makes denial of issues, including some which are clearly admissible by documents produced by the Respondents. There are certainly issues that may require going for trial. I therefore find that in the spirit of Article 48, 50 and 159 of the Constitution and the overriding objectives under section 1A, 1B and 3A of the Civil Procedure Act, it's important to allow a party to litigate their dispute in Court, unless that party's case is obviously hopeless and will serve no purpose in being given audience. An untold story will never been known. It must be told for its worth or value to be assessed.

18. In this case, the merits or lack of it in the defence, may not be fully appreciated, unless it is allowed an opportunity to be heard. I find that, if the Defendants are shut out of the doors of the Courts, they may be prejudiced by not being heard, on the other hand, if the Application is allowed, the Plaintiff will still have a second bite of the cake. Their case will still be heard. If indeed the Defence is a mere denial or sham they will still have an opportunity to prove the same. I further find that the inconvenience caused through the delay in filing the defence and or setting aside of the interlocutory judgment can be remedied through the award of costs.

19. I wish to borrow the words o**f APALOO J. A,** in the case o**f Philip Keipto Chemwolo and Mumias Sugar Co. Ltd –vs- Augustine Kubende (1982 – 1988) 1 KAR 1036** 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 it's merits".***

He went on to say:

> ***"Unless there is fraud or intention to overreach there is no error of default that cannot be put right by payments of costs".***

20. I therefore allow the application in the following terms:

- ***The Interlocutory Judgment entered into herein and the Decree thereto and all consequential orders are set aside.***
- ***There is no prayer to deem the annexed Draft, Defence, as duly filed and served upon payment of the requisite fee. I order that, the Defendant do file their defence to the Plaint within the stipulated period under the Civil Procedure Rules 2010 with effect from the date of this ruling.***
- ***If the Defendant fails to file and serve the Defence as directed herein, the Interlocutory Judgment, Decree and all consequential orders shall forthwith without a Court Order, revive afresh.***
- ***Prayers 3 and 4 of the Application are not granted***
- ***The Defendants to pay the Respondent /Plaintiff the costs of this application.***

DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI THIS 30th DAY OF JUNE 2016.

G.L.NZIOKA
JUDGE

Ruling Read in open court in the presence of:

Kimani for the Plaintiff/Respondent

Ohanga hb Morara for the Defendant/Applicant

Teresia – Court Clerk