**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 CPA, 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 the firm of Stephen Njau Ng'ang'a, an Advocte 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 file a Defence, an interlocutory judgement herein 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 that 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. They argued that, the amount claimed is colossal and it is only fair and

just that the matter be heard on merit. They prayed 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 the Application should be dismissed on the grounds. 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 judgement entered in default of appearance and filing of defence and it is based on material misrepresentation and flimsy excuses. They argued that the Defendant were properly served with summons and acknowledges knowledge of the suit vide an affidavit dated 20th November 2015 in Hccc No. 577/2015 at paragraph 19 where the deponent John Karanja acknowledges that fact and that the Judgement/Debtor was entered on 17th November 2015 and Notice of judgement was served on the Defendants on 15th January 2016 and by 15th February 2016 the Defendants had not filed a memorandum of appearance nor Defence. That 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 and more so they purport to have tendered the instructions more than 15 days required to enter appearance. Thus there is no evidence to support instructions to the said Advocate or even to support the alleged payment of Kshs.50,000. They submitted that there was lack of vigilance on the part of the Defendant to obtain a copy of defence filed in this suit as the suit involves a "whooping? sum of Kshs.19,574.312.05 and there they are just feigning ignorance of the financial accommodation requested for and granted by the plaintiff. Yet the Defendants have admitted indebtedness in vide letters dated 30th January 2014, and 6th November 2013, seeking for restructuring of the facility and 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. Therefore the Application lacks merit and should be dismissed with costs.

7. The Applicant's further Supporting Affidavit denied that he has never been served with any Notice of entry of judgement other than the summons to enter Appearance. He told the court, he did not instruct a non-practicing Advocate knowingly. It is a genuine mistake to most of the litigants. He denied even being advanced the sum claimed in the Plaint and denied a 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.

8. The parties subsequently filed written submissions to dispose off the Application. In a nutshell the Defendant/Applicant submitted that the blame in this matter lies on the instructed Advocates and not the plaintiff. 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, 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 evidenced through the annexed Draft Defence.

9. The Respondents in their submission told the court that a regular judgement 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**. The Respondent submitted that, the question of indolence by client and 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?.***

10. On the merit of the Defence, the Respondent cited the case of **Beena K. Khambita Vs.Talvinder Salgoo [2012] eKLR**, which states that the Court has to consider whether the Applicant has a reasonable Defence that raises triable issues and the case of **Dancan Njathi Macharia Vs. Richard Murigu Wamai (2012) eKLR** which dealt with the issues of the Defendant acknowledging the debt and denying indebtedness. Similar finding was held in the case of **Sameer Africa Ltd Vs. Aggarwal & Sons Ltd [2013] e KLR and Onoka Vs. KCB Ltd LLR No. 5152 (CAK).**

11. I have considered the Orders sought for in this Application, the grounds and Affidavit in support thereof. I have also considered the Replying Affidavit and all the annextures thereto, and the submissions filed by both parties and the authorities cited.

In my opinion I find the following issues require determination, whether;

- ***the Application herein is fatally defective for failure to involve order 10 Rule 11 of Civil Procedure Rules.***
- ***the Applicant has offered a reasonable explanation for failure to enter Appearance.***
- ***The Defence drafted and annexed raises triable issues.***

On the 1st issue I find that Article 159 of the Constitution of (Kenya), the Civil Procedure Rules 2010 support to the Applicant Submission and therefore I shall not dismiss this Application on technicalities. The Applicant's in their submissions have regretted the mistake.

On the issue of the reasons 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, it may or may not be true such instructions were issued. The Applicants pleads ignorance of the fact that deregistration of the said "Advocate?, As he is a layperson I shall give him the benefit of the doubt. Although both parties require protection of their respective rights under the law.

13. In that regard, the determining factor in this matter is to determine the merit of the Draft Defence annexed to the supporting affidavit of the Applicant. It will serve no purpose to set aside a Judgement lawfully entered, and open padoras box for the Plaintiff to seek for summary Judgement against the Defendant immediately the Draft Defence is filed, if that defence does not raise any triable issue.

14. I have therefore carefully considered the defence herein. I am warning myself that at this interlocutory stage, the Court should not go into the merits of the case. However, I must interrogate the Defence to establish whether it raises triable issues or it's a mere denial. I find in 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 in paragraph 9 and 10 of the Plaint are figures made up of loan account amount, the current account amount, and the Loan Arrears. All totalling Kshs. 19,574.312.05. Equally, the Defendants deny denial 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.** That fact of Existence of the suit is also deponed to under paragraph 8 of the Replying Affidavit of **MONICA KAMAU**. That seems to contradicts the said paragraph 11 of the Plaint. However, as a Court I note that taking into account the case number **HCCC No 577 of 2015** was filed after HCCC No. 420 of 2015, that may justify the contents of paragraph 11 of the Plaint.

Be it as it were, I find that although the Draft Defence makes denial of issues some which are clearly admissible by documents produced by the Respondents, the entire Defence is not just denial and/or a sham. There are certainly issues that may require evidence in proof thereof. That may be through either a summary procedure or a full hearing of the matter. 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. It must be told. To assess a story to it's value. Untold story will never been known.

15. In this case, the Defendants have not even filed their defence. The merits or lack of it, thereof may not be fully appreciated, unless it is allowed an opportunity in to do so. 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, and if indeed the Defence is a mere sham or denial, they will still have an opportunity to quickly deal with it through summary Judgment process, if they so elect. 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. I wish to borrow the words of **APALOO J. A,** in the case of **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".***

16. 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, with effect from today date of this ruling 14 days.***
- ***The Defendants to pay the Respondent /Plaintiff the costs of this application.***
- ***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.***
- ***All other Orders sought fall on the way and or are not granted.***

**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

Ohaga hb Morara for the Defendant/Applicant

Teresia – Court Clerk