



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 21 OF 2014**

**MUSEE MATI .....PLAINTIFF/ RESPONDENT**

**VERSUS**

**FAMILY BANK LIMITED .....DEFENDANT/APPLICANT**

**RULING OF THE COURT**

1. The **Notice of Motion** application before the court is dated 9<sup>th</sup> October 2015 filed by the Defendant. The Applicant seeks to secure the following prayers:-

- a) **“That the application herein be certified as urgent and service be dispensed with in the first instance.**
- b) **That default judgment entered for the Plaintiff against Defendant herein on the 7<sup>th</sup> July 2014 be set aside pending inter-parties hearing and determination of this application.**
- c) **That default judgment entered for the Plaintiff against Defendant herein on the 7<sup>th</sup> July 2014 be set aside pending inter-parties hearing and determination of this suit.**
- d) **That this Honourable Court be pleased to issue an order staying the execution of the default judgment entered for Plaintiffs against the Defendants on the 7<sup>th</sup> July 2015.**
- e) **That leave be granted to the Defendant/Applicant to file its defence out of time.**
- f) **That if prayer (5) above is granted, the defence herein marked as Annexure ‘AO2’ to the Supporting Affidavit be deemed to have been filed and served upon the Plaintiff.**
- g) **That cost of this application be in the cause.”**

2. The application is premised on the grounds set out therein and is supported by affidavit of **Anthony Ouma** sworn on 9<sup>th</sup> October 2015.

3. The Applicant’s case is that the Plaintiff obtained judgment in default of defence on 7<sup>th</sup> July 2014 and unless the same is stayed the Plaintiff is likely to execute against the Defendant and further continues to enjoy a permanent injunction restraining the Defendant from realizing the security offered for a loan amount that remains owing. The previous advocates on record, Messrs J.W. Wambua & Company Advocates, entered appearance on the 19<sup>th</sup> of May 2014 but failed to file defence to the suit despite being instructed by the Defendant Bank to defend them in the suit herein. Due to that failure, refusal, negligence and/or neglect by the said Advocates to inform or update the Defendant on the developments of the suit,

the Defendant Bank did not have the information on the proceedings and events in the file in particular the default judgment entered herein. The applicant states that delay in filing the defence was caused by the mistake or error of the said Advocate which mistake should not be visited upon the innocent client. The applicant's case is that non of the parties herein will be prejudiced in any way whatsoever by the granting of the prayers herein, which are necessary in the interests of justice so that the real questions for determination between the parties are placed before the court for final and effectual determination thereof.

4. The application is not opposed. The Respondent was served both with the application and the hearing notice for 18<sup>th</sup> July 2016 but has not responded to the application. The hearing notice was received in the firm of **Apollo Muinde & Ngunze Advocates** on 6<sup>th</sup> July 2016. The Applicant filed an affidavit of service herein on 18<sup>th</sup> July 2016. Upon being satisfied that the application was served, and that a hearing notice was also duly served, I allowed the Applicant's Counsel **Mr. Akelo** to proceed in the absence of the Respondent.

5. I have carefully considered the application. The Respondent is aware of this application but has chosen not to appear to oppose it. The presumption then is that the Respondent does not oppose the possible grant of the prayers. In that regard, the only issue this court raises for determination is whether or not the application appears merited.

6. The application speaks for itself. The Applicant has stated the reasons why it seeks to set aside the judgment. It means that the Applicant is not happy with the said judgment which was entered in default, and wants to have the same set aside to enable it defend the suit. That is a prayer which should be granted where there is no opposition to it.

7. In the upshot, the said application is allowed as prayed with the result that the default judgment entered against the Defendants on 7<sup>th</sup> July 2015 is hereby set aside as are all consequential orders arising there from.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF JULY, 2016.**

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**E. OGOLA**

**JUDGE**

**Present**

Mr. Akelo for Applicant

Court Assistant – Ms. Doreen