



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 200 OF 2015**

**PRIME BANK LIMITED.....PLAINTIFF**

**VERSUS -**

**RELISH TEA PACKERS.....1<sup>ST</sup> DEFENDANT**

**AYUBKHAN RASULKHAN WALIMOHAMED.....2<sup>ND</sup> DEFENDANT**

**ROSE ANN WAWUDA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The defendants have asked the court to set aside the Interlocutory Judgement which was entered against them on 7<sup>th</sup> August 2015.
2. The defendants have also asked the court to grant them leave to file their Defence out of time.
3. Finally, the defendants asked that the costs of the application be in the cause.
4. The plaint was filed in court on 24<sup>th</sup> April 2015.
5. After being served with the plaint and summons, the 1<sup>st</sup> and the 2<sup>nd</sup> defendants entered appearance on 11<sup>th</sup> June 2015.
6. As regards the 3<sup>rd</sup> defendant, she was served through an advertisement in a local daily newspaper, after the court had granted leave for substituted service. The 3<sup>rd</sup> defendant entered appearance on 17<sup>th</sup> December 2015.
7. However, none of the defendants filed their Defences.
8. On 15<sup>th</sup> July 2015 the plaintiff filed a Request for Judgement in default of Defence, and on 7<sup>th</sup> August 2015 the court granted judgement.
9. On 7<sup>th</sup> January 2016 the plaintiff filed a Request for Judgement against the 3<sup>rd</sup> Defendant, and on 21<sup>st</sup> January 2016, the Court entered judgement.

10. The application before me was brought by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, on 16<sup>th</sup> March 2016. In effect, the said application was made about 7 months after judgement was entered.
11. Mr. D.W. Muyundo, the learned advocate for the applicants, swore the affidavit in support of the application. He explained that as at the time when his law firm entered appearance for the applicants, the said law firm was in the process of moving its offices from **MAENDELEO HOUSE** along Monrovia Street, to **LOWER HILL DUPLEX APARTMENTS**, upper Hill.
12. Muyundo deponed that the case file was either misplaced or misfiled during the process of moving the firm's offices from Maendeleo House to Lower Hill Duplex Apartments.
13. Muyundo advocate confirmed that in August 2015, his law firm was served with a Notice of Entry of Judgement. He said that after being served with the said Notice, his law firm intensified the search for the case file.
14. In October 2015 the advocates traced their file, and Muyundo advocate placed the said file into the hands of an Associate, with appropriate instructions.
15. According to advocate Muyundo, the Associate whom he had give the file to, left the employ of the firm of D.W. Muyundo & Associates Advocates, before the said Associate had regularized matters in the case.
16. It was not until recently that Muyundo's attention was drawn to the fact that the case file had been returned to the Office Filing Cabinet, without being attended to by the Associate.
17. Upon becoming aware of the fact that no Defence had been filed in this matter, advocate Muyundo brought this application.
18. The applicants' advocate also said that he had been unable to reach the 2<sup>nd</sup> defendant for awhile, resulting in further delays before this application could be filed.
19. It was the contention of the applicant's advocates, that the delay in filing the Defence was not in bad faith. He attributed the said delay to a mistake or laxity on the part of the advocate. He therefore expressed regret for what had transpired, which he described as having been both inadvertent and unintended.
20. The applicants' advocates asked the court not to visit upon his client, the mistake or laxity of the advocate.
21. The plaintiff opposed the application. It submitted that the judgement in this case was regular. Nonetheless, the plaintiff appreciates that the court has a wide discretion to set aside a regular judgement.
22. But the plaintiff's opinion was that the applicants in this case had failed to meet the threshold.
23. The plaintiff cited the case of **SHANZU INVESTMENTS LTD Vs COMMISSIONER of LANDS, CIVIL APPEAL No. 100 of 1993**, as authority for the threshold which an applicant must meet, in order to have the court set aside a judgement. The plaintiff cited the following words from that judgement of the Court of Appeal;

***“The test for the exercise of this discretion are these:-***

***First, was there a defence on the merit? Secondly, would there be any prejudice? Thirdly, what was the explanation for the delay??***

24. Apart from spelling out those requirements, the Court of Appeal said;

***“The Court has a very wide discretion under the Order and rule, (0.9A rule 10), and there are no limits and restrictions on the discretion of the Judge except that if the Judgement is varied, that must be done on terms that are just?.***

25. The court also made it clear that no useful purpose could be served by setting aside a judgement where there was no possible defence to the action.

26. In the light of that decision, the plaintiff pointed out that in this case, the applicants had not filed any Defence, even in draft form.

27. As far as the plaintiff was concerned, the defendants had not rebutted the averments concerning the loans which were secured by personal guarantees, and also the post-dated cheques which were dishonored upon presentation.

28. At first glance there might appear to be an inconsistency between the assertion that the defendants had not rebutted averments in the plaint, and the fact that the plaintiff was aware that there was no Defence on record. But in reality there is no inconsistency at all. I so hold because the nature and scope of the proposed Defence may be provided through either a draft Defence or through an affidavit.

29. In this case, the applicant’s affidavit did not give any hint of the nature of Defence.

30. The applicants’ annexed to their written submissions, a draft Statement of Defence. Regrettably, the court is unable to receive evidence which a party seeks to introduce through written or oral submissions.

31. The advocate or party making submissions is not, at that stage, a witness. He cannot therefore produce evidence. He can only analyse the evidence already produced.

32. Accordingly, the draft Statement of Defence which was attached to the applicants’ submissions cannot be taken into account at all.

33. Nonetheless, I have found no reason that could lead me to conclude that the defendant had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

- See **SHAH Vs MBOGO [1967] E.A 116.**

34. The advocates for the applicants definitely shifted their offices from Maendeleo House, to Duplex Apartments, Upper Hill.

35. I find that in the process of moving offices, mistakes happened.

36. The advocates for the applicants admitted that the plaintiff even notified them that Judgement had been entered in default of Defence. I deem that admission as evidence of honesty on the part of the defendants’ advocates.

37. But I also find that there is no explanation or proper explanation for the delay which persisted from August 2015 (*when the defendants’ lawyers were made aware of the judgement*), and March 2016, when the defendants filed the present application.

38. I find no reason why the advocates could not have sought out the court file, and then engaged their clients to prepare a Defence.

39. In conclusion, I find that the delay was unreasonable.

40. I also find that the applicants failed to demonstrate that they have an arguable defence, on the merits of the case. Therefore, there is no good reason for giving the defendants an opportunity to file a defence when the court has no way of knowing whether or not the proposed Defence was arguable.

41. In the final analysis therefore, the application dated 10<sup>th</sup> February 2016 is without merit. It is dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

*Miss Kisaka for Gichuhi for the Plaintiff*

*No appearance for the 1<sup>st</sup> Defendant*

*No appearance for the 2<sup>nd</sup> Defendant*

*No appearance for the 3<sup>rd</sup> Defendant*

*Collins Odhiambo – Court clerk.*