REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 125 OF 2018

JAMES MOGUNDE MOGUNDE.....PLAINTIFF/RESPONDENT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....DEFENDANT/APPLICANT

R U L I N G

1. Before me for determination is the defendant/applicant's Notice of Motion application dated 23rd December, 2019 brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -

1. Spent

2. Spent.

3. THAT this honourable court be pleased to set aside the judgement and order for costs made on the 1st October, 2019 and grant the defendant unconditional leave to defend the claim.

4. THAT costs of this application be in the cause.

2. The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn on the same day by Charles Njenga the advocate for the defendant/applicant herein. He averred that the instant matter was heard without the defendant/applicant's participation and judgment made on 1st October, 2019. He stated that failure by the applicant to enter appearance was caused by an inadvertent mistake by its advocate who had allocated the matter to an associate who left employment before preparing and filing the required documents and/or properly handing over the matter. The applicant further stated that the mistake was only discovered when they received a copy of the judgment from the plaintiff's advocate and that the said mistake cannot in any way be attributed to the applicant. The defendant further stated that it has a good defence to the claim as the impugned documents were supplied by one Esther Njeri Ngigi who was a beneficiary of the loan advanced on the security of the title. He stated the applicant was not negligent and was not privy to any fraudulent acts.

3. The applicant stated that it had not been served with any notice for the hearing date and therefore it did not have notice of the hearing and hence the entire proceedings and judgement should be set aside. The applicant averred that the plaintiff/respondent would not suffer any prejudice if the orders sought are granted. The defendant prayed that the judgment be set aside and it be granted leave to defend the suit.

4. The plaintiff/respondent filed a replying affidavit dated 24th January 2020 in opposition to the application. The respondent averred that the applicant's application was mischievous, incompetent and devoid of any merit. The respondent averred that the applicant had always been aware of the proceedings leading to the exparte judgment but voluntarily and knowingly chose not to participate in the proceedings. The plaintiff/respondent filed a certificate of urgency dated 22nd March 2018 which came up for inter parties hearing on 19th April, 2018 where the defendant/applicant despite being served failed to attend. The respondent maintained that the applicant had been served with the hearing notices which were duly received but failed to file their documents or attend court for the hearing.

5. The Respondent stated that the allegation by the applicant that the associate allocated the matter left their employment before preparing and filing the required documents was a mere excuse as the office never stopped operating and any matters the associate was handling must have been taken over by others to handle.

6. The applicant in response to the replying affidavit filed a supplementary affidavit dated 2nd June 2021 where it reiterated the contents in its supporting affidavit. The applicant averred it had a good defence to the claim as it had relied on the documents presented by one Esther Njeri

Ngigi (the Borrower) to process and advance the loan on the security of the charge over the suit property.

Submissions of the Parties.

7. The parties canvassed the application by way or written submissions. The applicant submitted that failure to enter appearance was as a result of an inadvertent mistake in its advocate's office which was only discovered after they were served with a copy of the default judgment and certificate of costs. The applicant further argued that the failure to enter appearance and file a defence was not deliberate but was occasioned by an inadvertent mistake that should not be visited on an innocent litigant. The applicant relied on the case of ***Philip Chemwolo & Another vs Augustine Kubende [1982-88] KLR 103*** where the court held as follows:

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit."***

8. The applicant further submitted that the judgment delivered on 1st October, 2019 was irregular and unfair to the applicant for the reason that the applicant had not been served with any hearing notice resulting in the matter proceeding exparte. The applicant submitted that it should in the circumstance be granted unconditional leave to defend its case since the defence raises bonafide triable issues. The applicant relied on the case of **Continental Butchery Limited vs Nthiwa [1978] KLR** where the court held that if a bonafide triable issue is raised in the intended defence, the defendant must be given unconditional leave to defend the claim. It submitted that it has a sustainable defence for which it should be afforded a chance to prosecute on merit.

9. The respondent in his response submissions filed on 25th October 2021 submitted that the applicant was duly served with the pleadings and hearing notices which they acknowledged by stamping the principal copies as evidenced in the affidavits of service filed court. He further submitted that the court was satisfied the defendant was duly served before allowing the plaintiff/respondent to proceed with the hearing exparte. The respondent contended that the defendant's application was devoid of merit and was merely intended to frustrate and delay the respondent's quest for justice and prayed that the same be dismissed with costs.

Analysis and determination.

10. I have reviewed and considered the pleadings and the submissions of the parties and the issue for determination is whether the applicant has made out a case to warrant the court to exercise its discretion in favour of the applicant and set aside the judgment delivered on 1st October, 2019. The basis of the applicant's application is that it had no notice of the hearing of the case. Although the applicant admits having been served with the summons to enter appearance it stated that the advocates it had given instructions inadvertently failed to enter appearance and file a defence on their behalf resulting in the hearing of the case proceeding exparte to their prejudice.

11. A perusal of the court record reveals that the instant suit was filed by the plaintiff on 28th March 2018. Simultaneously with the plaint an interlocutory application for injunction was also filed under a certificate of urgency. The pleadings were served on the defendant on 5th April 2018 as per the affidavit of service filed by the process server on 18th April 2018. The interlocutory application was fixed for interpartes hearing on 19th April 2018. The defendant though served did not attend court and the application was heard exparte and a ruling delivered on 8th May 2018 allowing the application. Thereafter the suit was fixed for mention for pretrial directions on 26th June 2018. The defendant was served to attend court but did not attend and had not appeared and/or filed any defence. The court fixed the suit for hearing as an undefended cause on 17th October 2018 but nonetheless ordered the defendant to be served. Though served the defendant did not attend court on the date although the hearing did not proceed. The suit was again fixed for hearing on 1st February 2019 and the defendant was served with a hearing notice. From the court record no proceedings took place on this date. The matter was on 11th February 2019 fixed for mention on 18th March 2019 when a hearing date for the suit was fixed on 18th June 2019 and a hearing notice directed to be served on the defendant. A hearing notice was served on the defendant on 27th March 2019 and an affidavit of service was filed on 17th June 2019.

12. On the hearing date the defendant did not attend and the court being satisfied the defendant was duly served permitted the hearing to proceed exparte. The plaintiff testified and closed his case and the court fixed the matter for delivery of judgment on 1st October 2019 and directed the defendant to be served a judgment notice which was duly done on 28th June 2019. On the date of the delivery of judgment the defendant did not attend and the judgment was duly delivered in favour of the plaintiff.

13. From the above chronology of events it is evident the defendant was served with court process on various occasions. On every occasion the defendant acknowledged service of the documents tendered for service by embossing their official stamp on the documents returned to court. There can therefore be no doubt that the defendant was served and that the default judgment obtained by the plaintiff was a regular judgment. The Court of Appeal in the case of ***James Kanyiita Nderitu & Another -vs- Marins Phillotas Chikas & another (2016) eKLR*** outlined the criteria upon which a court exercises discretion to set aside a regular exparte judgment. The court expressed itself thus:-

> *" – In such a scenario, the court had unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be, lengthy of time that has elapsed since the default judgment was entered, whether the intended defence raises triable issues; the respective prejudice; whether on the whole, it is in the interest of justice to set aside the default judgment, among others"*

14. In the case ***of Shah -vs- Mbogo (1967) EA 166 the East African*** **Court of Appeal** stated as follows respecting factors to be considered in an application to set aside an exparte judgment:-

> *"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. Secondly the discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice"

15. In the case of ***Patel -vs- African Cargo Handling Services Ltd (1974) EA 75 Duffus V.P stated*** thus:-

"– I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied there is a defence on merits. In this respect defence on merits, does not mean in my view defence that must succeed it means as Sheridan, J put it: a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

16. In the matter before the court the defendant's advocate Mr Charles Njenga who swore the affidavit and the supplementary affidavit in support of the application explained there was inadvertence in their offices as the lawyer who had been assigned the matter failed to cause an appearance and defence in the suit to be filed and left the firm before doing so. According to the advocate the mistake was only discovered after the plaintiffs advocates sent a copy of the judgment and demand for costs to the defendant. On the basis of the record that I adverted to earlier in this ruling, there can be no doubt that the defendant was served not only with the pleadings but with various mention notices and the hearing notice of the suit on 27th March 2019. On all occasions the defendant acknowledged service by embossing their "Receipt Stamp "on the document served. The defendant was directly served with process on 21st May, 2018, 6th July 2018, 27th March 2019 and 28th June 2019. The defendant's advocates on record filed a memorandum of appearance together with the instant application on 23rd December 2019 after the plaintiff served upon the defendant a copy of the judgment delivered by the court on 1st October 2019 vide the plaintiff's Advocates letter of 11th December 2019 advising on its costs of the suit.

17. There was no explanation whatsoever why the defendant who was served by the plaintiff directly on not less than five (5) occasions before the judgment was delivered did not seek to find out from their advocates the status of the case. Either the defendant had no interest about the case and/or did not care about it. The plaintiff was entitled to serve the defendant directly since no advocate had come on record for them. The defendant was served with a hearing notice for the hearing of the case scheduled on 18th June 2019. The service was regular and in the absence of the defendant, the court properly allowed the plaintiff to proceed with the hearing. The judgment that the plaintiff obtained was a regular judgment since the defendant had been served. It was the defendant's duty to pass the mention notices to their advocate if they had appointed one. There was no way the plaintiff would have known that the defendant had appointed an advocate to represent them without any notice having been filed and served. The reason adduced by the defendant's advocates for failure to enter appearance and file a defence in the face of the acts of omission by the defendant is inacceptable. **What did the defendant do to ascertain its instructions were acted upon? What did the defendant's do with the documents that were served upon them?** The defendant in my view did not act with diligence in the handling of their case and in the circumstances are underserving of the court's discretion. Their conduct militates against any discretion being exercised in their favour.

18. On the facts and circumstances, the defendant cannot be entitled to have the exparte judgment set aside for want of service. The defendant was duly served and the plaintiff obtained a valid and regular judgment which ought not to be wiped out unless there is a justifiable cause. He is entitled to enjoy the fruits of his judgment which he labored to get.

19. I have reviewed the draft defence filed by the defendant applicant and I am not persuaded the defence raises any triable issues to warrant the defendant to be granted even conditional leave to defend the suit. On the basis of the plaint and the evidence tendered by the plaintiff at the hearing it is irrefutable that the plaintiff was the registered owner of the suit property and that he never executed the charge over the suit property in favour of the defendant to secure a loan of Kshs.10,000,000/= against the account of one Esther Njeri Ngigi. The plaintiff at the time he was alleged to have executed the charge was in the United States of America (USA) and there was no way he could have executed the charge. The defendant was simply a victim of fraudulent acts by the said Esther Njeri Ngigi. The learned Judge properly found the charge to have been fraudulent and therefore null and void and hence liable to be cancelled.

20. There was no valid charge over the suit property and the remedy the defendant has is to pursue the fraudster directly. The defendant has no cause of action against the plaintiff as clearly the plaintiff was not involved in the fraud that resulted in his land being charged in favour of the defendant. 21. In the premises there is no basis upon which I can exercise my discretion to set aside the exparte judgment delivered by the court on 1st October 2019.

22. The defendant's Notice of Motion dated 23rd December 2019 lacks any merit and the same is dismissed with costs to the plaintiff.

23. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 3RD DAY OF JANUARY 2022.

J M MUTUNGI

JUDGE