



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 206 OF 2014**

**COMMERCIAL BANK OF AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**THE TREE TOPS ACADEMY LTD..... 1<sup>ST</sup> DEFENDANT**

**JAMES KABIRU NDIRITU.....2<sup>ND</sup> DEFENDANT**

**DENNIS MIANO KABIRU.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Judgment in default of filing a Defence was entered herein on 3<sup>rd</sup> November, 2014 against all the three Defendants. The Notice of Motion of 27<sup>th</sup> July 2015 seeks to set aside that Default Judgment and for grant of unconditional leave to the Applicants to defend this suit.
2. These proceedings commenced on 20<sup>th</sup> May 2014 when the Plaintiff's Bank presented a Plaintiff dated 19<sup>th</sup> May 2014. In it the Plaintiff sought judgment against the Defendants jointly and severally for:-
  - a. Kshs.14,492,533.76 together with interest thereon at 23.5% per annum from 1<sup>st</sup> March, 2014.
  - b. Kshs.915,640.99 together with interest thereon at 18% per annum form 1<sup>st</sup> March 2014.
  - c. Costs.
3. The claim is said to arise from loan and overdraft facilities granted by the Plaintiff to the 1<sup>st</sup> Defendant whose payment was guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant who, separately, executed written guarantees and indemnities dated 24<sup>th</sup> July 2012.
4. There was default and on 26<sup>th</sup> July, 2013, the Plaintiff demanded payment of the sum of Kshs.13,970,088.80 together with interest from the 1<sup>st</sup> Defendant. As default persisted, that amount was on 4<sup>th</sup> September 2013 demanded from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as guarantors thereto. The sum of Ksh.14,492,533.75 is on the loan account while Kshs.915,640.99 is on the current or overdraft account.
5. It is not in dispute that after service of the Summons and Plaintiff on at least two Defendants (being the 1<sup>st</sup> and 2<sup>nd</sup>), Anyegah & Co. Advocates Entered Appearance on behalf of **all the three** Defendants

through a Memorandum of Appearance filed on 10<sup>th</sup> July 2014. Defence was never filed and on 8<sup>th</sup> September, 2014 the Plaintiff's Counsel filed a request for judgment against the trio. Acting on that request, Default Judgment was entered on 3<sup>rd</sup> November, 2014.

6. In the Affidavit of James Kabiru Ndiritu (sworn on 27<sup>th</sup> July 2014) in support of the Motion for setting aside, the Deponent explains that he was unable to instruct his advocate to file Defence because of illness. In paragraph 3 he depones:-

“THAT I was to meet with the said advocates thereafter to instruct them to prepare and file a defence in this suit but unfortunately I was taken ill. I have been experiencing medical complications that kept me bed ridden for over a year now and as a consequence I have not been able to meet with my advocates for further instructions. Annexed hereto and marked as JKN 1 is a true cop of the medical report from the Physician.”

7. In the Replying Affidavit of Ronald Gitobu Mworira sworn herein on 21<sup>st</sup> August 2015 and filed on 24<sup>th</sup> August 2015 he sets out the manner in which the Plaintiff accommodated the Defendants before finally requesting for judgment. He depones:-

“3. I am informed by the Plaintiff's advocates, Hamilton Harrison & Mathews, and I verify believe it to be true that:

a. The summons to enter appearance was served on the first and second defendants on 30<sup>th</sup> June, 2014 by serving the manager of the first defendant who was also the wife of the second defendant. The details of the service are set out in the Affidavit of Service of Isaac Miano on 9<sup>th</sup> July, 2014 and filed on 16<sup>th</sup> October, 2014 a copy of which is at pages 1 and 2 of the exhibit hereto.

b. The firm of Anyegah & Company entered appearance for all three defendants on 14<sup>th</sup> July, 2014 copy of which is at pages 3 and 4 of the exhibit hereto.

c. The Defence was therefore due on or before 28<sup>th</sup> July, 2014. No Defence was filed.

d. Hamilton Harrison & Mathews did not immediately apply for judgement in default of defence waiting for the Defence to be served.

e. On 25<sup>th</sup> August, 2015 Mr. Ondieki of Anyegah & Company telephoned Hamilton Harrison & Mathews stating that the Defence would be filed on 26<sup>th</sup> August, 2015 and requesting Hamilton Harrison & Mathews to withhold any application for judgment in default of Defence.

f. On 28<sup>th</sup> August, 2014 Hamilton Harrison & Mathews wrote to Anyegah & Company pointing out that the Defence had not been served and stating that if the Defence was not served by close of business on 3<sup>rd</sup> September, 2014 an application for judgement would be filed. A copy of the letter is at page 5 of the exhibit hereto.

g. As no Defence was received the application for judgment was file don 8<sup>th</sup> September, 2014 a copy of which is at page 6 of the exhibit hereto.

h. Judgment was entered on 3<sup>rd</sup> November, 2014.

i. On 19<sup>th</sup> November, 2014 Hamilton Harrison & Mathews sent a draft decree for approval to Anyegah & Company. A copy of the letter is at page 7 of the exhibit hereto.

j. That no response was received form Anyegah & Company to Hamilton Harrison & Mathew's letter of 28<sup>th</sup> August, 2014 or 19<sup>th</sup> November, 2014.”

8. There is no doubt that the judgement obtained by the Plaintiff was a regular judgment. It was obtained after the 3 Defendants, who had entered Appearance, failed to file Defence. The manner in which the Exparte Judgment was obtained cannot be faulted.

9. Once accepted that the Judgment is regular, the Defendants needed to establish that the Application before Court was brought without delay, that there is a satisfactory explanation for failure to file Defence and that the proposed Defence discloses a triable issue or issues (Chemwolo & Another Vs. Kabende [1986] KLR 492).

10. It seems to me that the Defendants were jolted into filing the present application by the threats of the Notice to Show Cause take out by the Plaintiff on 12<sup>th</sup> June, 2015. It was only then that they filed the present Application on 28<sup>th</sup> July, 2015.

11. The Defendants blames the failure to file Defence on the illness of the 2<sup>nd</sup> Defendant. As proof thereof the 2<sup>nd</sup> Defendant attached this Medical chit to his Affidavit;

**Consolidated Medical & Dental Services**

*Blessed House 1<sup>st</sup> Floor, Opp.KCB Ngara, P.O. Box 1001-00600 Nairobi*

*Cell: 0720808797, 0722480452*

21.7.2015

**To whom it may concern**

**RE; JAMES KABITU NDIRITU OP.NO.503/2014**

This is to inform you that the above mentioned has been on follow up at our Clinic since 8//9/2015. He's suffering from Essential Hypertension, Type 11 diabetes and Peripheral Neuritis which has led to reduced movement and being bed ridden on and off.

His condition has since greatly improved though he's still on medication and Physiotherapy.

I hereby request minimal strain and bed rest to enhance recovery.

Thank you in advance.

Truly

*Signed*

**Macharia**

As correctly pointed out by the Plaintiff's Counsel, that chit, which is dated 21<sup>st</sup> July, 2015, was confirming that the patient had been to the Clinic for follow up treatment on a date that was yet to reach (ie. 8.9.2015). However let it be assumed that there was an error on the face of the chit and the actual date was 8.9.2014, the 2<sup>nd</sup> Defendant does not explain why he failed to instruct his Lawyer from 29<sup>th</sup> July 2014 when Defence was due to 8<sup>th</sup> September 2014 when he fell sick.

12. There was also something curious about that chit of 21<sup>st</sup> July 2015. The day the 2<sup>nd</sup> Defendant was supposedly at Nairobi attending the Clinic was on the very day that he was served with a Notice to Show Cause at his Hotel 'The Bright Star Resort' in Diani Kwale off Diani Beach Road. The Affidavit of service of Isaac Miano sworn on 27<sup>th</sup> July 2015 and which was filed in Court on 28<sup>th</sup> July 2015 shows

that in acknowledgement of service, the Defendant signed the back of the Notice.

13. Given the speed of modern transport (Air transport for instance) it is possible that on one part of the day a person can be at Diani and later at Nairobi or vice versa. What however is curious about this matter is that faced with that evidence, the 3<sup>rd</sup> Defendant choose not to react to it by way of a further affidavit. That silence discredits the 3<sup>rd</sup> Defendants' entire explanation that illness was to blame for the inaction herein.

14. Something else. While the 2<sup>nd</sup> Defendant gives an explanation on behalf of the 1<sup>st</sup> Defendant and himself, no explanation is forthcoming from the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant was a Guarantor and would be personally liable for the Plaintiffs claim, yet he has not explained why his advocate did not file his Statement of Defence in time.

15. It is the view of this Court that the Defendants have not given a satisfactory answer as to they failed to file Defence on time even after they had instructed Counsel to Enter Appearance on their behalf.

16. That said something may tilt the scales in favour of the Defendants. In paragraph 9 of his Affidavit, the 2<sup>nd</sup> Defendant raises the following issues:-

“9. THAT I am further advised by my said advocates which advise I verify believe to be correct that in any case, the Respondent holds a security to the loan worth in excess of Kshs.60,000,000/= which it has not attempted to realize to recover its money and as such the Notice to Show Cause is ill advised and just meant to curtail the freedom of the applicant without justifiable cause”.

That is also raised in paragraph 6 of the Draft statement of Defence. And then in paragraph 7 thereof this averment is made:-

“The defendants are not aware of any demand made or notice issued as alleged in paragraph 12 of the Plaint”

17. Reacting to this, the Plaintiff states as follows in the affidavit of Mworira:-

“The Plaintiff does hold a charge over two pieces of land owned by the second defendant, but investigations have shown that the school operated by the first defendant is situated on these two plots and other plots and the advice which the Plaintiff has received from its valuers is that it would be difficult to sell the two charged properties by auction in view of their integration with the other plots on which the school has been constructed”.

18. It turns out that the facilities to the 1<sup>st</sup> Defendant was secured by way of charge. And looking at the Letter of Offer dated 18<sup>th</sup> July 2002 ( pages 35-46 of the Plaintiffs Bundle of Document), a first legal charge for Ksh.21,500,000/= was to be created over properties titles Loc/11/Maragi/2002 and Loc/15/Kimathe/1709 registered in the name of James Kabiru Ndiritu(the 2<sup>nd</sup> Defendant). This Court takes the Statement of Mworira to be confirmation that it is over these two properties that the Plaintiff Bank holds a charge in respect to the facilities.

19. The proposed Defence, albeit in an inelegant manner, raises two important issues. One, was the Statutory Notice required by Section 90 of the Land Act 2012 served upon the 2<sup>nd</sup> Defendant before the filing of this suit? The provisions of subsections (1) (2) and (3) of Section 90 are relevant which provide:-

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- (a) the nature and extent of the default by the chargor;
- (b) if the default consists of the non- payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
- (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land;

Although I had always thought that the three months statutory Notice was required only when the chargee intended to exercise its power of sale, the provisions of Section 90(3) are clear enough that the Notice is mandatory even where the remedy elected by the chargee is a suit for recovery.

20. That no notice or demand was made is taken up in the draft Defence. Looking at the Plaintiffs Bundle of Documents, this Court is not able to find any such Notice. What the Court sees is the Demand Notice dated 4<sup>th</sup> September 2013 from the firm of Hamilton Harrison & Mathews. This is not the Notice contemplated by Section 90 of the Land Act 2012. If that were so, then the proceedings herein may well be premature. That is a triable issue.

21. A second issue that may arise revolves around the provisions of Section 91 of The Land Act which reads:-

“(1) The chargee may sue for the money secured by the charge only if—

- (a) the chargor is personally bound to repay the money;
- (b) by any cause other than the wrongful act of the chargor or chargee, the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity to provide additional sufficient security and the chargor has failed to provide that additional security; or

(c) the chargee is deprived of the whole or part of the security through or in consequence of, a wrongful act or default of the chargor.

(2) The court may order the postponement of any proceedings brought under this section until the chargee has exhausted all other remedies relating to the charged land, unless the chargee agrees to discharge the charge.” (my emphasis)

Section 91(2) is of significance. While the Plaintiff’s explanation that the charged property may now be a difficult sale the Defendants are entitled to seek the suspension or postponement of these proceedings until the Plaintiff Bank exhausts its remedies relating to the charged land.

22. Only because of the matters in relation to the Land Act that demonstrate that the Defendants have a Defence that raises Triable issues or serious points of law that this Court exercises its discretion to set aside the Default Judgment entered herein. The Applicants are granted unconditional leave to file and serve their Defence within 14 days of this Decision.

23. As to costs, the Defendants did not give sufficient explanation for their failure to act diligently and for that reason the costs of Notice of Motion dated 22<sup>nd</sup> July 2015 shall be to the Plaintiffs in any event.

24. Only to the extent of the Orders in paragraphs (22) and (23) above does the Application of 27<sup>th</sup> July 2015 succeeds.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> Day of November, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Fraser for Plaintiff

N/a for Defendants

Alex - Court clerk