



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

**ELC 20 OF 2013**

**(Formerly CIVIL SUIT NO. 190 OF 2011)**

FREDRICK NYAGARI NYARIBO.....PLAINTIFF/RESPONDENT

**VERSUS**

HOUSING FINANCE.....DEFENDANT/APPLICANT

**RULING**

1. The application dated 14<sup>th</sup> August, 2012 seeks orders that the interlocutory judgment entered against the Defendant herein pursuant to the Plaintiff's Request for Judgment dated and filed on 9<sup>th</sup> May, 2012 be set aside and the Defendant be granted leave to file and serve its defence out of time.
2. It is stated in the affidavit in support that the Applicant filed a Notice of Appointment and a Memorandum of Appearance on 26<sup>th</sup> September, 2011. That the Applicant filed a reply to the application that was filed by the Respondent simultaneously with the plaint. That the parties agreed to canvass the said application by way of written submissions. That the Applicants filed their written submissions but were surprised to be served with a judgment notice indicating judgment had already been entered against the Defendant in default of filing a defence.
3. The Applicants contention is that the interlocutory judgment is irregular as the Plaintiff's suit seeks declaratory and injunctive orders. The Applicant has further averred that failure to file the defence was an oversight. It is argued that the Defendant has a serious and arguable defence as per the annexed copy of the draft defence. The Applicant has enumerated a number of triable issues that are raised in the defence which includes whether the Plaintiff defaulted in payment of the loan, whether the Defendant in exercise of its statutory powers of sale complied with the law, whether the intended auction was within the law and whether the Defendant can be restrained from exercise of its statutory power of sale.
4. The application is opposed. According to the replying affidavit sworn by the Respondent, the application is supported by an affidavit deposed by the Applicant's counsel on contentious issues. That the default judgment was properly entered on interlocutory basis pending formal proof. It is further stated that no valid reason has been given for the failure to file the defence.
5. The application was canvassed by way of written submissions which I have duly considered.
6. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which

are not carried out. (See for example **Wasike v Wamboko, HC Kakamega and Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Anor [1998] eKLR**).

7. The failure to file a defence is not denied. According to the applicants, the failure to file a defence was an oversight on their part.

As was stated by the Court of Appeal in **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** while referring to the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, J.A.** (as he then was) posited 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”*

8. On the issue of the affidavit in support having been sworn by the Advocate, it is noted from the contents of the said affidavit that the matters deponed to relate to his duties as the counsel for the Defendant. These are therefore matters within the knowledge and/or information of the counsel.

9. On whether the interlocutory judgment was irregularly entered, it is observed that the prayers in the plaint are for declaratory and injunctive orders. The applicable law is therefore **Order 10 Civil Procedure Rules** and specifically **Rule 9 and 10** thereof which provide as follows:

*(9) Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.*

*(10) The provisions of rules 4 – 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.”*

The interlocutory judgment was therefore irregularly entered. The suit ought to have been set down for hearing.

10. The annexed draft defence raises triable issues which include the question whether the plaintiff defaulted in the payment of the loan; whether the Defendant in its exercise of the statutory power of sale complied with the law whether the auction was lawful and whether the Defendant can be restrained from exercising its statutory power of sale.

11. With the foregoing, I allow the application with thrown away costs to the Plaintiff.

.....

**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 29<sup>th</sup> day of April, 2015

.....

**B. THURANIRA JADEN**

**JUDGE**