



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 257 OF 2009

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KENNETH PATRICK DOWSON.....1ST DEFENDANT

THE LORD DELAMERE.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant's Notice of Motion dated 4th September 2014 and filed on 5th September 2014 was brought pursuant to the provisions of Article 159 of the Constitution, Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act as well as Order 10 Rule 11, Orders 21, 22 and 51 of the Civil Procedure Rules. Prayer No (1) was spent. It sought the following remaining orders:-
 1. **Spent**
 2. **THAT the Ex-parte Default Judgment entered against the 1st Defendant on 18/5/2010 in default of entering an appearance and/or filing a Defence, be set aside and all Consequential Order and/or Orders made thereon be Vacated and/or Set Aside, and the 1st Defendant be granted unconditional leave to defend this suit to its logical conclusion.**
 3. **THAT consequently, there be a Stay of Execution of the Decree Issued on 18/5/10 until the Final Determination of both this application, and this suit to its logical conclusion.**
 4. **THAT the 1st Defendant's attached "Draft Defence" be treated as properly filed and served.**
 5. **THAT the Costs of this application be paid by the Plaintiff/Respondent in any event.**

THE 1ST DEFENDANT'S CASE

2. The application was supported by the Affidavit of Kenneth P. M Dowson, the 1st Defendant herein. It was sworn on 4th September 2014. He also swore a Further Affidavit on 19th January

2015. It was filed on 21st January 2015. His Written Submissions dated 19th January 2015 were filed on 21st January 2015. On 13th March 2015, he also filed a Rejoinder to the Plaintiff's submissions dated 8th February 2015.

3. It was his case that the Plaintiff never informed him of the entry of the *ex parte* default judgment that was entered against him on 18th May 2010. He stated he only became aware of the entry of judgment when he went to court on 28th July 2014 after seeing the matter listed on the cause list of that day. He said that the interlocutory judgment was void having been obtained against him in a suit that was already barred by limitation. He also contended that he was also under the impression that the 2nd Defendant was defending the suit on their behalf as there was an Advocate on record for the reason that both of them were co-defendants having signed the joint guarantees in favour of the Plaintiff.
4. He averred that he had a good defence which raised triable issues, against the Plaintiff's claim similar to those that were raised by the 2nd Defendant in his Defence. He elaborated the contents and merits of his Defence in his supporting affidavit.
5. In light of the foregoing, he urged the court that it was in the interests of justice that the *ex parte* judgment entered against him be set aside and that he be granted unconditional leave to defend this suit.

THE PLAINTIFF'S CASE

6. In opposition to the said application, Samuel Wanjohi Mundia, an Advocate, swore a Replying affidavit that was filed on 11th December 2014. He also swore a Further Replying affidavit on 2nd February 2015, that was filed on 3rd February 2015. Its Written Submissions were dated 8th February 2015 and filed on 11th February 2015.
7. The Plaintiff's case was that the delay in bringing the current application was unexplained, inordinate and inexcusable. It averred that the 1st Defendant had been duly served with Summons to Enter Appearance and that he was further made aware of the proceedings by an advertisement in the Daily Nation of 12th November 2009 pursuant to the court order that was made on 23rd October 2009 and vide a letter dated 8th June 2010 that was sent to him by registered mail.
8. It contended that the 1st Defendant's defence was a sham and frivolous as the same had failed to disclose triable issues capable of being adjudicated upon by the court at a full trial on merits. The Plaintiff therefore urged the court to dismiss the 1st Defendant's application with costs to it.

LEGAL ANALYSIS

9. The law and principles on setting aside an interlocutory Judgment are now well settled. This court has the discretionary powers under Order 10 Rule 11 of the Civil Procedure Rules, 2010 to set aside or vary such judgment and consequential decree or order upon such terms as are just. In the case of **Kenya Commercial Bank Ltd vs Nyantange & Another(1990)** Klr 443 Bosire J, as he then was held:-

1. Order IXA rule 10 of the Civil Procedure Rules (Now Order 10 Rule 11 of the Civil Procedure Rules, 2010) donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.

2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

10. The 1st Defendant was served by way of substituted service which service was advertised in the

Daily Nation newspapers. To this end, he submitted that at the time of service he resided in 'rural' Nakuru where he could not access Newspapers daily as the distribution of the same was irregular. The court cannot ascertain his contention. After all, substituted service is considered to be as effective as personal service on a Defendant as can be seen in Order 5 Rule 17(2) of the Civil procedure Rules. It was therefore the view of the court that the 1st Defendant was duly served with Summons to Enter Appearance and having failed to enter appearance or to file a Defence, the *ex parte* Judgment herein was regular.

11. The court can, however, exercise its discretion to set aside the Ruling of *ex parte* judgment. It has wide and unfettered discretion to set aside *ex parte* orders if sufficient cause is shown. Order 10 Rule 11 of the Civil Procedure Rules stipulates as follows:-

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

12. The 1st Defendant's main contention was that he was never informed of the entry of the *ex parte* default judgment by the Plaintiff. It was also his position that he was under the impression that the 2nd Defendant was defending the suit on both their behalf. On the other hand, the Plaintiff asserted and even demonstrated that in June 2010, it duly notified the 1st Defendant of the entry of Judgment by way of registered post. This fact was not rebutted by the 1st Defendant.

13. Evidently, the guarantees were joint as was apparent from the pleadings on record. However, the court was unable to comprehend why the 1st Defendant had the impression or assumed that the 2nd Defendant's Advocates were representing him without him having given them express instructions or information to that effect. It appears that his impression of the said joint representation had no legal basis.

14. There was indeed no plausible reason why the 1st Defendant did not actively defend its case after being served with summons or why he did not take action after being served with the Notice of entry of Judgment. He claimed that he did not know of the *ex parte* Judgment until 28th July 2014 when he saw the case on the cause list.

15. Having been informed that interlocutory judgment had been entered against him, it would have been expected that the 1st Defendant would have brought the present application as a matter of urgency. However, he only filed it on 5th September 2014, almost two (2) months after he had learnt of the *ex parte* judgment. The unexplained delay in bringing the current application and the lack of diligence on the 1st Defendant's part in defending this matter was inordinate.

16. The above notwithstanding, the court noted that this matter had not yet been set down for hearing. As the 2nd Defendant was allowed to amend its Defence vide the court's Ruling of 15th October 2014, it would only be prudent and in the interests of justice that all matters between the parties be fully adjudicated upon to finality. It was discernible from the Plaintiff's claim that the Plaintiff's claim was against the 1st and 2nd Defendants jointly and severally. The Guarantees in issue were jointly executed by both the 1st and 2nd Defendants.

17. In other words, as the Plaintiff's claim against the Defendants was similar, the court found and held that there would be no harm and prejudice suffered by the Plaintiff in allowing the 1st Defendant to have his day in court and defend his case. The court is alive to the fact that shutting out a litigant from defending or prosecuting its claim should be as matter of last resort.

18. This does not in any way mean that the court has lost sight of the fact that the Plaintiff was inconvenienced by the undue and unexplained delay by the 1st Defendant in defending this case. However, the said delay can be compensated by way of costs.

19. Having considered the pleadings, affidavit, evidence, written submissions in support of the parties case, the court found that the 1st Defendant's argument that it had a good and water tight Defence was not relevant in an application seeking setting aside of judgment as it was not required to consider the merits or otherwise of the Defence. For that reason, although the court noted the case law that was relied upon by the Plaintiff in this regard, it did not analyse the same. Notably, it had not been demonstrated anywhere in the pleadings herein that the 1st Defendant had deliberately sought to obstruct or delay the cause of justice. As such, the court was inclined to give him a chance to defend his case.

DISPOSITION

20. In the circumstances foregoing, the upshot of this court's ruling was that the 1st Defendant's Notice of Motion dated 4th September 2014 and filed on 5th September 2014 is hereby allowed in the following terms;-

1. **The *ex parte* default judgment entered against the 1st Defendant on 18/5/2010 in default of entering an appearance and/or filing a Defence, is hereby set aside and all consequential order and/or orders made thereon are hereby vacated.**
2. **The 1st Defendant is hereby granted leave to file and serve his Defence within Fourteen (14) days from the date of this Ruling.**
3. **The Plaintiff will be at liberty to respond to the 1st Defendant's Defence within fourteen (14) days from the date of service.**
4. **The 1st Defendant shall bear the costs of this application. The 1st Defendant shall also pay the Plaintiff's thrown away costs in the sum of Kshs 50,000/= within the next fourteen (14) days from the date hereof failing which the Plaintiff will be at liberty to apply for the appropriate orders.**

21. Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of May 2015

J. KAMAU

JUDGE