



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

**AT MOMBASA**

**CIVIL SUIT NO. 30 OF 2013**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**V E R S U S**

**BLUESHED FREIGHTERS LIMITED ..... DEFENDANT**

**RULING**

1. The Defendant filed its Memorandum of Appearance on 18<sup>th</sup> April 2013. Its defence should have been filed within 14 days thereof. See Order 7 Rule 1 of Civil Procedure Rules, 2010. The defence was not filed within that period and Plaintiff filed a request for judgment in default of defence on 6<sup>th</sup> May 2013. The Deputy Registrar of this Court on the same day entered judgment in favour of Plaintiff. Judgment was entered for Kshs. 9,692,065.20 as prayed in the plaint. The Defendant since it is assumed was unaware of the entry of that judgment filed a defence on 8<sup>th</sup> May 2013 after judgment had been entered as stated before in default.
2. Defendant by its Notice of Motion dated 23<sup>rd</sup> September 2013 seeks to set aside that ex parte judgment. The main grounds for seeking to set aside the ex parte judgment are that the Advocate who had the conduct of this case suddenly proceeded on maternity leave on 1<sup>st</sup> May 2013 and as a consequence the Defendant's firm of Advocates failed to file the defence in time and secondly that Defendant has stated that its defence raises triable issues which should go to trial.
3. Plaintiff does oppose the Defendant's application. Plaintiff submitted that it obtained a valid judgment because the Defendant failed to file a defence within 14 days of filing a Memorandum of Appearance. The Plaintiff further submitted that Defendant had failed to explain the delay in filing defence. Plaintiff's learned Counsel supported that submission by stating that the firm of Advocates that represents the Defendant has other Advocates other than the one who proceeded on maternity leave. Plaintiff further submitted that Defendant's defence did not raise an answer to the merit of Plaintiff's claim. Plaintiff referred to Defendant's correspondence admitted indebtedness to the Plaintiff and offered to settle its debt and submitted that Defendant's defence did not raise bonafide defence. In that regard Plaintiff relied on the following cases **DAIMA BANK LIMITED –VS- ISAAC KIPCHUMBA MAIYO & ANOTHER HCCC NO. 1611 OF 1999** and **NATIONAL DEVELOPMENT BANK –VS- ESTATE CONSTRUCTION PROPERTY LTD & OTHERS 2004(2)BLR 492 (HC)** where the Court stated-

**“The Plaintiff is a Banking institution. The Applicant cannot be serious when he states that no interest would be due to the Plaintiff. That is clearly not being reasonable. In any event I have perused all the letters written by and/or on behalf of the Applicant. He does not deny at**

any stage that interest was chargeable. He does not in any of those letters question the rate of interest that was chargeable. I am not satisfied that the draft defence raises a reasonable defence that would necessitate my setting aside a regular interlocutory judgment. I will not set it aside.”

The judgment in that case related to an application for summary judgment. The Court therein also stated-

**“It is also argued that the interest rates charged are too steep. Nothing has been placed before me to show that the rates or security taken by the Plaintiff are out of the ordinary, regard being had to the commercial environment in the country. I consequently have nothing before me to compare them with.”**

4. The Court has wide discretion to set aside ex parte judgment. The relevant rule is Rule 11 of Order 10 of Civil Procedure Rules. That Rule provides-

**“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.”**

That discretion has been considered in various cases. In the case PATEL –VS- EA CARGO HANDLING SERVICES [1974]EA 75 the Court stated-

**“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. 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 it by the rules.”**

In the case SHAH –VS- MBOGO [1967]EA 116 the Court stated-

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

In CMC HOLDINGS LTD –VS- NZIOKI [2004]I KLR the Court held-

**“We are fully aware that in an application before a Court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition.”**

5. I have considered the parties’ affidavit evidence and their submission. It is clear to me that the failure to file a defence within time was due to inadvertence or excusable mistake. Defence stated that the Advocate who had the conduct of this matter suddenly went on maternity leave on 1<sup>st</sup> May 2013 before filing the defence. That statement conjures up the situation as it was. It is reasonable to expect if indeed the said Advocate left the office so suddenly that it would have taken the other Counsels in the same office some time before realizing that a defence in this matter had not been filed on 2<sup>nd</sup> May 2013 when it was due. The mistake on the part of Defendant’s Advocate is therefore excusable.
6. In regard to whether Defendant’s defence raises triable issues I find that the Defendant in addition to writing letters making proposal to clear its debt with Defendant also seems to suggest that Plaintiff had reneged on an agreement between them and was the cause of the large claim against Defendant. This becomes clear from Defendant’s letter of 31<sup>st</sup> March 2012 where they stated-

**“We, wish to register our disappointment on the manner in which you are handling this Matter. This is specifically in reference to your letter dated 24/03/12 giving us an ultimatum of 14 days.**

**The most frustrating thing about your unprofessional approach to this matter is the fact that its hardly a month since we gave a proposal to deposit Kshs. 500,000/- monthly as we await the lump sum payment.**

**Without prejudice, please be reminded that you are the cause of all this mess to our account. If the past is anything to go by, you know very well that if you had stuck to the agreement we had made on 03/01/12, the debt would be cleared by now. I guess it was in your bid to exercise your managerial powers that you woke up one morning and decided to disregard our agreement without notice. It was because of you decision that subsequently led our company to an uncalled for indebtedness not to mention the loss of lucrative business and money.”**

7. It is also pertinent to note that the Plaintiff’s Counsel on being served with Defendant’s defence, and when they did not know whether exparte judgment had been entered in their favour filed a reply to that defence on 16<sup>th</sup> May 2013. Although that reply was not in the Court file when I considered this ruling it is an indication that Plaintiff conceded that Defendant’s defence raised issues that required a response. That reply to defence does go towards supporting Defendant’s contention that its defence raises triable issues.
8. In my humble view therefore the interests of justice will best be served by setting aside the exparte judgment. The Court grants the following orders-
  - a. **The exparte judgment entered against Defendant on 6<sup>th</sup> May 2013 is hereby set aside.**
  - b. **The defence filed on 18<sup>th</sup> April 2013 is hereby deemed as though filed with the leave of the Court.**
  - c. **The costs of Notice of Motion dated 23<sup>rd</sup> September 2013 shall be in the cause.**

**Ruling by:**

**MARY KASANGO**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 27<sup>TH</sup> day of FEBRUARY, 2014.**

.....

**JUDGE**