



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO 152 OF 2013

PRIME BANK LIMITED.....PLAINTIFF

VERSUS

PAUL OTIENO NYAMODI T/A

V.A. NYAMODI & CO ADVOCATES.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 9th July 2013 and filed on 10th July 2013 was brought under the provisions of Order 10 Rule 11, Order 22 Rule 22, Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 1C and 3A of the Civil Procedure Act and Article 159 of the Constitution. Notably, there is, however, no such section as Section 1C of the Civil Procedure Act Cap 21 (laws of Kenya). Prayer Nos (1) and (2) of the said application are spent. The remaining orders sought were as follows:-
 - a. **Spent**
 - b. **Spent**
 - c. **THAT the judgment in default entered against the Defendant herein be set aside.**
 - d. **THAT the costs of this application be provided for.**
2. The Defendant relied on several grounds which can be summarised as follows:-
 - a. **THAT he failed to enter appearance as there were on-going negotiations between him and the Plaintiff herein, which he contended was a plausible explanation for the delay in not filing his pleadings within the prescribed periods.**
 - b. **THAT the judgment obtained herein was null and void *ab initio* as he had duly filed his Memorandum of Appearance and a Statement of Defence.**
 - c. **THAT he would suffer prejudice if the said judgment was not set aside.**
 - d. **THAT his Defence raised triable issues and if the said judgment was not set aside, he would be condemned unheard which was contrary to the rules of natural justice.**
 - e. **THAT Article 159 of the Constitution required this court to proceed without undue regard to procedural technicalities.**
 - f. **THAT this court exercises its power under the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of disputes.**
 - g. **THAT an award of costs would compensate the Plaintiff if the said judgment was set aside.**

AFFIDAVIT EVIDENCE

3. The Defendant's application was supported by Affidavit of his advocate Muriuki Mugambi. It was sworn on 9th July 2013. The deponent reiterated the grounds in the face of the application and annexed copies of letters evidencing the negotiations that were going on between the Defendant and the Plaintiff herein. It was his averment that the present application was brought before this court without unreasonable delay.
4. In a Replying Affidavit sworn by Alka Shahi on 26th July 2013, the Plaintiff averred that the interlocutory judgment entered in its favour against the Defendant was regular as he was duly served with the Summons to Enter Appearance and that the said interlocutory judgment was entered on 29th May 2013 after he failed to enter appearance within the stipulated period.

LEGAL SUBMISSIONS BY THE DEFENDANT

5. The Defendant's written submissions were dated 30th July 2013 and filed on 28th August 2013. He submitted that Order 10 Rule 11 of the Civil Procedure Rules gave the court discretion to set aside or vary a default judgment upon such terms as may just. He argued that he had a defence with merits and that he had indeed filed the same. At the time of orally highlighting of the submissions on 26th March 2013, his counsel submitted that he had paid the principal amount and that what was being challenged was the rate of interest, an issue which he argued was a triable issue for the determination by the court.
6. It was also the Defendant's contention that the Plaintiff had not demonstrated that it would suffer prejudice if the application herein was allowed and that in any event, the delay in filing the Memorandum of Appearance was because he was having negotiations with the Plaintiff.
7. It was his case that he had been able to demonstrate that his defence had merits, that the Plaintiff would not suffer any prejudice and that there was a plausible explanation for the delay as aforesaid.
8. He referred the court to several cases amongst them the celebrated case of **Shah vs Mbogo (1974) E.A.** The common thread of the said cases in support of his case was that the main concern of the court must always be to do justice to all parties where a mistake had been inadvertent provided that no irreparable damage was suffered by the opposing party. Copies of the cases he relied on were attached to his written submissions.
9. He submitted that it was in the interest of justice that he be given an opportunity to defend the suit herein and therefore prayed that his application be allowed as prayed.

LEGAL SUBMISSIONS BY THE PLAINTIFF

10. The Plaintiff raised a preliminary issue regarding the Supporting Affidavit of Muriuki Mugambi, which it said was scandalous and that it contained evidentiary matters of facts which the deponent had not disclosed the source of information. It referred the court to the case of **East African Foundry Works (K) Limited vs Kenya Commercial Bank Limited [2002] 1 KLR** where the court struck out certain paragraphs in an affidavit and held that advocates ought not to swear affidavits where there were contentious matters due to the unseemly prospect of counsel being called upon to be cross-examined on those contentious facts. The court will address this issue later on in this ruling.
11. In its written submissions dated and filed on 4th December 2013, the Plaintiff stated that it was a financial institution that relied on lending and advancing monies to its customers and that its inability to recover monies from the Defendant amounted to prejudice.
12. It stated that the interlocutory judgment was entered in a regular manner after the Defendant failed to enter appearance and hence the Defendant's argument that the interlocutory judgment was irregular *ab initio* was devoid of any merit.
13. It was its argument that the Defence had not raised any triable issues but that the same consisted of admissions. It contended that for the reason that the Defendant had since repaid the principal

sum, there was nothing left for determination by the court. It termed the said Defence as frivolous and vexatious and said that it was intended to prejudice the fair trial of this matter. It placed reliance on the case of **Cabro East Africa Limited vs Rosoga Investments Limited [2023] eKLR** and **Bullen and Leake and Jacob's Precedents of Pleadings 12th Edition** which espoused what frivolous and vexatious pleadings were.

14. It thus urged this court to dismiss the Defendant's application with costs to it as the said application lacked merit.

LEGAL ANALYSIS

15. A perusal of the court record shows that the Plaintiff dated 18th April 2013 was filed on 22nd April 2013. The Plaintiff filed a Request for Judgment dated 28th May 2013. It was filed on the same date. Interlocutory judgment was entered on 29th May 2013 whereupon the decree was issued on 2nd July 2013.

16. Notably, the Defendant filed his Memorandum of Appearance and Defence on 7th and 24th June 2013 respectively which was way after the said interlocutory judgment was entered. It served no useful purpose for the Defendant to file the said pleadings as the said judgment had already been entered. The said pleadings could not therefore serve the purpose for which they were intended.

17. The Civil Procedure Rules, 2010 contains a provision detailing what would happen in the event a defendant failed to enter appearance. Failure to enter appearance and/or file a defence will lead to entry of interlocutory judgment upon application by a plaintiff as has been clearly captured in Order 10 Rule 4(1) of the Civil Procedure Rules, 2010. It is provided that:-

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”

18. Having failed to enter Appearance and file his Defence within the stipulated period, the Plaintiff was entitled to request for judgment against the Defendant and for the court to enter the same accordingly. The court therefore rejects the Defendant's submissions that the said interlocutory judgment was null and void *ab initio*.

19. Be that as it may, the entry of interlocutory judgment is not cast in stone as the court has 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.

20. Ordinarily, the court will not set aside or vary interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that the defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and Defence within the prescribed period under the Civil Procedure Rules, 2010 before such judgment can be set aside and/or varied.

21. In the letter dated 6th June 2013 from the Defendant's advocates to those of the Plaintiff, it is clear that the former had indicated that they had instructions to seek an amicable settlement in the matter herein and therefore sought a further seven (7) days to enable them seek instructions from the Defendant. This was a day before the Defendant's advocates filed a Memorandum of Appearance. The Plaintiff's advocates responded vide their letter of 10th June 2013, informing the Defendant's advocates that they could not hold on to the matter but undertook to revert after seeking the Plaintiff's instructions.

22. From the said letter, the court finds that the non-disclosure of the material fact that the said judgment caused the Defendant to have legitimate expectation that he would receive a response as regards his request to resolve the matter out of court. The Plaintiff cannot, however, be blamed as it was the duty of the Defendant to peruse the court file to establish the true position on the ground.

23. Bearing in mind the facts of his advocate's letter in respect of a possible out of court settlement, it

- does appear to this court that the Defendant was keen in looking for ways to resolve the dispute herein. The court would not deem this to have been a delaying tactic to keep the Plaintiff out of payment of what was due to it.
24. While the court noted the Plaintiff's submission that the failure by the Defendant to pay amounts due to it amounted to prejudice, in the mind of the court, this is not prejudice that could not be compensated by way of damages while the dispute was being litigated upon. Indeed, the Defendant has since paid the principal amount, a fact that was admitted by the Plaintiff leaving the question of the payment of interest as the only issue in for determination by the court.
 25. The court disagrees with the Defendant's contention that once the principal amount was paid there was nothing left for the court to determine. That is the Defendant's case and he must provide evidence to support his claim failing which final judgment will be entered against him.
 26. As was stated herein, the Defendant's defence was of no value as the same was filed after the interlocutory judgment was entered. A cursory look at the same reveals general denials, a fact that the Plaintiff correctly pointed out. However, the court is not required to consider the merits of a Defence in applications for setting aside and/or varying *ex parte* judgments. Such applications are quite distinct from those of striking out brought under Order 2 Rule 15 of the Civil Procedure Rules, 2010.
 27. In applications under Order 10 Rule 11 of the Civil Procedure Rules, 2010, the court is only interested in establishing whether or not there exist sufficient grounds to set aside and/or vary an interlocutory judgment. The court finds that the Defendant did not adequately explain why he failed to file his pleadings after he was served with Summons to Enter Appearance and the Plaintiff.
 28. The Affidavit of Service sworn on 27th May 2013 by George Watiri and filed on 28th May 2013 shows that he was served with the said Summons to Enter Appearance on 10th May 2013. The documents annexed to the Supporting Affidavit only seek to explain is the delay from 6th August 2013 when the Defendant instructed the firm of M/S Muthaura Mugambi Ayugi & Njonjo Advocates to act on his behalf, which this court finds not to have been a sufficient reason to set aside and/or vary the interlocutory judgment herein.
 29. However, it is not lost to the court that when the matter came up in court on 4th November 2011, the Plaintiff's and Defendant's counsel recorded a consent that the Defendant should deposit the principal sum of Kshs 7,578,262.25, a sum which he paid to the Plaintiff. The court does not see any prejudice that the Plaintiff would suffer if the Defendant's application was allowed. Its argument that it would suffer prejudice as it was unable to recover the monies due to it from the Plaintiff is not persuasive to the court as the principal amount has already been secured. The court therefore finds that it is in the interests of justice that the Defendant be given a fair and reasonable opportunity to present his case to enable the court consider the same on merit and make a determination thereof.
 30. In arriving at the said conclusion, the court has had due regard to the cases of **Civil Case No 3399 of 1992 Fredrick Chege Kamenwa vs Aron K. Kandie** where the Court of Appeal held that “... notwithstanding the regularity of an *ex parte* judgment, a court may set aside the same if he has reasonable defence on the merits” and **Civil Case No 222 of 2010 Winnie Wambui Kibinge & 2 others vs Match Electricals Limited** where the court held that, “... it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit...”
 31. The court has also considered the Plaintiff's submissions that the Supporting Affidavit was scandalous, vexatious and that it contained evidentiary facts averred by the Defendant's advocates. It also referred to an averment by the said Muriuki Mugambi, advocate in Paragraph (9) of the said Affidavit which made reference to the following words, to wit, “**I have been advised by my advocates...**” when in fact it was the said advocate who had sworn the Affidavit in support of the application herein.
 32. The said Supporting Affidavit largely contained matters that the deponent could comfortably attest to from his own knowledge. However, the court cannot ignore the fact that the said Paragraph (9) of the said Affidavit did not reflect the correct position on the ground. While it is true that Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates this court to determine matters without undue regard to procedural technicalities, the said averment was not a procedural technicality. It was a substantive flaw that was null and void ab initio and could not be cured by the aforesaid provision in the Constitution of Kenya, 2010.

33. As this court has power to strike out averments from an affidavit under Order 19 Rule 6 of the Civil Procedure Rules, 2010, Paragraph (9) of the said Supporting Affidavit is hereby struck out for having been irrelevant to the facts of this case.
34. Accordingly, having carefully considered the parties' respective pleadings, written and oral submissions and all the case law in support of their respective cases, this court has come to the conclusion that it would be fair, equitable and just for the Defendant to be given an opportunity to present his case. In this regard, it will therefore exercise its discretion in favour of the Plaintiff herein and vary the interlocutory judgment that was entered on 29th May 2013 and all the consequential orders thereon to the extent that the same relates to the interest accruing at the prevailing interest rates from 1st February 2008 only. The entry of interlocutory judgment in respect of the sum of Kshs 7,578,265.25 will remain unchanged as the said sum was not in dispute and had in fact been secured by the Plaintiff.

DISPOSITION

35. Therefore, the upshot of this ruling is that the court has found that the Defendant's Notice of Motion application dated 9th July 2013 and filed on 10th July 2013 to have been merited and the same is hereby allowed in terms of prayer No 3 therein but only as it relates to the issue of the accruing interest.
36. The Defendant did not pray for leave to file its pleadings on the erroneous assumption that the same were properly on record. For the avoidance of doubt and expediency purposes, the Defendant is hereby directed to file its pleadings in response to the Plaintiff's claim within fourteen (14) days from today. The Plaintiff will be at liberty to respond to the Defendant's Defence within fourteen (14) days from the date of service. The timelines for filing subsequent pleadings shall be as set out in the Civil Procedure Rules, 2010.
37. To avoid confusion in the file, the Defendant's Memorandum of Appearance and Defence filed on 7th and 24th June 2013 respectively are hereby expunged from the court record.
38. The Defendant shall pay to the Plaintiff thrown away costs in the sum of Kshs 30,000/= within the next fourteen (14) days from the date hereof failing which the Plaintiff will be at liberty to apply for the appropriate orders.

20. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of May, 2014

J. KAMAU

JUDGE