



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 470 OF 2012

JOHN NGULA MUSILU..... PLAINTIFF/RESPONDENT

VERSUS

CO-OPERATIVE BANK OF KENYA..... DEFENDANT/APPLICANT

RULING

1. The application dated 7/5/2013 seeks orders that:-
3. **“The interlocutory judgment entered on 6th March 2013 and all consequential orders thereto be set aside.**
4. **The Applicant be granted unconditional leave to defend this suit by filing its defence within the time to be specified by this Honourable Court.”**
2. The gist of the application according to the affidavit in support is that the Applicant’s pleadings were wrongly placed in the wrong ‘Filing Tray’ and ended up not being filed in court. It is averred that the Applicant has a solid and credible defence which raises triable issues. That the Plaintiff’s claim of Kshs.840,000 is a colossal figure and that it is only fair that the suit be heard on merits.
3. In opposition to the application, the Respondent filed a replying affidavit sworn on 16/9/2013. According to the said affidavit the Defendant/Applicant entered appearance but failed to file a defence. That the Applicant has taken 3 months and 27 days before making the application for setting aside of judgment and has not given any convincing reasons for failure to file a defence within the prescribed time. That the Defendant’s defence raises no triable issue and is a mere denial. That if the application is allowed, the Defendant should be ordered to deposit the decretal sum in court and pay throw away costs of Kshs.50,000/=.
4. The setting aside of judgment is a matter of discretion on the part of the court. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the cause of justice (**See Shah –vs- Mbogo & Another (1967) EALR.**
5. The application for setting aside was made without inordinate delay. The mistake by the counsel’s office in finding their file in the wrong **“Filing Tray”** is excusable. I am convinced that the Applicant did not deliberately seek to delay the conclusion of this matter. As stated by the Court of Appeal in the case of **Philip Chemwolo & Another –vs- Augustine Kubende (1992 – 88) 1 KAR:-**

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on its merits.”

6. I have considered the draft defence. The same is not frivolous and raises triable issues e.g. whether the Plaintiff fulfilled his obligations to settle the principal sum and the interest as per the terms of the loan facility advanced.
7. Considering the circumstances of this case, I will exercise this court's discretion in favour of the Defendant. Consequently, I allow the application with costs of this application and the throw away costs to the Respondent. The said costs to be agreed upon by the parties and if there is no agreement the same to be taxed by the Deputy Registrar.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **19th** day of **June** 2014.

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B. THURANIRA JADEN

JUDGE