



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**CIVIL SUIT NO 279 OF 2013**

**JAMII BORA BANK LIMITED.....PLAINTIFF**

**VERSUS**

**JAMES GITAU SINGH T/A**

**SINGH GITAU ADVOCATES.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion application dated and filed on 6<sup>th</sup> September 2013 was brought under the provisions of Section 3A and Section 63 (e) of the Civil Procedure Act Cap 21 of the laws of Kenya and Order 10 Rules 5 and 11, Order 50 Rule 6 and Order 51 Rules 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It sought orders that can generally be summarised as follows:-
  - a. **THAT the court be pleased to set aside the *ex parte* judgment entered on 20<sup>th</sup> August 2013.**
  - b. **THAT the Court be pleased to enlarge time for filing and service of its Defence out of time.**
  - c. **THAT costs of the application be provided for.**
2. The Defendant relied on several grounds. The relevant grounds can be summarised as follows:-
  - a. **THAT the Defendant sought the Plaintiff's indulgence to enable it file its Defence which the Plaintiff rejected.**
  - b. **THAT the claim was not a liquidated amount within which a default judgment could be obtained.**
  - c. **THAT the Plaintiff was heavily indebted to the Defendant in respect of taxed costs and there being a good defence, it was only fair that the Defendant be accorded an opportunity to be heard and the suit be determined on merit.**

**DEFENDANT'S CASE**

3. The Defendant's application was supported by an Affidavit of James Singh Gitau that was sworn on 6<sup>th</sup> September 2013. He stated that he was the Plaintiff's sole advocate and that following the placing of the Plaintiff under statutory management, it was agreed that the Plaintiff would pay the Defendant a global amount of Kshs 22,000,000/= plus VAT as fees.
4. He stated that the Plaintiff did not pay the said amount by 3<sup>rd</sup> April 2009 as had been agreed and

- pursuant to further discussions on several occasions, it was agreed that the Defendant would tax its Bills of Costs and the amount owing would then be offset from the rent owing from it.
5. It was his contention that it was not possible for the rent that was due from him to have been a sum of Kshs 23,161,527.04 whereas by a letter dated 15<sup>th</sup> March 2011, the Plaintiff had claimed a sum of Kshs 1,665,925.34 as at 28<sup>th</sup> February 2011 and admitted being indebted to the Defendant in the sum of Kshs 24,723,338/= in its letter dated 30<sup>th</sup> August 2012.
  6. He contended that the Defendant's advocates were unable to file a Defence as the court file could not be traced at the Registry and that when the said file was traced, it emerged that interlocutory judgment was entered against the Defendant on 20<sup>th</sup> August 2013. He annexed a copy of the Draft Defence which was marked as Exhibit 'JGS 19.'
  7. The Defendant's written submissions dated 10<sup>th</sup> December 2013 were filed on 16<sup>th</sup> December 2013. It argued that the court could exercise its discretion under Order 51 Rule 15 and Order 10 Rule 11 of the Civil Procedure Rules, 2010 and Article 50 of the Constitution of Kenya, 2010 to grant it the orders it had sought. It referred the court to several cases including that of **Shah vs Mbogo (1967) EA 116** where it was held that the court's discretion was to be exercised to avoid hardship or injustice resulting from accident, inadvertent or excusable mistake or error.
  8. It said that it was common for advocates to seek indulgence and that its request for a seven (7) days' indulgence from the Plaintiff was not intended to delay the matter.
  9. It was its further argument that the *ex parte* judgment entered herein was irregular as entry of judgment could only be for a liquidated claim for an amount that had been previously agreed upon by the parties or if it could be precisely determined by operation of law or by the terms of the parties' agreement, factors that were absent in the matter herein. It argued that the Plaintiff ought to have provided evidence how the rate of interest at the rate of 27% per annum until payment was arrived at.
  10. To buttress its argument, it placed reliance on the cases of **Valeo (K) Limited vs Barclays Bank of Kenya Limited [2013] eKLR, HCCC No 1280 of 2001 National Bank of Kenya Limited vs Francis Wasuna** (unreported) and **HCCC No 234 of 2007 Paul Kirento Ole Yialle vs Jonathan Mueme Muntet & Others** (unreported).
  11. It was its contention that the Plaintiff was estopped from alleging that it could not off-set the rent arrears from its taxed costs because the Plaintiff had led it to believe that that arrangement would subsist- **See Section 120 of the Evidence Act Cap 80 (laws of Kenya), Mclikenny vs Chief Constable of West Midlands Police Force & Another England Law Reports 1937 All ER 1980 Vol 2.**

### **PLAINTIFF'S CASE**

12. In response to the said application, Head of Legal Services, Fred Chumo swore a Replying Affidavit on behalf of the Plaintiff herein on 8<sup>th</sup> October 2013. The same was filed on the same date. The gist of the Plaintiff's case was that the Defendant had not denied being indebted to it and that the Defendant did not have a logical explanation for it to have been granted any indulgence as it had refused to indulge the Plaintiff in respect of payment of its taxed costs.
13. It contended that the Defendant was approbating and reprobating factual positions because despite an agreement that the rent arrears be off-set from the taxes costs, the Defendant had demanded that the said taxed costs be paid to it.
14. In its written submissions dated 20<sup>th</sup> June 2013 and filed on 23<sup>rd</sup> June 2013, the Plaintiff contended that the Defendant had acted contrary to the provisions of Section 23 of the Evidence Act Cap 80 (laws of Kenya) when it exhibited correspondence that had been exchanged on a "without prejudice" basis. It relied on the case of **Nzau vs Mbuni Transport Co Limited [1990] KLR 173** in this regard.
15. It submitted that under Order 10 Rule 11 of the Civil Procedure Rules, 2010, the wide discretion of the court had to be exercised with the purpose of doing justice to the parties. It pointed out that the Defendant was one and the same person as the deponent of the Affidavit in support of its present application herein and consequently, the explanation that the Defendant's advocates did not have instructions to file the Defence was not acceptable.
16. In addition, it stated that its indulgence to the Defendant was a favour and not a right and that the

court ought to strike out or ignore an application where a party approbated and reprobated factual positions- See **Air Alfaraj Limited vs Raytheon Aircraft Credit Corporation & Another [2000] KLR 624** (also cited in **Behan & Okero Advocates vs National Bank of Kenya [2007] eKLR**) where the Court of Appeal held that:-

**“...The conduct and etiquette at the Bar demands that a counsel not to approbate and reprobate.”**

17. It denied that the judgment herein had been entered irregularly and that the rate of interest pleaded and allowed could not render the judgment invalid or irregular. It therefore urged the court to dismiss the Defendant's application.

### **LEGAL ANALYSIS**

18. The Defendant's submissions regarding mistake, the amount due, interest payable and lack of contract and the Plaintiff's submissions on the leases are not relevant in the circumstances of this case. The court runs the risk of considering the merits of the case at this juncture if it was to consider the same.
19. The court's concern is merely to establish whether or not the Defendant had satisfied the court that it should exercise its discretion in the Plaintiff's favour. The court will therefore say no more regarding the said contentious issues but note that the same amounted to triable issues that would need to be ventilated during trial.
20. Whereas the court has noted the Plaintiff's submission and the case law in support thereof, to the effect that the Defendant had annexed letters that had been exchanged between the parties on a **“without prejudice”** basis, there were certain letters that were not on a **“without prejudice”** basis.
21. If the court were to expunge from the court record letters from the Plaintiff that had been exchanged on a **“without prejudice”** basis for having offended the provisions of Section 23 of the Evidence Act Cap 80 (laws of Kenya), the court would still be able to discern that there were agreements between the Plaintiff and the Defendant for the off-setting of the Defendant's rent arrears from its taxed costs.
22. Inclusion of the letters that had been exchanged on a **“without prejudice”** basis would therefore not render the Defendant's application defective or incompetent. However, so as to fully comply with the law, the court hereby strikes out and expunges from the court record, Exhibit marked 'JGS 9 (c), "JGS 11 (a)" and "JGS 13".
23. Exhibit "JGS 6 (a)" was a letter from City Finance Bank Limited dated 24<sup>th</sup> November 2009 to the Defendant in which the former had requested that a sum of Kshs 232,964.80 inclusive of VAT be off-set against the Defendant's rent arrears of Kshs 1,156,680/= that it owed the Bank from 1<sup>st</sup> January – 31<sup>st</sup> July 2009. In another letter dated 27<sup>th</sup> September 2009 to the Defendant, the Plaintiff alluded to the adjustment of rent arrears from the taxed costs. This was evidenced on page 27 of the Defendant's application.
24. In yet another letter dated 21<sup>st</sup> September 2012 marked Exhibit "JGS 9 (c)", the Plaintiff requested that it pay the Defendant a sum of Kshs 29,723,338/= as full and final settlement of its costs and indicated that it was amenable to discussing the terms of settlement. In its letter of 17<sup>th</sup> September 2012 marked as Exhibit "JGS 9(b)", the Defendant had previously demanded from the Plaintiff a sum of Kshs 35,000,000/= as full and final settlement of its costs.
25. In letters dated 24<sup>th</sup> June 2010 and 15<sup>th</sup> March 2011 to the Defendant marked "JGS 6 (b)" and "JGS 12 (b)", M/S Macharia-Mwangi & Njeru Advocates for City Finance Bank Limited confirmed to the Defendant that rent owing could be off-set from certain costs that had been taxed.
26. In the said advocates' letter dated 21<sup>st</sup> August 2013 to the Defendant and marked Exhibit "JGS 16", there was an express admission of the Plaintiff's request to set off the rent arrears from the Defendant's taxed costs. In its Notice of Motion application dated and filed on 21<sup>st</sup> May 2013, the Plaintiff admitted to its weak financial status and had sought to pay the Defendant's taxed costs in the sum of Kshs 6,168,069.53 by way of monthly instalments of Kshs 500,000/=.
27. The court has found it necessary to look at the aforesaid letters with a view to establishing the

- relationship that was obtaining between the Plaintiff and the Defendant. It is clear that the setting off of rent arrears by the Defendant from its taxed costs was an accepted mode of settling the monies that were owing between the said parties.
28. While the Plaintiff was correct in stating that indulgence to the Defendant was not a right, the court cannot ignore the fact that there was an arrangement between the Plaintiff and the Defendant regarding how they were to settle the monies that were due from each other.
  29. The court therefore agrees with the Defendant's submissions that the Plaintiff was estopped from deviating from the Defendant's assertions that its rent arrears would be set off from its taxed costs as the Plaintiff led it to believe that the said arrangement would subsist.
  30. The Plaintiff did not provide the court with any evidence to show that the Defendant had demanded that the taxed costs be paid directly to it or not to have the same set-off from the rent arrears. In any event, the fact that the Defendant had purported to execute against it would not be a good reason not to ignore the existence of the said arrangement of setting off the sums due.
  31. The legal defence of set-off is recognised to prevent an unfair position where Party A owes Party B monies and Party B faces execution of A's judgment when Party A owes Party B monies in another transaction that could be set-off and thus avoid execution of judgments against either of them. The legal basis of this principle is that the law allows both parties to defer payments until their respective claims have been heard in court. Set-off is applied if proven to the satisfaction of the court. The parties herein could therefore enter into arrangements of set off amounts they owed each other.
  32. On the issue of irregular entry of the judgment herein, the court notes that failure to enter appearance and/or file a defence will lead to entry of interlocutory judgment upon application by a plaintiff. This has been clearly set out 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.”**

33. It is therefore clear that the Plaintiff was quite in order when it sought entry of judgment against the Defendant when it failed to file its Defence. The said provision does not say that the rate of interest shall be proven before such the court can enter such judgment. It only states that the rate of interest shall be reasonable.
34. Having said so, there was no indication of how the Plaintiff arrived at the said rate of 27% per annum. If interest has not been awarded under the court rates, it would be prudent that there justification showing how interest has been arrived at. The court is of the view that this is an issue that would require to be ventilated in a full trial.
35. 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 a 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 a court can set aside and/or vacate such judgment.
36. As entry of interlocutory judgment is not cast in stone, the court has discretionary powers under Order 10 Rule 11 of the Civil Procedure Rules, 2010 to set aside and/or vary such judgment and consequential decree or order upon such terms as are just. The court did not find any prejudice that would be occasioned to the Plaintiff that cannot be compensated by an award of costs if the Defendant's application was allowed so as to allow the court determine this matter on merit.
37. On the other hand, it is the view of the court that disallowing the Defendant's application would actually cause it injustice, prejudice and hardship as it would be denied an opportunity to access the court, a right that is enshrined in Article 50 of the Constitution of Kenya, 2010.
38. Bearing in mind that interlocutory judgment was entered in favour of the Plaintiff against the Defendant on 20<sup>th</sup> August 2013, the Defendant's application was filed timeously on 5<sup>th</sup> September 2013. The court finds no inordinate delay or laches on the part of the Defendant.

39. In arriving at a finding that the Defendant ought to be afforded a reasonable and fair opportunity to present its case in court, 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...”
40. Having considered the pleadings, written and oral submissions and the case law relied upon by the respective parties, the court finds that the Defendant satisfied the court that it was entitled to the orders sought. In view of the new Constitutional dispensation to administer justice without undue regard to technicalities, the court is more inclined to accord the Defendant an opportunity to have its day in court.
41. However, the Defendant must bear the responsibility of causing delays to realisation of the Plaintiff’s fruits of judgment, if any and be condemned to pay the Plaintiff’s thrown away costs. The Defendant cannot be allowed to go scot free as the Plaintiff has been greatly inconvenienced. It would be a travesty and miscarriage of justice not to compensate the Plaintiff with an award of costs.

### **DISPOSITION**

42. For the foregoing reasons, the upshot of this court’s ruling is that the court has found that the Defendant’s Notice of Motion application dated and filed on 6<sup>th</sup> September 2013 to have been merited. Prayer Nos (4), (5) and (6) the said application are hereby allowed in the following terms:-
- a. **The court hereby grants leave to the Defendant to file and serve its Defence within fourteen (14) days from the date of this ruling.**
  - b. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence to the Defendant’s Defence within fourteen (14) days from the date of service.**
  - c. **The Defendant shall pay to the Plaintiff thrown away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date of this ruling.**
  - d. **In the event the Defendant shall fail to comply with order 42 (c) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**
  - e. **Costs in the cause.**
43. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of September 2014**

**J. KAMAU**

**JUDGE**