



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

**AT MOMBASA**

**CIVIL SUIT NO. 51 OF 2013**

**K-REP BANK LIMITED ..... PLAINTIFF/RESPONDENT**

**V E R S U S**

**INCLUSIVE AGENCIES MSA LTD .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOHN EVANGELIST OTIENO ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**AMBROSE PETER MUGA ..... 3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Plaintiff by this action seeks judgment against all the Defendants jointly and severally for Kshs. 2,611,468.53 plus interest at 14%. That amount was a result of the loan granted by the Plaintiff to the 1st Defendant which was guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
2. On being served with the Memorandum of Appearance and the Plaint the Defendants through their Advocates Ojode, Udoto & Onjoro Advocates the Defendants filed Memorandum of Appearance. That Memorandum of Appearance was filed on 13<sup>th</sup> May 2013.
3. The Defendant did not file a defence and by an application dated 18<sup>th</sup> June 2013 the Plaintiff requested for judgment to be entered in its favour in default of a defence. The entry of that ex parte judgment was on 26<sup>th</sup> July 2013.
4. It is that judgment which is the subject of the Defendant's Notice of Motion dated 30<sup>th</sup> July 2013. The Notice of Motion seeks an order to set aside the ex parte judgment and an order granting the Defendants leave to file their defence to this claim.
5. At this initial stage I wish to consider a separate prayer in that Motion which seeks the Courts leave for the firm of A. A. Amadi & Co. Advocates to act for the Defendants in place of their former Advocate Ojode, Udoto & Onjoro Advocates. The Defendants by the affidavits of the 2<sup>nd</sup> Defendants state that they did indeed instruct A.A. Amadi & Co. Advocates to act for them. For that reason the leave sought is granted and accordingly A. A. Amadi may take over the conduct of this case on behalf of the Defendants.
6. In support of the Defendants' prayer to set aside ex parte judgment the 2<sup>nd</sup> Defendant by his supporting affidavit had this to say-

***“4. THAT prior to this entry of the said judgment, we had instructed the firm of M/s A.A. Amadi & Co. Advocates to lodge the application herein.***

5. ***THAT we have since learnt that the said Advocates namely M/s Ojode, Udoto & Onjoro Advocates duly entered appearance on our behalf but hesitated to file a statement of defence within the prescribed time hence the entry of the said request for judgment against us.***
6. ***THAT it was our firm and sincere hope that we would be duly represented by the said Advocates on record for us in vain.***
7. ***THAT had the said Advocates acted diligently and timely, the said judgment would have not been entered and consequently the judgment and decree should be set aside and the proceedings thereof and the defendants given a chance to be heard and defended themselves.”***
7. The Defendants annexed to their affidavit statements of account of the 1<sup>st</sup> Defendant with the Plaintiff and supported those statements by depositions to the effect that those statements were at variance with what is claimed by the Plaintiff in this case. The statements are for the months of April 2013 and show a debit balance of Kshs. 911,087.42. For the month of May they show a debit balance of Kshs. 903,512.42. For the month of June the debit balance is of Kshs. 903,512.42.
8. The Defendants also annexed a draft defence to the Plaintiff's claim. Defendants denied the Plaintiff's claim and stated that the Plaintiff's claim was attributable to the failure on the part of the Plaintiff to exercise due diligence. It is not clear to the Court what that pleading means.
9. The Plaintiff did not controvert the Defendants deposition by affidavit evidence. Instead the Plaintiffs filed Grounds of Opposition. By those grounds the Plaintiff stated that the Defendants should have sued their former Advocates for failure to file their defence and further stated that the Defendants draft defence did not raise triable issues. The Plaintiffs termed the exparte judgment as '**regular judgment**'. Those Grounds of Opposition should not have advanced factual arguments and in my view they were a poor response to what I consider to be very legitimate issues raised by the Defendants.
10. The Defendants as I understand it raised an issue about the discrepancy between the amount claimed in the plaint as at 12<sup>th</sup> February 2013 that is for Kshs. 2,611,468.53 compared to the 1<sup>st</sup> Defendants statements of account which show that from April to June 2013 the debit balance was Kshs. 309,512.42.
11. It would be worth considering the discretion that this Court has in considering an application such as the one before the Court. In the case **PATEL -VS- E.A. CARGO HANDLING SERVICES (1974) EA 75** the Court considering that discretion 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.”***

Similarly discretion was discussed 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.”***

12. Although there has been a lot submitted by the parties on whether the alleged default of the

Defendants former Advocates to file a Defence within time would be a basis to set aside exparte judgment I believe in respect of this case the more important issue is whether the Defendants have shown a bona fide defence with triable issues. In my view they have shown such a defence when one considers the discrepancy between the amounts claimed by the Plaintiff and the amount reflected as debit balance on the 1st Defendant's statement of account. In this regard I am guided by the case **BARAKA APPAREL EPZ (K) LTD -VS- ROSE MBULA OJWANG T/A FAIDA 2002 CATERERS (2007)eKLR-**

*“It is our humble view that where there is a Defence which raises bona fide triable issues, or even a solitary bonafide issue, the same ought to be allowed to proceed to hearing and final determination on merit.”*

13. It is because of the finding above that I grant the following orders-

- a. **The exparte judgment of 26<sup>th</sup> July 2013 is hereby set aside. The Defendants are granted leave to file and serve a defence within 14 days from this date hereof.**
- b. **The costs of the Notice of Motion dated 30<sup>th</sup> July 2013 shall be in the cause.**
- c. **The claim in this case is for an amount of Kshs. 2 million. That is an amount within the jurisdiction of the Chief Magistrate's Court. I therefore order that this file be transferred to the Chief Magistrate's Court, Mombasa for disposal. The Deputy Registrar of this Court is requested to inform the parties of the new case number allocated to this matter in the Chief Magistrate's Court.**

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October, 2013.**

**MARY KASANGO**

**JUDGE**