



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 992 of 1997

NATIONAL BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS

1. JOSPHAT MACHARIA WACHIRA t/a ALLIGATOR SUPPLIERS

2. MUTONGO NJOROGE

3. LAWRENCE IMBATU HUSSEIN..... DEENDANTS

R U L I N G

1. The Defendant has applied by **chamber summons** dated **11th June 2007** for an order to set aside *ex parte* judgment entered against him on 30th November 1997 and for him to be granted leave to defend the suit. The application was brought under **Order IXA, rules 9 and 10** of the old **Civil Procedure Rules** (the **Rules**).

2. The grounds for the application appearing on the face thereof are –

(i) That summons to enter appearance have never been served upon him and he was unaware of the suit until he was arrested in May 2007 in execution of decree.

(ii) That he has a meritorious defence that raises triable issues.

3. The application is supported by the 1st Defendant's affidavit in which he deposes that he has never been served with summons to enter appearance and copy of the plaint, and further, that he was not aware of the suit until he was arrested and taken to court in execution of decree. He also pointed out that his name is JOSPHAT MACHARIA WACHIRA whereas the 1st Defendant as named in the plaint and subsequent documents is JOSEPH MACHARIA WACHIRA.

4. The 1st Defendant also annexed to the supporting affidavit a draft defence in which he admits –

(i) that at all material times he was a customer of the Plaintiff; and

(ii) that loans and overdraft facilities or other accommodation were advanced to him as pleaded in paragraph 5 of the plaint, but that the same were fully paid.

5. He denies that he is indebted to the Plaintiff in the sum of KShs 646,746/15; or that loans and overdraft facilities were advanced to him as pleaded at paragraph 6; or that any demands for payment were made as pleaded in paragraph 7.

6. The Plaintiff opposed the application by replying affidavit filed on 10th July 2007. It was sworn by one Alidan Mathya Mbinda, then the manager-in-charge of the Plaintiff's Kenyatta Avenue branch. The affidavit gives a full history of the bank/client history of the bank/client dealings between the Plaintiff and the 1st Defendant. A number of documents are annexed to the affidavit.

7. Grounds of opposition to the application that emerge from the replying affidavit include –

(i) That the 1st Defendant was duly served with summons to enter appearance and copy of the plaint.

(ii) That he was even served with notice of entry of judgment.

(iii) That the 1st Defendant has not demonstrated any lawful ground upon which the judgment against him can be set aside.

(iv) That there has been undue delay in applying.

8. With leave of the court the 1st Defendant filed a further (supplementary) affidavit on 24th October 2007 in response to the replying affidavit. In this affidavit he deponed *inter alia* that the money borrowed was shared among from people “whose properties were auctioned and the claim was repaid”. He further reiterated that he has never been served with summons to enter appearance and pointed out that in all the affidavits of service the 1st Defendant's first name is given as “Joseph” and not “Josphat.”

9. The application was canvassed by way of written submissions, which I have considered, including the cases cited. The 1st Defendant's submissions were filed on 24th February 2009 while those of the Plaintiff were filed on 3rd March 2009.

10. The 1st Defendant's application stands or falls on the mean issue whether he was duly served with summons to enter appearance and copy of the plaint.

11.

12.

13. For all the above reasons I will refuse the 1st Defendant's application. It is dismissed with costs.

14. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2012