REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 518 OF 2011

BETHANY VINEYARDS LIMITED ……..…..……. 1ST PLAINTIFF

JOSEPH MUTURI KAMAU …….. 2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED ……..……..…… 1ST DEFENDANT

EQUITY NOMINEES LIMITED ……...……. 2ND DEFENDANT

PETER K. MUNGA ……..…….. 3RD DEFENDANT

R U L I N G

1. At the request of the Plaintiff herein, the learned Deputy Registrar entered interlocutory judgement for the Plaintiff as against the first, second and third Defendants herein on the 3 February 2012. In relation thereto, the first and second Defendant filed a Notice of Preliminary Objection on 2 March 2012 detailing first that the Interlocutory Judgement was a nullity in law and secondly, that it ought to be set aside as a matter of law. On 28 June, 2012, the third Defendant herein filed a Notice of Motion seeking substantive orders as follows:-

"3. Upon hearing inter-partes, the judgement entered against the Defendants/Applicant hearing and all the consequential orders and proceedings following therefrom be vacated and/or set aside and the Defendants/Applicants be allowed to defend against the Plaintiffs' suit herein on merits.

4. On prayer 3 herein above be granted the 3rd Defendant's draft defence annexed hereto be deemed duly filed and served.

When the advocates for the parties appeared before this court on 4 July, 2012 it was agreed that the aforesaid Preliminary Objection, as well as the said Notice of Motion, should be heard and determined together.

2. The third Defendant's Notice of Motion dated 26 June, 2012 was brought upon the grounds that there existed a judgement in favour of the Plaintiff against which the Defendants had a good defence and should formal proof proceedings continue and judgement be entered against the third Defendant, he would suffer substantial loss and damage. Further, the Plaintiff herein had not complied with the prescribed form when making the request for interlocutory judgement to be

entered as stipulated in **Order 10 Rule 11**, *Civil Procedure Rules 2010* and hence the entering of the default judgement was irregular and untenable. The Application was supported by the Affidavit of the advocate on record for the third Defendant – **Charles Njuru Kihara** sworn on 26 June, 2012. Paragraph 3 of the said Affidavit was instructive:

"THAT the 3rd Defendant purely on a without prejudice basis, and in consideration of his status as concerns the 1st and 2nd Defendant, and also being unable to appreciate what had caused the Plaintiffs to institute these proceedings, and without making any admission of liability, paid the subject loan that the Plaintiffs owed the 1st Defendant, to ensure that the subject suit title/security instruments held by the 1st Defendant were discharged and released, to the Plaintiffs, and not held any further, as claimed."

The deponent then recorded communication with the advocates for the Plaintiffs herein which resulted in consent orders being recorded in court on 20 December, 2011. From the court record, my learned brother **Kimondo J** recorded by consent that the Plaintiffs' Notice of Motion dated 21 November 2011:

"be and is hereby marked as withdrawn with no orders as to costs."

3. The said Notice of Motion filed by the Plaintiffs on 21 November, 2011 sought orders that the Defendant be restrained from selling a number of properties in the Ngong area as well as calling up corporate guarantees from three companies which had been executed in favour of the first Defendant. That prayer in the said Notice of Motion, matched prayer No.6 of the Plaint herein. There are 5 earlier prayers set out in the Plaint as follows:

"1. An order for supply of the true statement of accounts No. [particulars withheld] in the name of Bethany Vineyard Limited at Equity Bank Limited, Equity Centre Branch, Nairobi as of 4th June, 2011 to-date.

2. An order that 1st defendant do set off the amount due to them arising out of the loan facility granted by them to the plaintiff from the sale proceeds of the Trans century 3 million shares at a price of Kshs.50.00 per share making a total of Kshs.150,000,000.00 as of the date of the sale and the balance credited into the account of the plaintiff, for their own use in the manner they may so wish.

3. An order for unconditional release by the 1st defendant of securities lodged for the loan facility namely Title Nos. Ngong/Ngong 48152, 48153, 48154, 48155, 48156, 48157, 48158, 48159, 48160, 48161, 48162, 48163, 48164, 48165, 48166, 48167, 48168, 48169, 48170, 48171 corporate guarantors by Fatima Holdings Limited, Consolidated Securities Limited and Nimex Limited to the guarantors.

4. Damages for non user of the guarantees held by the 1st defendant as from the date of the sale of the 3 million transcentury shares to-date.

5. Interest at commercial rates at the rate of 18% per annum compounded monthly from the date of filing this suit until payment in full".

4. Reverting to the said Affidavit of Mr. Kihara, he proceeded to set out in full a copy of a letter written by the Plaintiffs' advocates on record to the Deputy Registrar of this court being the request for judgement. The court presumes that the reason for so setting out the letter in full detail was so as to show that the Plaintiffs' said advocates had not utilised the prescribed form which is Form No. 13 of Appendix A of the *Civil Procedure Rules, 2010*. That Form is referred to in **Order 10, rule 4** which reads as follows:

"4. (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the

court shall, on request in Form No. 13 of 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 the judgment, and costs.

(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim".

5. The gist of the remainder of Mr. Kihara's Affidavit in support was to the effect that the advocates for the Defendants had already attended court on two occasions and the only outstanding part of the Plaintiffs' claim was awaiting its counsel's confirmation of whether payments had been effected by the third Defendant or not and whether the titles to the Ngong properties, as well as the corporate guarantees, had been released. The deponent maintained that the request for judgement although irregular and ineffective was also unethical and unprofessional, in that the Defendants had not been copied in to the request for judgement. Thus, when the counsel for the Defendants came to court to record the consent order on 20 December 2011, they were unaware that the Plaintiffs' advocate had made the request to this court for interlocutory judgement to be entered. Finally, Mr. Kihara detailed that as far as the third Defendant was concerned, if any claim against it was deemed to be pending, then it had a good defence with triable issues that this court should allow to be filed, as per the draft Defence of the third Defendant annexed to the said affidavit.
6. In answer to the third Defendant's Application, the advocates for the second Plaintiff filed Grounds of Opposition on 19 July, 2012. These detailed as follows:

"1. That the application is misconceived and bad in law.

2. The applicant is guilty of laches by failing to file a Statement of Defence within the prescribed time allowed by law after service of the summons and he is therefore not worthy of the orders sought.

3. The applicant has failed to give to this Honourable Court his reasons for the default in filing a defence within time and the orders are not justified.

4. The Supporting Affidavit is sworn by counsel which is irregular and should be struck out.

5. Parties should not be allowed to come to court as and when it is convenient to them in total disregard to procedural law.

6. The Intended Defence does not raise any triable issues.

7. The application is only meant to delay the determination of this suit.

8. It is an abuse of court process".

7. On behalf of the first and second Defendants, **Joyce Munene** the Legal Services Manager of the first Defendant swore an affidavit in support of the third Defendant's Application dated 25 July, 2012. The deponent confirmed that when the Plaintiffs herein applied for judgement in default of defence, their said Application dated 21 November 2011 had already been adjourned twice to enable the parties to confirm whether the first Plaintiff's indebtedness with the first Defendant Bank had been settled by the third Defendant. The deponent further confirmed that on the 19 December, 2011, the first Plaintiff's indebtedness with the first Defendant bank had been fully settled and the title Deeds and discharges of charge in respect of the facility were available for collection from the first Defendant. In that regard, the deponent attached a copy of a letter dated

19 December, 2011 from the first Defendant to the first Plaintiff confirming that situation. She also attached a copy of a letter dated 16 December, 2011 from the third Defendant's said advocates on record to Sichangi Partner Advocate which was copied to the advocates on record for the Plaintiff's being Aming'a Opiyo, Masese & Co. which read *inter-alia* as follows:

"Your representative Advocate is of course aware that our client has already remitted a sum of money equivalent to pay in full the indebtedness of the Plaintiff's Bank loan, so that this suit is settled conclusively by deleting the bank and the Equity Nominees Ltd's names from these proceedings.

Kindly, confirm the position urgently and let us have a consent order recorded on 20th December, 2011, when we are in court next.

Please note that our client is very keen on having this claim settled immediately, notwithstanding that it has no merits."

The deponent stated that it was clear therefore that as at 19 December, 2011, the Plaintiffs' Advocates knew that the suit as against the first and second Defendants had been compromised. She was thus of the opinion that the interlocutory judgement had been wrongly entered and in the interests of justice it should be set aside.

8. The third Defendant's submissions commenced by reviewing the proceedings up until the 20 December, 2012. He maintained that on that day this court was informed that the third Defendant had made payment of the entire debt of the first Plaintiff to the first Defendant bank on a without prejudice basis. Such was to enable the first Defendant to discharge all the securities that were held over the Plaintiffs' properties. The Plaintiffs had been requested to withdraw the suit as against the first and second Defendants. The third Defendant maintained that its counsel had been present when the consent order as regards the Plaintiffs' said Notice of Motion dated 21 November, 2011 had been entered into and that there would be a mentioned for further orders. I have perused the court file in this connection and nowhere did my learned brother Kimondo J make a note that the matter was to be further mentioned. It never did come to mention and the next note on the court record was that the Deputy Registrar, Mrs. Njora, who made an entry of judgement against all 3 of the Defendants noting that they had been duly served, had failed to enter Appearance and file Defence. The third Defendant's submissions continued by stating that the parties having unanimously agreed on the terms of settlement, the Applicant and the reliefs prayed for in the Plaint had been substantively now wholly compromised. The third Defendant maintained that this was because there was an estoppel by record to that effect, until the Plaintiffs' counsel had reported back to court and/or amended the Plaint to reflect any further and better particulars. The submissions were somewhat convoluted, as was the next sentence which read:

"Again we submit that given the generic claims of special damages, that is there being no specific pleadings concerning the special damages, then the same does not lie and hence, the entire suit, in the absence of an appropriate amendment to the plaint, has nothing left to enter judgement for or to take to formal proof."

9. The third Defendant's submissions continued by saying that according to the applicable Order (being **Order 10**) **Rules 4, 5, 6 and 7**, where a defendant has failed to appear or file a defence within the prescribed time, the court shall enter interlocutory judgement only on request in Form No. 13 of Appendix A. The third Defendant submitted them as the Form was not used by the Plaintiffs, the interlocutory judgement was wrongly entered and had the Form been used, the parties would not find themselves in the vague position that they were now in. The third Defendant then asked the questions as to whether the judgement entered had been an interlocutory or a final judgement? Whether the claim was a liquidated claim or not? What was the remainder of the claim that the Plaintiffs sought which required the matter going to formal proof? Finally, as regards the Deputy Registrar's note, which part of the Plaintiffs' claim was categorized as "non-remainder" or "the remainder of the matter"? In answer to those questions in a nutshell, the third

Defendant submitted that to avoid causing injustice and/or embarrassing the administration of justice, he submitted that the purported entry of the default Judgement herein, should be set aside. The third Defendant then referred to this court to the following authorities being **Meir Mezrahi vs Nairobi City Council (2005) eKLR, Cyrus K. Waithaka vs Hezron K. Waithaka (2005) eKLR, Paragon Electronics Ltd vs Velos Enterprises Ltd HCCC No. 285 of 2010** and **Maccu Motors Ltd vs B. M. Patel & 3 Ors Civil Appeal No. 284 of 1997**.

10. The Plaintiffs' submissions herein detailed that third Defendant had argued mainly, that the reason he considered the interlocutory judgement entered herein on 3 February 2012 was that it did not make for a liquidated claim and contravened **Order 10 rules 4 (2), 5, 6 and 7**, *Civil Procedure Rules, 2010*. The Plaintiffs noted that an interlocutory judgement in default could only be entered on condition that the Plaint sought (a) a liquidated claim only; (b) a liquidated demand together with such other claim; (c) a liquidated demand with or without such other claim and (d) pecuniary damages or detention of goods. The Plaintiffs confirmed that, in fact, they agreed with the Defendants on the relevant laws cited that confirm that it is only where a liquidated demand has been made that the interlocutory judgement can be entered *ex parte.* The Plaintiffs maintained that their claim included a prayer for a liquidated demand under paragraph 2 of the Plaint. That prayer read as follows:

"An Order that, the 1st defendant do set off the amount due to them arising out of the loan facility granted by them to the plaintiff from the sale proceeds of the Trans century 3 million shares at a price of the Kshs 150,000,000.00 as of the date of the sale and the balance credited into the account of the plaintiff for their own use in the manner they may so wish."

It seems that as far as the Plaintiffs are concerned such is an ascertained sum/liquidated sum. The Plaintiffs submitted that on this ground alone, it was their humble opinion that the interlocutory judgement is not a nullity but is indeed regular and properly entered. The Plaintiff then referred this court to the authority of **Geeta Bharat vs Omar Civil Appeal No. 46 of 2008 (Court of Appeal unreported)**. What that case detailed was that:

"Where it is established that the defendant was served with summons, the court has unfettered discretion to set aside the default judgement, provided that in so doing, no injustice is occasioned to the opposing party."

11. The Plaintiffs maintained that in the case before court, the 3 defendants had not denied that they were properly served, in which case, this court had unfettered jurisdiction to consider setting aside the default judgement but that such discretion was only given where there is an inexcusable mistake inadvertent in not filing the defence or an accident or hardship but not a deliberate move to delay justice. The Plaintiffs also noted that the Defendants had maintained that the suit had been entirely settled. The Plaintiff submitted that for a suit to be settled an order must be made by the court and there is no such order on the court record. Moreover, the Plaintiffs stated that if the suit on the Defendants' part was settled, then there would be no prejudice if the interlocutory judgement stands and assessment of damages proceeds in the normal way. The Plaintiffs disagreed that the suit had been entirely compromised. They maintained that the Defendants herein were duly served with the Plaint and Summons on the 21 November, 2011. As they had failed to file their defences and that delay was not accounted for in the supporting Affidavit to the third Defendant's Application, (other than pointing at negotiation), such cannot be an excuse for failing to file a statement of Defence. The Plaintiffs' submissions then replicated their Grounds of Objection (as above) and pointed the court to the case of **Kangi vs Agroquip Agencies (EA) Ltd** in which the Court of Appeal had stated that an application for summary judgement should not be allowed if there are triable issues raised in the case. However if there were no triable issues raised in the same, the lower court was correct in dismissing the application. I was also referred to the case of **Protection Fund Board vs Sunbeam Supermarket & 2 Ors HCCC No. 3099 of 1996** in which it was stated that the averment as to the existence of a debt is one condition precedent to the implication of the summary procedure pursuant to the provisions of **Order 35 rule 1 (1) (a)** since the plaintiff must show that the claim is for a liquidated demand. In addition to this, the plaintiff must depose the non-existence of a defence to such a claim.

12. The first and second Defendant filed their submissions on 9 September, 2012, mainly in relation to their Preliminary Objection dated 1 March 2012. They noted that the Preliminary Objection raised two points of law namely that the interlocutory judgement herein is a nullity and that it ought to be set aside. They also recited the prayers sought in the Application of the third Defendant. The first and second Defendants identified the issues for determination as (a) whether there is proper and lawful interlocutory judgement validly entered in favour of the Plaintiff and (b) whether the same ought to be set aside. As regards (a), the first and second Defendants submitted that as at the 19 December, 2011 the entire suit by the Plaintiff had been compromised. They maintained that the reliefs sought in the Plaint all derive from the fact that there was a subsisting creditor – debtor relationship between the Plaintiffs and the first Defendant. Such was discharged upon payment of the debt leading to the consent as recorded on 20 December, 2012. If the court required evidence of the debt, it was contained in the said Affidavit of Joyce Munene. Further, in the opinion of the first and second Defendants, the reliefs sought in the Plaint clearly showed that interlocutory judgement cannot be entered under **Order 10 rules 4 (2), 5, 6 and 7** of the *Civil Procedure Rules*. Such require that judgement is entered for (a) liquidated claims only, (b) a liquidated demand together with such other claim, (c) a liquidated demand with or without such other claim and (d) where there are claims in the Plaint for pecuniary damages or for detention of goods, that ought to be set aside. The first and second Defendants commented that the reliefs sought in the Plaint herein are neither for liquidated demands, pecuniary damages nor for the detention of goods as envisaged by the said Order. Consequently, the interlocutory judgement entered herein is a nullity in law.
13. The first and second Defendants then referred this court to the case of **Meir Mizrah** (supra) as well as **Apungu vs Justnice & 2 Ors HCCC No. 738 of 2003** in which this court set aside an interlocutory judgement where there was a claim for vacant possession, injunction and general damages in the Plaint therein. They also referred to the **Waithaka** case (also supra) and the **Paragon Electronics** authority all of which had been cited to this court by the third Defendant. The first and second Defendants submitted that the Deputy Registrar ought not have entered interlocutory judgement in favour of the Plaintiff and to remedy the situation it was important for the court to distinguish between an irregularity and a nullity. They cited the case of **Association of Member Episcopal Conference in Eastern Africa vs Alfred Romani & 3 Ors NAI Civil Appeal No. 22 of 2001**. The Court of Appeal quoting **Macfoy vs United Africa Company Ltd (1961) EA 1169** at page **1172**:

"If an act is void, then it is in law and a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so…. It is only an irregularity that can be waived."

Turning to the authority as quoted by the Plaintiffs being that of **Geeta Bharta** the first and second Defendants relied upon the Court of Appeal's dicta as follows:

"In the Plaint that was before the superior court, there was no liquidated demand. Mr. Oddiaga submitted that the issue as to whether the request for judgement was procedurally proper was not raised in the memorandum of appeal. He is right to that extent as indeed it was not specifically raised in those terms. However, we feel as the irregularity of the interlocutory judgement has been raised and as the record that was before the Judge already showed that the request was not made pursuant to the provisions of the Civil Procedure Rules, it was one of the matters the learned Judge should have considered. As it was indeed not raised in the grounds of appeal before us, we leave it at that".

Finally, the first and second Defendants in their submissions maintained that the settlement of the first Plaintiff's indebtedness with the first Defendant Bank and upon confirmation of settlement and discharge of charges, all the reliefs in the Plaint were no longer alive as of 19 December 2011 being the day that the interlocutory judgement was applied for. The suit having been compromised as at that date, it was mischievous and an act of bad faith on the part of the Plaintiffs to make an application for judgement.

14. I would refer to the provisions of **Order 10 rule 4** that I have set out as above. I would also refer to the prayers in the Plaint nos. 1 to 5 also set out above. The Plaintiffs have tried to convince me that prayer no. 2 amounts to a liquidated demand as the amount claim thereunder is easily calculable. With respect, I don't think it does amount to a liquidated demand as if it had been, then the Plaint would have stated a specific figure. There could well have been a quary as to the amount due to the first Defendant arising out of the loan facilities granted to the first Plaintiff. There may well have been a dispute as to the amount arising out of the sale proceeds of the Trans Century shares even though the price was known for such may not have taken into account any commission payable. Despite that, prayers nos. 1, 3, 4 and 5 in my opinion fall outside the parameters of **Order 10 rule 4 (1)**. They may be covered by **rule 4 (2)** but then I have already found that prayer 2 does not amount to a liquidated demand. Further I have considered the authorities cited to me by the parties. Of those cited by the Plaintiffs, in my opinion only the **Geeta Bharat** case has any relevance to this matter. The Court of Appeal quite clearly found that in the plaint before the superior court, there was no liquidated demand which puts that case on all fours with my finding in that regard as above. I have perused the Judgement entered by the Honourable Deputy Registrar on 3 February, 2012. All that she has done is to detail over the top of the court's rubberstamp the names of the three Defendants, signed and dated the same. The court's rubberstamp reads:

"Defendant …… having been dully served and having failed to enter appearance/file defence and on the application of the advocates for the plaintiff. I enter judgement as prayed. Save as to costs which shall be party and party costs without interest thereon."

15. Further, I have perused the court's file. The advocates acting for the Plaintiffs' letter dated 19 December, 2011 and received in court on that date merely asks the Deputy Registrar to:

"Kindly enter judgement against the 1st, 2nd and 3rd defendant herein who have failed to file a Memorandum of Appearance and/or defence in the above matter within the stipulated period as required by law, and proceed to list the matter for Formal Proof."

There is no sign of Form No. 13 of Appendix A as required by **Order 10 rule 4** of the *Civil Procedure Rules*. As I read **rule 4** it mandates the court to enter judgement against a defendant or defendants for any sum not exceeding the liquidated demand upon request in Form No. 13. In my opinion, the court should never have entered default judgement on the mere say-so of a letter from the said advocates. Certainly, it should not have entered default judgement as regards the said prayers in the Plaint as I have detailed above. Accordingly, I strike out the same and allow the third Defendant's Notice of Motion dated 26 June, 2012 including prayer 4 thereof, as well as the first and second Defendants' Notice of Preliminary Objection dated 1 March, 2004, with costs.

DATED and delivered at Nairobi this 6th day of December 2012.

J. B. HAVELOCK

JUDGE