REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 406 OF 2007

FIDELITY COMMERCIAL BANK KENYA LIMITED..PLAINTIFF

Vs.

FRED WANYONYI MUCHANGA T/A WOMI ASSOCIATES........................1ST DEFENDANT
LAWRENCE NJOGU MUNGAI ....2ND DEFENDANT

RULING

By a way of an amended Notice of Motion dated 27th June 2011 and expressed to be brought under Order 10 Rule 11,Order 50 Rule 1 and Order 8 Rules 5 and 8 of the Civil Procedure Rules, the 2nd Defendant/Applicant has moved this court for orders to set aside judgment entered against the Applicant is default of appearance and for stay of further proceedings in this matter to enable the applicant defend the claim. The application is supported by grounds enumerated on the face of the application and by affidavits sworn by Laurence N . Mungai, on 27th June 2011 and 28th June 2011,respectively. The grounds in support of the application essentially state that the 2nd Defendant has a good defence which raises triable issues and should therefore be accorded an opportunity to be heard in his defence in the interest of justice.

The plaintiff opposes the application. In that regard, a replying affidavit sworn on 26/06/2011by Philip Muoka, a legal officer of the plaintiff is filed to rebut the Applicant's case. From the affidavit, the plaintiff strongly refutes that the Applicant has a bona fide defence to the plaintiff's claim as would justify grant of the prayers sought in the application. Granting such prayers, in the plaintiff's view, would amount to gross abuse of the court process as the Application by the 2nd defendant is merely a mischievous attempt to delay the recovery of the sum owed to the plaintiff. The plaintiff therefore prays for dismissal of the application with costs.

At the hearing of the application, Ms Kamau, learned counsel for the Applicant submitted that the 2nd defendant is guarantor to the 1st defendant in a claim where the amounts involved are substantial hence should be allowed to defend the claim. She requested the court to consider the matters deponed to in the

supplementary affidavit of Lawrence N. Mungai which she fully associated with. She admitted that the Applicant had not filed a defence in the matter but was willing to do so as soon as the orders prayed for were granted.

In reply, Mr. Kanjama, learned counsel for the plaintiff, told the court that the Applicant had not presented to the court any bona fide issue as would justify the setting aside of the default judgment to allow for full trial. He told the court that the failure by the defendant to file a defence was in itself a clear indication that he had no defence to the claim. He referred the court to the Applicant's own supplementary affidavit which exhibits a letter dated 23rd November 2007. The letter was addressed to the plaintiff by both the 1st and 2nd Defendants and through which they acknowledged service of summons in this matter and expressly admitted liability. He submitted further that the plaintiff's claim was of a liquidated sum over which no denial of liability had been made. He urged the court to disregard the affidavit of Lawrence N. Mungai sworn on 27th June 2011pointing out that the same was fatally defective as an attempt had been made to amend it. He relied on the holding of Ringera J in HCCC No.572 of 2000 **Greenhills Investments Limited vs. Complete Plant Expert Corporation (complant) t/a COVEL** where the court held that an affidavit is evidence and cannot be amended.

I have considered the application, affidavits filed by both parties and the submissions made by counsel for both parties.

On the outset, the court notes that the concern raised by counsel for the plaintiff contesting the validity of the supporting affidavit dated 27th June 2011 was not contested by counsel for the Applicant and was actually conceded to by the latter in her oral submissions. This ruling does not therefore rely on any matter deponed to in that affidavit. However, the court also notes that the supplementary affidavit sworn on 28th June 2011 contains most of the averments made in the defective affidavit.

Turing to consideration of the application on its merits, Order 10 Rule 11 on which the application is framed allows this court to set aside or vary any judgment or order upon such terms as are just. The question that this court must address itself to is therefore whether the 2nd defendant /Applicant has made a case that would render it just for the default judgment entered in favour of the plaintiff to be set aside, in the interest of justice. In my view, this question is determinable through an examination of whether, from the architecture of the Applicant's case, this court can discern and isolate a good point of defence harboring a triable issue that cannot be disposed of otherwise than through a full hearing of the matter.

The case put forth by the Applicant is that he was merely a guarantor to the 1st defendant in respect of financial facilities extended to the 1st defendant by the plaintiff. From his supplementary affidavit sworn on 28/06/2011, it is not denied that the Applicant has all along been aware of the institution of this suit and the subsequent entry of judgment in favour of the plaintiff and against both defendants. The Applicant was also aware of the notice to show cause against him from as early as 7th April 2011. The only excuse the defendant relies on to justify why he never took any action to defend himself is that he was only a guarantor. To the Applicant, being guarantor connoted that he would only be liable to pay the debt if the 1st defendant refused or was unable to pay. The naivety of this argument is further compounded by the Applicant's own averment that he has at all times impressed upon the first defendant to clear the debt and that the 1st defendant had agreed to do so. To me, either the Applicant was completely oblivious of the obligations of a guarantor or took a light view of the responsibility the position entailed. For it is a trite principle of a contract of guarantee that the contract stands on its own and is not subservient to or depended upon the performance of the contract between the principal borrower and the creditor. Enforcement of a guarantee can be levied upon the guarantor whether or not the principal borrower is performing as against the creditor .The Applicant's aforesaid line of defence cannot therefore hold in the face of this well settled position.

In any event, any doubt as to whether the Applicant was aware of the default position on the part of the 1st Defendant is allayed by the letter of 23rd November 2007 which the two defendants jointly addressed to the plaintiff admitting liability of the debt. This letter alone conclusively decimates any odds there may

have been in favour of the Applicant to the effect that he has a defence, leave alone a strong defence against the plaintiff's claim. In the face of the same letter, who would not consider it laughable that Applicant had the courage to aver further that the failure to file a defence was not deliberate but was purely inadvertent!

Overall, the foregoing analysis reveals a number of weaknesses on the 2nd Defendant's case that hamper the chances of a favorable finding for the Applicant. Salient of these are:

1) The contract of guarantee between the Applicant and the plaintiff is not denied.

2) The plaintiff's claim is liquidated and there is no contest with regard to the judgment sum.

3) The claim is unequivocally admitted in writing by both defendants.

4) No defence has been filed by the Applicant, and not even a draft thereof has been exhibited to guide the court in determining whether, if llowed, it would have triable issues.

The above flaws can only form a strong case for the plaintiff on the flip side – that the judgment entered in its favour was due and just and that there lacks a basis for the court to vary or set aside the judgment. This court is therefore left with little option but to follow course on the path already traced by this court in, inter alia, HCCC NO.113 of 1997 **John Patrick Machira vs. Patric Kahiaru Muturi** where Kuloba J (as he then was) underscored that in seeking to set aside default judgment, it was incumbent upon the applicant to show the court what defence there was, whether by a draft of the proposed defence or as may be demonstrated by the affidavit. He emphasized that it was not enough for the applicant to confront the court with a bare statement "I have a good defence" without disclosing it. He concluded thus:

"Nothing is made out to justify setting aside the judgment… On the whole there is no good explanation for the defendant. No defence intended to be relied upon has been disclosed and no draft proposed one has been annexed to see whether it would be worthwhile to re-open the case by setting aside default judgment".

I can concur no further with the above holding, which closely mirrors the facts of the present case. Suffice it conclude that I find nothing in the applicant's prayers, supporting affidavit and submissions by his learned counsel tracing any case justifying re-opening of the case by a way of setting aside the default judgment.

For these reasons, the application by the 2nd defendant dated 27th June 2011 is dismissed with costs.

DATED and DELIVERED in NAIROBI this 27th day of October 2011

J.M. MUTAVA
JUDGE
27.10.2011