



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 131 OF 2011

THOMAS RATEMO OIRA PLAINTIFF

VERSUS

EQUITY BANK LIMITED DEFENDANT

R U L I N G

1. On the 23 November 2011 there was no appearance before me on the part of the Defendant. Accordingly, I granted orders as per Prayer 3 of the Plaintiff's Notice of Motion dated 6 April 2011. Interim orders were already in place prior to that date granted by my learned brother Muga Apondi J on 8 April 2011 and extended until the hearing of the said Notice of Motion, inter partes. I am not in the habit of granting orders in the absence of parties, lightly. In granting the Orders as per prayer 3 of the said Notice of Motion dated 6 April 2011, I had taken into account the Supporting Affidavit sworn by the Plaintiff herein and dated 6 April 2011 as well as his Supplementary Affidavit sworn on 12 May 2011. I had also considered the Replying Affidavit sworn by **PURITY KINYANJUI**, the head of the Defendant's Debt Recovery Unit, dated 4 May 2011 and her further Affidavit dated 30 May 2011. Further, I have perused the Plaintiff's authority attached to his List of Authorities filed herein on 5 July 2011 and the Defendant's List of Authorities dated and filed on 5 May 2011.
2. From the above, it can be seen that in arriving at the Orders that I made on 23 November 2011, such were not made lightly. This is not just a simple case of the Plaintiff acknowledging indebtedness, he has brought into issue an agreement supposedly reached with the Defendant that the loan account that he enjoyed with it, would be reduced by legal fees due and payable by the Defendant to the Plaintiff, as he was on the Defendant's panel of advocates. Such is an important issue that needs to be canvassed at the hearing of this suit in due course.
3. Against this background, I must necessarily weigh up the importance of this Application before me today. I do not think that it is just a matter of apology by the Defendant's advocate due to his oversight in not being present before Court on 23 November 2011. I also appreciate and accept his apology to this Court in that regard.
4. I have noted the Grounds of Opposition and Replying Affidavit of the Plaintiff filed herein yesterday. Basically, the Plaintiff is saying, in both documents, that the Defendant's advocate was aware of the date of the hearing of the said Notice of Motion taken by consent before Musinga J on 5 October

2011. The Plaintiff maintains that there is no good or sufficient reason given by the Defendant's advocate for his non-appearance. He also states that the Defendant will suffer no prejudice as a result of the granting of the Orders by me, ex-parte, on 23 November 2011.

5. In my view, 2 points arise:

(a) Should a Defendant have to suffer as a result of the deficiencies or oversight of its advocate, and

(b) Would the appearance of the Defendant's advocate before me on 23 November 2011 and his submissions that may have been made on that day, have made any difference to the orders made?

6. There is a long line of cases in our Courts that a party should not be made to suffer as a result of the default or mistake of its advocates but the Court must bear in mind the circumstances in each particular case. I believe that Mr. Muturi Kamande had he appeared on 23 November 2011, would have had submissions to make on behalf of his clients and valuable (to this Court) ones at that. Should his client now be prejudiced because of Mr. Kamande's default or mistake? I do not think so. I would refer to the ruling of Githinji J as he then was in **THRIFT HOMES LTD VS. KAYS INVESTMENTS LTD** – HCCC NO. 1512 OF 1998. At page 9 of his Judgement, the learned Judge had this to say:

“Lastly, it was submitted that defendants should not be punished for errors of its advocates, the Court's duty being that of doing justice. I have read the decisions cited. There is no absolute principle of law that errors of advocates will always be excused. It depends on the nature of the case and the kind of error committed. In some cases, the court will not pardon the error and the litigant will be left with the remedy of recovering damages from his advocate for professional negligence”.

7. I have reconsidered all the circumstances of the Plaintiff's Notice of Motion dated 6 April 2011. There are important issues raised on both sides in relation to whether a Defendant, who holds security over property for monies lent or advanced to a Plaintiff, may dispose of the same by way of sale, exercising its statutory power in relation thereto.

Accordingly, I grant the Defendant's request in this regard and set aside my ex parte orders made on 23 November 2011. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 30th day of November, 2011.

J. B. HAVELOCK
JUDGE