



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1705 of 1997

NATIONAL BANK OF KENYA LIMITED PLAINTIFF

VERSUS

ALI MOHAMED MWANZIA1ST DEFENDANT
CLEMENT MUTUMA 2ND DEFENDANT
BOTH T/A FERRARI AUTO SPORTS

RULING

1. The chamber Summons dated 11th November 2009 seeks for an order of stay of execution and an order to set aside an ex parte judgment entered against the 1st defendant, who should be allowed to adduce evidence. This application is brought under the provisions of **Order IX B and section 63 (e) of the Civil Procedure Rules and Acts**. This application is based on the grounds that the 1st defendant was condemned un heard. The application is supported by the affidavit of **Ali Mohamed Mwanzia** which was sworn on 11th November 2009.
2. According to the 1st defendant, he was wrongly sued in this matter because **Ferrari Auto Sports** is a limited liability company and it is the one which entered into a contract with the plaintiff. The plaintiff's case was heard by **Ransely J** but when the defence came up for hearing on 26th June 2008, judgment was entered against the defendants despite the fact that they were not notified of the hearing date. Counsel urged the court to allow the application, set aside the judgment and allow 1st defendant to adduce evidence.
3. This application was opposed by Counsel for the plaintiff; reliance was placed on the matters deposed to in a replying affidavit of **Damaris Wanjiku Gitonga** sworn on 14th

February 2008. It is contended that the judgment in this matter was properly obtained and the plaintiff's case was heard by **Ransely J**. The defence case was fixed for hearing on 26th June 2008, however on that day of hearing, the defendants and their advocate did not attend court thus judgment was entered for the plaintiff.

4. Counsel pointed out that the defendants were duly invited to fix the hearing date but they failed to attend court. A date was fixed and they were served with a hearing notice which was duly served upon counsel for the defendant. Counsel acknowledged receipt of the hearing notice and affixed their stamp. There is also an affidavit of service which was filed by the process server who served the hearing notice upon counsel for the defendants.

5. After judgment was entered against the defendants, counsel for the plaintiff issued the requisite 10 days notice of the entry of judgment which was duly served upon the 1st defendant as required under the provisions of **Order XXI**. The process server who served the notice upon the defendants also filed an affidavit of service. The 1st defendant was also faulted for keeping quiet for one and half years and for coming to court too late to seek to set aside a regular judgment.

6. Under **Order IX B (8) of the Civil Procedure Rules** it is provided as follows:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such term is just.”

In the case of **Ceneast Airlines Ltd v Kenya Shell Ltd East African Law Reporting [2000] 2 EA 362(CAK)** the Court of Appeal cited with approval a passage by Duffus Re in the case of **Patel v East Africa Cargo Handling services 1974 EA** as follows:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it ‘a triable issue’ that is an issue which raises a prima facie defence and which should go to trial for adjudication”

7. Taking the above principles into consideration, the issue for determination is whether the 1st defendant's application should be allowed. The questions to bring to bear are, firstly whether the judgment was regularly obtained and whether the defence raises

triable issues and lastly whether the 1st defendant has brought this application without unreasonable delay.

8. Firstly, the applicant and his counsel have offered no explanation at all as to why they failed to attend court on the hearing day after they were notified of the hearing. It is evidently clear that counsel was served with hearing notice which they duly acknowledged receipt by affixing their stamp on the notice and also the affidavit of service confirms that counsel was served. Further, the 1st defendant was served with the notice of the judgment dated 9th October 2008. This is also confirmed by affidavit of service of **James Mutaga Mutua** which is not at all contested.

9. The 1st defendant failed to attend court, sat on his rights for over one year, fails to give any reasons why they failed to attend court and why it took them such an inordinate delay to bring this application. For those reasons I am not persuaded that the applicant deserves the exercise of this court's discretion which is exercised in the interest of justice.

10. The other issue to consider is whether the amended defence raises triable issues. The 1st defendant has not denied having guaranteed the loan to Ferrari Auto Sports. He also raised a preliminary objection that he was not properly joined in this suit which preliminary objection was heard and rejected **by Mwera, J.** There is also evidence on record from the bank statement that the loan was disbursed, and it was not repaid to the plaintiff. I find this is not a suitable case for setting aside a regular judgment. I hereby dismiss the application with costs to the plaintiff.

RULING READ AND SIGNED ON 12TH MARCH 2010 AT NAIROBI

M.K. KOOME
JUDGE