



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 128 of 2009

A.S. SHEIKH TRANSPORTERS LTD:.....PLAINTIFF/RESPONDENT

VERSUS

BARCLAYS BANK OF KENYA LTD:.....DEFENDANT/APPLICANT

RULING

The Plaintiff/Respondent herein came to court vide its plaint dated 14th July 2009 and which was filed on 15th July 2009. It sought reliefs as follows:-

- a) A declaration that the alleged outstanding amount of Kshs.50, 978,697.35 (fifty million nine hundred and seventy eight thousands, six hundred and ninety seven thirty five cents) only is premised on excessive, harsh, unconscionable and illegal charges, penalties and/or interest rates.
- b) An order of reconciliation of all the Plaintiff's accounts with the Defendant including current account number 1128153.
- c) An order of supply of certified copies of the statements of all the Plaintiff's accounts with the Defendant including current account number 1128153.
- d) An order of permanent injunction restraining the Defendant either by itself, servants and/or agents whatsoever from selling, alienating, disposing of or in any way interfering with LR. Number .209/8343/55 or any other security (ies) held by itself on account of the Plaintiff.
- e) Costs of the suit
- f) Any other relief that the court may deem.

The Defendant entered appearance through the Memorandum of Appearance dated 28th July and filed in court on even date. The Defendant did not file defence and so on 29th September 2009 an ex parte default judgment was entered against it. Earlier and more particularly on 14th July 2009 the Plaintiff/Respondent had filed an application seeking orders of injunction restraining the Defendant from in any way dealing with the Plaintiff's property known as LR. No.209/8343/55 or any other properties or securities and for an order for reconciliation of accounts. That application was heard on 28th April 2010 and Defendant's/Applicant states that it was then that it became aware of the default judgment sought on 14th August 2009 and entered as stated above. The application was withdrawn on 28/04/2010 as the orders therein sought were no longer necessary in light of the entry of the interlocutory judgment. That is the background of the Chamber Summons now under consideration.

The Defendant/Applicant's application dated 6th May 2010 is brought under Order IXA Rule 10 of the Civil Procedure

Rules, section 3A of the Civil Procedure Act and all other enabling provisions of the law. That applications seeks the setting aside and/or vacation of the ex parte default judgment of 29th September 2009 on the grounds that the entry of the same was irregular and improper as the claim was not a liquidated one and it is fair and in the wider interest of justice that the orders sought be granted as the Plaintiff would not suffer any prejudice. It is deponed in the supporting affidavit by counsel for the Defendant Mungai Victor Kimani that his firm inadvertently omitted to file the defence and counterclaim annexed to the application and further that the court is dressed with the necessary discretion to grant the orders sought.

In the Replying Affidavit sworn by the Managing Director of the Plaintiff/Respondent one Abdi Said Sheikh Ali in opposition to the application he swears that the application is incompetent devoid of merit and an abuse of the court process. It is contented that the Defendant was merely waiting for the withdrawal of the injunction application so as to tactfully move to set aside the ex-parte judgment. That is their case that the application is brought in bad faith as no explanation is given for the failure to file defence.

In his submission before me Mr. Thiga learned counsel for the Defendant/applicant submitted that the entry of judgment was irregular and improper as the claim did not fall under Order 9A Rule 5 for pecuniary claim. That the court has a wide discretion to grant the orders sought. That there is a genuine defence with triable issues and also a counter claim and the Defendant should be afforded an opportunity to be heard.

Submissions by Mr. Ngetich learned counsel for the Plaintiff/Respondent were that the entry of judgment was regular as there was no defence on file within the required time and that in any case the application has been brought after a delay of some seven months and that takes away the exercise of the court's discretion in favour of the applicant. That the Plaintiff will suffer prejudice if orders sought are granted as it withdrew its application for injunction once it had obtained the judgment now sought to be set aside.

Both counsel relied on various authorities which I found useful in arriving at my decision.

This is now an appropriate point to render my finding. The reliefs sought in the plaint are set out at the early part of this ruling. The question that arises then is whether those reliefs are of a liquidated claim or a pecuniary one to regularize the entry of judgment as herein done. What then is a liquidated claim?

“A liquidated demand is in the nature of a debt i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money even though it be specified or named as a definite figure requires investigation beyond mere calculation, then the sum is not a “debt or liquidated demand”, but constitutes “damages”....The words “debt or “liquidated demand” do not extend to unliquidated damages, whether in tort or contract, even though the amount of such damages be named at a definite figure” – see IN THE SUPREME COURT PRACTICE, VOLUME 1 1985 page 33. The claim herein does not fit the above definition and therefore order 9A Rule 3 could not be used to empower entry of that judgment. Order 9A Rule 5 which reads:-

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any Defendant fails to appear, the court shall, on request in form no. 26 of Appendix C enter interlocutory judgment against such Defendant, and the Plaintiff shall set the suit for assessment by the court of the damages or the value of the goods and damages as the case may be” was clearly in-appropriate for use for the entry of judgment herein as there is no claim in the plaint herein fitting the above description. That

in my view dispossess of the issue of the irregularity of the entry of judgment herein. That entry of judgment was not regular. That then makes a case for the setting aside of that judgment not as a matter of discretion but **ex debito justitiae**. On that account alone I order the judgment herein entered on 29th September 2009 be set aside.

The overriding objective of the court is to do justice to the parties and not to shut out any party but rather to determine cases on their merit. “To deny the subject a hearing should be the last resort of a court” see **SEBEEI DISTRICT ADMINISTRATION –VS- GASYALI (1968) E.A. 300**.

I have seen the draft defence and counterclaim attached to the application. I accept the explanation that the same was inadvertently not filed. These things do happen. **“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud, or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”** – to borrow the words of APALOO J.A. in **PHILIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBENDE (1982 – 88) KAR 103 at page1024**. That defence raises issues which are proper for the court’s determination. The counterclaim ought to be considered. I further accept the explanation that the Defendant became aware of the entry of the judgment on 28/4/2010 in court otherwise had they known of it even at the stage of being served with the application for injunction surely they would have sought to file their defence. And upon discovery of the fact of the entry of judgment the defence and counterclaim were brought to the attention of the court within a period of seven days. The plaintiff suffers no prejudice that cannot be properly compensated by costs. I therefore order that the Defence and counterclaim annexed to the application under consideration shall be deemed filed upon payment of the requisite court fees which payment shall be made within SEVEN (7) days of the date hereof in default of which the Plaintiff shall be at liberty to apply appropriately. The Plaintiff shall have costs of this application.

Orders accordingly.

DATED SIGNED ND DELIVERED AT ELDORET THIS 14TH DAY OF JULY 2010

P.M.MWILU
JUDGE

IN THE PRESENCE OF

Cheruiyot H/B Thiga - Advocated Defendant/Applicant

Z.K. Yego H/B Ogolla - Advocate for Plaintiff/Respondent

Andrew Omwenga - Court clerk.

P.M.MWILU
JUDGE