REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Case 130 of 2009

CONSOLIDATED BANK OF KENYA………….………….PLAINTIFF

VESUS

ISAAC KAMAU MUNYI…………………………………..DEFENDANT

R U L I N G

The Application dated 25.05.2010 was filed in this court under certificate of urgency on 25.05.2010 after Applicant's property was proclaimed for sale by public Auction which sale was to take place on 27.05.2010. After perusal of the court file, I did not see any notice of entry of the judgment as required under OXXI Rule 6 (the proviso thereof) which provides as hereunder,

> ***"…where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than 10 days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of the notice shall be filed with the first application for execution"***

The court record shows that the Application for execution was made to this court on 18.05.2010 but no notice of entry of the judgment was annexed to the said application. I will come to that point later.

The other ground relied on by the Applicant herein was that he was never served with the summons to enter Appearance, plaint, or any other document in relation to this suit. He averred in his affidavits that the affidavit of service sworn by one Amos Mumo on 19.10.09 was false. He denied the contents of that Affidavit and even asked the court to summon the process server suo motu for cross examination. My view however is that it will not be necessary to summon the said process server for cross examination purposes. From the contents of the Affidavit of service, I have no doubt that the Applicant was actually served with the plaint, and summons and verifying affidavit as deponed in the Affidavit of service. The details given in that affidavit are such that the deponent who is not based in Chuka could not have known if he did not personally travel there for purposes of serving the Plaintiff/Applicant. I have no reason to doubt the truthfulness for the contents of that affidavit. The issue therefore of the Applicant being entitled to the setting aside of the judgment ex-debito justitiae does not arise.

The court will therefore be guided by the usual principles that are to be considered by the court when setting aside an exparte judgment. Setting aside an exparte judgment is at the discretion of the court. This discretion though unfettered must nonetheless be exercised judicially and on such terms as may be just with the sole intention of doing justice to both parties.

As held by the Court of Appeal in the case of **SHAH –VS- MBOGO (1967) EA 116**

> ***"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice".***

The above sentiments have been adopted with approval in several other cases and have acted as important guidelines in applications such as these.

I have carefully considered the rival Affidavits and the annexures thereto. Having made a finding that the Applicant was properly served, the important issue I need to consider is whether his failure to enter an appearance or file a defence as an act of inadvertence or excusable mistake. No reasons have been offered in absence of which I can only surmise that the Applicant either ignored the summons or did not see the need to file a defence because he actually had none, which brings me to the next issue. Does the defendant have any defence? Even in an Application such as this are where the applicant was basically relying on non service, it is important to annex a draft defence just in case the court was to find that service was proper. In this case, no draft defence was annexed. From the contents of the affidavits and the annexures thereto, the Applicant seems to be challenging the interest rate of 32% which was levied on the principal amount. He also seems to rely on the fact that the date of completion of the loan repayment which is 30.08.2011 is still not in sight and the plaintiff cannot therefore sue him for breach of contract. As rightly stated by the Respondent however, the terms of the Agreement are clear ("JG2"). The same was signed by both parties herein and they are thus bound by its terms.

According to the said agreement, the facility (i.e. the loan) ***"would attract default interest of 32% per annum on any overdue installment until such installment is paid".***

The 32% interest is therefore not arbitrary or unlawful. By acceding to the terms of the Agreement, the Applicant committed himself to its terms in toto and he cannot turn round after defaulting and claim that the interest is unconscionable.

Clause P of the same Agreement, which interestingly does not appear in his annexure “1kmII” clearly stipulates that

> ***“Any breach of any of the covenants and conditions contained herein or in any other Agreement shall constitute default on your part and shall render the entire facility immediately repayable on demand, along with overdue interest and administration charges which will be applied without notice.”***

The recall and demand of the entire loan was therefore in order. The issues which the Applicant had raised in paragraph 14 of his supporting affidavit are in my considered view not triable issues at all. They do not raise a prima facie defence which should go to trial for adjudication.

His intended defence is therefore only meant to delay the course of justice. I have no good reasons whatsoever to set aside the judgment herein. The applicant has failed to give me sufficient ground for me to exercise my discretion in his favour. That judgment will therefore remain undisturbed.

I now come back to the issue of the execution herein. As stated earlier on in this ruling, the law demands that a copy of notice to execute be attached to the application for execution filed in court. In this case, there was no evidence of such a copy having been annexed to the application. There is a copy that is annexed which was supposed to have been sent to the Applicant by registered post. The same could have been sent to him but the requirement that a copy thereof be filed in court was not complied with. The execution process herein was therefore improper. The said execution is therefore set aside.

Any costs incurred by the auctioneers during the execution process will be borne by the Respondent here.

The Respondent is nonetheless at liberty to move the court properly in accordance with the law and restart the process of execution.

Each party to bear its own costs of this Application. Orders accordingly.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 27th day of September 2010.
In presence of:- Mr. Wainaina for plaintiff/Respondent