



REPUBLIC OF KENYA

**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL
COURTS**

Civil Suit 1028 of 2000

RELIANCE BANK LIMITED (LIQUIDATION).....
PLAINTIFF

VERSUS

AQUVA AGENCIES LIMITED.....1ST DEFENDANT

RAJNIKANT B. PATEL.....2ND DEFENDANT

PINAKIN R. PATEL.....3RD DEFENDANT

RULING

The application under consideration is the Chamber Summons dated 4th September, 2008. It has been brought by the 1st and 2nd Defendants under Order XXI rule 22 and 91, Order IXB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicants seek to have the judgment delivered by this court on 16th May, 2008 and the subsequent proceedings emanating there from set aside. There are several grounds cited on the face of the application. The key grounds in my view are grounds (ii), (iii) and (x) which stipulate as follows: -

(ii) The said judgment was entered in default of attendance as the 1st and 2nd Defendants were not aware that the matter was coming up for hearing on 22nd November, 2007 due to the failure of their advocate then on record, Nyaberi & Co. Advocates to inform them of the said hearing date.

(iii) The said judgment was therefore entered without affording the 1st and 2nd Defendants a chance to be heard.

(x) The 1st and 2nd Defendants have a strong arguable Defence and the ends of justice will be defeated if they are not allowed to canvass the same at full trial.

The application is supported by the affidavits dated 4th September, 2008 and 16th March, 2009 sworn by R.B. Patel, the 2nd Defendant and the Director of the 1st Defendant. I have considered the contents of the said affidavit. The gist of the affidavits is that the two Applicants were not informed of the hearing date for the substantive suit set by the advocates to the parties by consent. It is also averred that no notice of entry of judgment was served on the Applicants and that they only became aware of the same when auctioneers proclaimed their goods.

The application is opposed. The Plaintiff filed grounds of opposition setting out the following grounds:

- 1. The application is not urgent or deserving admission during the court vacation as there are already stay orders granted in respect of the proclamation of attachment in execution of the decree in this suit.**
- 2. The applicants have not put facts before the court upon which the court may exercise its discretion.**
- 3. The application is late, an after thought and only meant to cloud the issue and further delay hearing of the applications currently pending in respect of the same subject matter.**
- 4. The application is made in bad faith, devoid of merit and blatant abuse of the due process of the court.**
- 5. The application should be dismissed with costs.**

The Plaintiff also filed a replying affidavit dated 17th October, 2008. I have considered the content of the affidavit.

Mr. Kariuki for the Applicants urged two points. One that the Applicants' failure to attend court for hearing of the suit was by reason their advocate failed to inform them of the hearing and therefore judgment entered against them was not based on merit. The second point was that the Applicants' defence raised triable issues which should be considered. For this preposition counsel relied on **Patel v E.A. Cargo and Handling [1974] EA 75**.

For the preposition that the court's discretion to set aside is wide, reliance was placed on the case of **Barclays Bank of Kenya v. Sparkle Food Manufactures Limited [2008] eKLR**. For the preposition that a party ought not to be punished for mistakes of his counsel, counsel relied on the case of **Mwangi vs. Mwangi [1994] 2 EA 234**. I have considered these cases.

Mr. Gitonga for the Plaintiff argued that no facts were placed before court to warrant the court to exercise its discretion in the Defendant's favour. Counsel drew court's attention to paragraph 13 of the supporting affidavit where the 2nd Defendant avers that his previous advocate did not inform them of the hearing. Mr. Gitonga submitted that the said excuse was not good enough as it could be pleaded over and over again.

Mr. Gitonga urged the court to consider pages 9 and 10 of the judgment herein to find that the court considered issues raised in the defence before entering judgment. Counsel urged that setting aside the judgment would serve no useful purpose in the circumstances.

Mr. Gitonga finally urged that if the court was inclined to grant the application, then it should require the Applicants to deposit the decretal sum in court. Counsel relied on the **Barclays Bank of Kenya case**, supra, for preposition that the court should be satisfied that the Defendant had an arguable defence before setting aside the judgment.

I have considered this application and submissions by counsel together with the cases cited.

The principles applicable in a case of setting aside an exparte judgment were set out in the celebrated case of **Patel v EA Cargo Handling Services Limited [1974] EA 75** at page 76 where Dufus P. said:

"I also agree with this broad statement of the principle to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where there 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 SHELDON J put it “triable issue”. That, is an issue which raises prima facie defence and which should go to trial for adjudication.”

The courts power to set aside are unfettered and wide. In order to do justice to the parties and avoid hardship, before setting aside an ex parte judgment, the court must be satisfied that the Defendants have a defence or a bona fide defence which ought to go to trial.

The Defendants joint defence was filed on 24th July, 2001. In paragraphs 4 and 5 of the same, the Defendants deny that the 1st Defendant ever requested for a loan nor that it was ever granted any loan by the Plaintiff at an interest rate of 24% or at all. The 2nd and 3rd Defendants deny that they were guarantors to any loan as alleged in the plaint. The Defendants have alleged impropriety against the Plaintiff and have pleaded particulars of fraud at paragraph 6, and particulars of the Plaintiff’s fraud at paragraph 8. To sample part of the particulars of defence pleaded in paragraph 6 (b) (c) and (d) the Defendants averred:

b) The Plaintiff colluding with some alleged individuals who fronted as directors of the Defendant in granting the loan without the Defendants knowledge.

c) The Plaintiff’s personnel signed the loan documents in the guise the same were signed by the Defendants to the detriment of the Defendant.

d) The Plaintiff personnel colluded with other individuals to sign documents indicating that a loan had been granted to the Defendants to the Defendants detriment.

In paragraph 8 (b), (d) and (e) it is averred as follows:

b) Demanding the said money from the Defendants.

d) Purporting that 2nd and 3rd Defendants are guarantors when they have made no such agreement with the Plaintiff.

e) Alleging that the 1st Defendant has opened an account at its branch when the Defendants have neither applied for not got an account with them.

In paragraph 10 the Defendants denied that any demand and notice of intention to sue were given. At the trial the demand and notice of intention to sue served on the Defendants were produced as exhibit. The Plaintiff also adduced evidence to show that the Defendants opened the two accounts through which the bank facilities were advanced. The Defendants, the Plaintiff contended, provided various documents including their identity cards, pin certificates for all 3 Defendants, passport size photos for all directors including those of the 2nd and 3rd Defendants. The Plaintiff also produced personal guarantees, promissory notes, request for loan in local currency, among other documents exhibited by the Defendants. The Plaintiff also adduced evidence to demonstrate that the loans were advanced. The Plaintiff also adduced evidence to show that attempt was made by the Defendants, to pay back the amounts owed to the Plaintiff. The Plaintiff produced 16 postdated cheques issued to it by the Defendants as payment of the loan. The same were all honoured. The Plaintiff also produced seven other cheques which were returned unpaid. The Plaintiff produced letters from Defendant forwarding to the Plaintiff 196 postdated cheques in replacement of dishonoured ones. Only 35 of them were honoured. The Plaintiff has also produced letters written by the Defendants in which the Defendants admit their indebtedness to the Plaintiff and in which promises were made to pay the sum owed by installments. The promises were not honoured and the sum remained unpaid until 1998, 9th September, when the Plaintiff bank was taken over by the Central Bank of Kenya.

Taking into considerations the Defendants allegations of fraud vis-à-vis the Plaintiff’s evidence that not only was the debt admitted but attempt was made to pay it, I do not think that the Defendants have a bona fide defence. The Defendants’ defence must be a sham. Not only did the Defendants open the loan

account and overdraft accounts through which the loaned sums were channeled, the Defendants also actively made efforts to repay the debt in the period between April 1998 when the loan was disbursed, and October 1999, when they stopped further repayments. The Defendants' allegations of fraud as pleaded cannot be based on candor and honesty.

The judgment delivered by this court on the 16th May, 2008 was a regular judgment. The Defendants were represented by Counsel throughout the period of the pendency of the suit including at the time when the suit was heard. The hearing date was taken by both counsels to the parties at the registry and therefore the Defendants' Counsel were fully aware of the hearing date.

Even if the court were to sympathize with the Defendants, no useful purpose will be served if the judgment were to be set aside. The Defendants' defence is a sham and no bona fide issues are raised which should go to trial. In the circumstances, the application should fail.

I have come to the conclusion that the Defendants' Chamber Summons application dated 4th September, 2008 has no merit and the same is dismissed with costs to the Plaintiff.

These are the orders of the court.

Dated at Nairobi this 30th day of April, 2009.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Kariuki for Applicant/1st Respondent

Ms. Karani holding brief Mr. Gitonga for Respondent/Plaintiff

LESIT, J.

JUDGE