REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 311 OF 2005

SAVINGS AND LOANS (K). ……..…… PLAINTIFF

VERSUS

CHRISTOPHER KARANJA MURIGU……. DEFENDANT

R U L I N G

This is a Chamber Summons application dated 5th December 2008 expressed to be brought under Order IXA Rule 10 and Order L Rule 2. It seeks four prayers.

1.THAT the Decree herein be stayed pending the hearing and determination of this application.

2. THAT the judgment and all subsequent decrees and orders be set aside unconditionally.

3.THAT the costs of this application be provided

4. THAT the Honourable Court be pleased to give any other or any further order as it may deem it.

Grounds upon which the application is based are cited on the face of the application as follows:-

a)THAT the Defendant was never served with summons to enter appearance,

b)THAT the Defendant has a good defence with a high chance of success,

The application is supported by an affidavit sworn by Christopher Karanja Murigu the Defendant herein dated 5th December, 2008.

The application is opposed. The Defendant's Mortgage Administration Manager Mr. James E.O. Odwako has sworn an affidavit dated 4th April 2008,

I have considered the application, supporting affidavit, the replying affidavit and submissions by counsel for the parties.

The Applicant in this case has urged the court to set aside the judgment. The key ground upon which this application is based is fact that the Applicant was never served with a summons to enter appearance. That fact is contested by the Plaintiff which has annexed to its replying affidavit a Memorandum of Appearance signed by the Defendant, the Applicant herein, and dated 15th August 2005. The

Memorandum of Appearance bears a stamp from the firm of Kipkenda, Lilan & Co Advocates, the firm of advocates on record for the Plaintiff/Respondent. The filing stamp is not clear. There is a copy of the same document in the court file and the stamp on it shows that it was filed on 18th August, 2005. According to the affidavit of service sworn by the process server, the Defendant was personally served with the summons to enter appearance on 1st August 2005, at 1.00 p.m. That means that despite service, even the Memorandum of Appearance was filed few days after the prescribed time.

The Applicant did not file any response to the Replying Affidavit nor contest the Memorandum of Appearance which means that the facts stated in that affidavit are admitted. I do find in the circumstances that the defendant was duly served with summons to enter appearance and with the plaint. I find that by 15th September 2005 when the interlocutory judgment was entered, no defence had been filed in this case. The interlocutory judgment on record is therefore a regular one.

Two issues then arise from this case; one whether the interlocutory judgment entered herein is final judgment and; two, whether the Defendant has a good defence and ought therefore to be given leave to defend the suit. I will consider both issues together. The Plaintiff's claim against the Defendant was for a sum of 2,245,438.81/= with interest at the rate of 15% from 30th April, 2004. This sum is claimed on account of a loan and/or overdraft facility granted to the Defendant by the Plaintiff. The loan sum is not stated. It is stated that the Plaintiff realized its security after sale of a property charged to its favour by the Plaintiff raising kshs.1,500,000/= which was credited onto the Defendant's account, leaving an outstanding balance which is the sum claimed in the plaint.

The Defendant has not annexed a draft defence. Does the absence of a draft defence limit the court's power to exercise its discretion under Order 1XA Rule 10 of Civil Procedure Rules? I will rely on the celebrated case of Patel v E.A. Cargo Handling Services Ltd [1974] EA 75. In that case default judgment was entered against the Defendant, who promptly moved the court to set aside the judgment under Order 9A Rule 10 of Civil Procedure Rules. No draft defence had been annexed to the application, very much like in the instant case. The court of Appeal for Eastern Africa cited with approval a House of Lords of England decision in the case of Evans v Bartlam [1937] AC 437 as follows:

"It was argued by counsel for the respondent that, before the court or a judge could exercise the power conferred but this rule, the applicant was bound to prove (a) that he had some serious defence to the action, and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that, until those two matters had been proved, the door was closed to the judicial discretion, in other words, that one proof of those two maters was a condition precedent to the existence, or (what amounts to the same thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority excised, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose. The contention no doubt contains this element of truth, that, from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance.

In the case now under discussion, the judge in chambers thought it proper, in the exercise of his discretion, to set aside the judgment, and, unless an appellate court is satisfied that the discretion has been wrongly exercised, and should have been exercised in the contrary way, the judge's order should be affirmed."

It is clear that the fact the Defendant has not filed a draft defence does not limit the power of the court to determine whether in fact a defence on merits exists from the supporting affidavit. I have considered

the supporting affidavit sworn by the Defendant on 5th December 2008 and filed in court on 8th December 2008. In paragraph 8 of that affidavit, it is shown that the Defendant purchased the suit property at an auction for Kshs.1,800,000/=. That he paid a loan from the Plaintiff's bank for the balance. It is shown at paragraph 9,10,11,15 to 20 that the Plaintiff did not put the Defendant in possession and therefore the Defendant could not earn anything from the suit property. It is therefore clearly demonstrated that there was an agreement between the plaintiff and the defendant that the former would place the latter in possession in order for the latter to earn from the property to enable him pay the loan advanced by the former. It is also shown that the Defendant and the Plaintiff were sued by parties claiming ownership over the suit property and that the said parties obtained an injunction preventing either party in this suit from gaining possession of the property.

The Defendant has pleaded frustration of the sale between it and the plaintiff and raises issue with the terms of sale of the property.

I find that the Defendant has a defence on the merit and that the reason for taking no action in this matter has been explained and is excusable. Among other issues the court will have to determine is whether the sale from the Plaintiff to the Defendant was frustrated and whether in the circumstances the Defendant owes anything to the Plaintiff.

Having come to this conclusion, I will grant the Chamber Summons application dated 5th December 2008 in the following terms:

1) That the interlocutory judgment entered herein in default of defence and all consequential orders be and are hereby set aside.

2)The Defendant is granted unconditional leave to defend the suit.

3) The Defendant should file and serve its defence within 15 days from date herein with leave to the Plaintiff to apply.

4) Costs of application to the Plaintiff/Respondent.

Dated at Nairobi this 26th day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in the presence of:

Mr. Mungu or the Applicant/Defendant

Mr. Odoyo holding brief Mr. Matheke for Respondent/Plaintiff

Dated at Nairobi this 17th day of July, 2009.

LESIIT, J.

JUDGE