



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 37 of 2007**

**SAMUEL KITI LEWA ..... PLAINTIFF**

**- Versus -**

**1. HOUSING FINANCE COMPANY OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**2. JAMES M. KAGETE ..... 2<sup>ND</sup> DEFENDANT**

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**R U L I N G**

By this application, the applicant seeks orders that the interlocutory judgment entered against the defendant by this Honourable Court on the 11<sup>th</sup> day of December, 2007, be set aside, and that the costs of the application be provided for.

The application is brought by a Chamber Summons taken out under O. IXA rules 10 and 11 of the Civil Procedure Rules, and Sections 3A and 63 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. It is supported by the annexed affidavit of Joseph Karanja Kanyi, Advocate, and pertinently on the following grounds:-

- (a) The plaintiff/respondent obtained interlocutory judgment against the defendant/applicant on 11<sup>th</sup> December, 2007.*
- (b) The defendant/respondent obtained interlocutory judgment against the defendant/applicant on 11<sup>th</sup> December, 2007.*
- (c) That the defence had been prepared earlier but the said advocates clerk only filed a replying affidavit and inadvertently left the said defence.*
- (d) That it is trite law that the advocate's mistake should not be visited on the client.*
- (e) It is also trite law that a suit should be heard on merits and parties be allowed to canvass their case fully, real issues in controversy be set out and rights of parties be determined in lieu of applying for judgment in default without affording the other party a chance to defend or show cause.*
- (f) The defendant/applicant will suffer substantial harm and loss at the instance and/or the plaintiff/respondent.*

During the oral canvassing of the application, Mr. Kanyi appeared for the applicant while Mr. Mokaya

appeared for the respondent. Mr. Kanyi argued that the defence on the record shows that this is a land matter which is serious by any standards. He invited the court to look at the reasons for the delay and note that there will be no prejudice to the plaintiff if the judgment is set aside. He submitted that this was a mistake of counsel, not of the litigant, and that courts should incline towards hearing cases on merit, especially matters concerning land.

Opposing the application, Mr. Mokaya relied on the replying affidavit and submitted that the court can only exercise its discretion in favour of the applicant if the applicant has a reasonable defence on merit. In the instant case he argued, no defence had been shown to the court. He referred the court to KINGSWAY TYRES AND AUTOMART LTD v. RAFIKI ENTERPRISES LTD. [1995-1998] EA. 143. He also contended that the reason given for the delay in filing defence was that the defendant's advocate's clerk had forgotten to file the same; yet there was no affidavit along those lines by the clerk, and the clerk's name was not given. He also submitted that the prayer to set aside the interlocutory judgment was defective in that it did not seek anything further. He further submitted that from the affidavit on record, if there was any mistake committed, it was committed by a clerk, not counsel. He therefore urged the court to dismiss the application with costs.

In reply, Mr. Kanyi submitted that there was a defence on record and therefore it was not necessary to exhibit a draft. He further submitted that the authorities cited by the respondent related to judgment for non appearance, and that a clerk is an agent of his advocate.

Arising from these submissions, I find it prudent to deal first with the preliminary issues raised by Mr. Mokaya. In order to do so, it is noteworthy that this suit was commenced by a plaint filed on 26<sup>th</sup> October, 2007. The plaint was accompanied by a Chamber Summons under a Certificate of Urgency. The defendants were served on 27<sup>th</sup> October, 2007, and entered appearance on 30<sup>th</sup> October, 2007. On 1<sup>st</sup> November, the application by Chamber Summons came for inter partes hearing and it was stood over generally. On 22<sup>nd</sup> November, 2007, the defendants filed their replying affidavit to the application by Chamber Summons which had accompanied the plaint. This was followed by a request dated 10<sup>th</sup> December, 2007 and filed on 11<sup>th</sup> December, 2007 by which the plaintiff's advocates requested for judgment against the 1<sup>st</sup> defendant for failing to file a statement of defence. Judgment was duly entered on 11<sup>th</sup> December, 2007, and the statement of defence filed on 25<sup>th</sup> January, 2008.

Relying on the case of KINGSWAY TYRES AND AUTOMART LTD v. RAFIKI ENTERPRISES LTD (*supra*), Mr. Mokaya submitted that this application was incompetent for not exhibiting a copy of a draft defence which would have demonstrated to the court that the applicants had a reasonable defence in the matter. The respondent's counsel must have overlooked the fact that the applicants filed their statement of defence on 25<sup>th</sup> January, 2008, and that by the time they filed the present application, that defence had been on record for a month. Even if it may have been filed irregularly, it is on record and therefore it cannot be ignored. It is for that same reason that the applicants did not have to seek any other orders in addition to the prayer to set aside the judgment.

Mr. Mokaya further argued that according to the replying affidavit, the mistake for the delay in the filing of the defence was caused by the defendants' advocate's clerk, and not by the advocate himself. Consequently, he submitted that the clerk should himself have sworn an affidavit to verify that delay. Mr. Kanyi for the applicant conceded that the delay was due to counsel's mistake. This was his way, or so I took it, of accepting responsibility for the mistake of someone else within his office. I don't think that one can go further than that.

Regarding the substance of the application, I note that the same is made under O.IXA rules 10 and 11 of the Civil Procedure Rules. Rule 10 states as follows:-

*"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."*

In KENYA CEMENT MARKETING LTD v. JAMES G. K. NJOROGE, Nairobi Civil Appeal No. 75 of

1997, the Court of Appeal took the view that this rule is worded in such a manner as to give an almost unfettered discretion to the Judge subject only to requirements of justice to both sides. In the case of SHAH v. MBOGO & ANOR [1967] EA. 116, Harris J. is credited with having remarked at p. 123:-

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

And in the subsequent case of PATEL v. E.A. CARGO HANDLING SERVICES LTD [1974] E.A. 75, Duffus, P. said at p. 76:-

*“...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 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 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.”*

Applying these principles to this case, the main concern of the court is to do justice to both sides. Mr. Kanyi for the applicants conceded that the delay in filing the defence in this matter was occasioned by a lapse in his own office. That is as good a reason as any for considering positively the setting aside of an interlocutory judgment under O.IXA rule 10. In SHABIR DIN v. RAM KARKASH ANAND (1955) 22 EACA, 48, Briggs, J.A. said at p. 51:-

*“I consider that ... the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible, nor desirable to indicate in detail the manner in which the discretion should be exercised.”*

In sum, it seems to me that the gist of these observations is that each case will be considered on the basis of its particular facts and circumstances.

On the basis of the facts of this application, the negligence of the applicants’ counsel should not be visited upon the applicants. On the contrary, it is a good ground upon which the applicants can seek reprieve. Secondly, a quick look at the statement of defence discloses that it does raise some triable issues. These include, *inter alia*, such issues as:-

- (a) *Did the plaintiff fail, refuse, ignore or neglect to service the loan plus interest and other charges?*
- (b) *Did the 1<sup>st</sup> defendant have a statutory power of sale?*
- (c) *If so, did the 1<sup>st</sup> defendant exercise that power properly?*

Even though the defence was not filed on time, it is on record and the court cannot afford to ignore it. In JAMNADAS V. SODHA v. GORDHANDAS HEMRAJ (1952)7 ULR II, Ainsley J., as he then was, said:-

*“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think that to deny the subject a hearing should be the last resort of a court.”*

Keeping an eye on these considerations, I have already indicated that the defence on record does raise some triable issues. There is no doubt in my mind that the plaintiff can be compensated by costs. In sum, I think that it is in the interests of justice that the parties to this suit be allowed to have their day in court.

Being of that persuasion, I accordingly allow the application and set aside the interlocutory judgment entered herein on 11<sup>th</sup> December, 2007. The defendants will pay the costs of this application as well as any thrown away costs.

It is so ordered.

Dated and delivered at Mombasa this 9<sup>th</sup> day of May, 2008.

**L. NJAGI**

**JUDGE**