

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 299 of 2007

NIC BANK LIMITED.....PLAINTIFF

- VERSUS -

STEEL REINFORCEMENTS LTD.....1ST DEFENDANT

DILIP B. PATEL.....2ND DEFENDANT

PRAKASH BHABAR PATEL.....3RD DEFENDANT

R U L I N G

On 29th November 2007, Judgment was entered in favour of the plaintiff and as against the defendants in default of appearance. Thereafter, the plaintiff notified the defendants of the said entry of judgment. According to Dilip B. Patel, the 2nd defendant, it was upon receipt of the notice of execution that he became aware that a suit had been filed against the defendants. On 29th May 2008, the defendants instructed Messrs Paurvi Rawal Advocate to enter appearance on their behalf. On 5th June 2008, the defendants filed an application under the provisions of **Order IXA Rule 10** of the **Civil Procedure Rules** seeking the setting aside of the *ex parte* judgment entered against them. They further prayed for leave of the court to be allowed to file a defence out of time to the plaintiff's claim. The grounds in support of the application are stated on the face of the application. The defendants contend that they were not served with summons to enter appearance and were therefore unaware that a suit had been filed against them. They stated that they only became aware of the suit when they were given notice of the entry of judgment in default of payment. They therefore craved for the exercise of this court's discretion to grant the orders sought in their application.

In the affidavit in support of the application, Dilip B. Patel, a director of the 1st defendant, denied the assertion by the plaintiff that any of the three defendants were served with summons to enter appearance. In particular, he denied service of the summons by the process server, Dickson Aura Etabale. He reiterated that he only became aware of the notice of execution when he was given a copy of the same at the offices of Blue Nile Company Ltd. He insisted that the 1st defendant was not properly served since service was not effected on the registered offices of the said 1st defendant, a duly incorporated company. He urged the court to set aside the *ex parte* judgment *ex-debito justiticiae*. He further deponed that the defendants had a good defence which raised triable issues which ought to be considered in a full trial.

The plaintiff is opposed to the application. The plaintiff filed grounds in opposition to the application. It reiterated that the defendant were duly served with summons to enter appearance, and which fact was admitted by the defendants as they had conceded that they were aware of the existence of the suit in 2007. The plaintiff was of the view that the application was presented in bad faith. It further contended that the defendants were guilty of laches. The plaintiff stated that the defendants had neither denied nor offered any evidence to controvert the contents of the affidavits sworn by process server regarding the places where the defendants were served. The plaintiff contends that it would serve no useful purpose were the interlocutory judgment set aside, since the defendants had not denied being indebted to the plaintiff. It reiterated that the defendants purported defence was therefore a sham and an abuse of the court process. The plaintiff stated that the defendants had placed no valid ground before the court to enable it exercise discretion in their favour by setting aside the judgment, which in its view, was regularly

entered.

At the hearing of the application, I heard the rival arguments made by Mr. Mandala on behalf of the defendants and by Mr. Kimondo on behalf of the plaintiff. I have carefully considered the said submissions made. I have also read the pleadings filed by the parties in support of their respective opposing positions. The principles to be considered by this court in deciding whether or not to set aside an *ex parte* judgment are well settled. Where it is established that there was no proper service, this court has no option but to set aside the judgment *ex-debito justiticiae* (see **Kanji Naran vs. Velji Ramji (1954) 21 EACA 20**). Where it is established that the defendant was served, this court has unfettered discretion to set aside the *ex parte* judgment obtained in default of appearance provided that in so doing, no injustice is caused to either party. The discretion to set aside *ex parte* judgments 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 the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (See **Shah vs. Mbogo [1967] EA 116**). In considering whether or not to set aside the *ex parte* judgment, the court must be satisfied that the defendant has a good defence on merits (See **Maina vs. Mugiria [1983] KLR 78**.)

In the present application, it is the defendants' case that they were not served with summons to enter appearance. The 2nd defendant deponed that he was not personally served with summons to enter appearance. The 3rd defendant did not however swear any affidavit in support of the application. Other than the assertion by the 2nd defendant that the 1st and 3rd defendants were not served with summons to enter appearance, nothing was placed before the court to support the claim that indeed the said defendants were not served with summons to enter appearance. It was also rather curious that the 2nd defendant stated under oath that he became aware of the suit when he was given notice of execution at the offices of Blue Nile Company Ltd yet it was the same offices that the process server deponed that he had served the 2nd defendant.

It was evident that prior to the 2nd and 3rd defendants being served, the plaintiff had instructed an investigator to trace the whereabouts of the said defendants. It was the said investigator who accompanied the process server when he served the 2nd and 3rd defendants. The 3rd defendant was served at his business premises at Kericho township. It was clear from the contents of the said affidavit of service that the defendants were indeed served with summons to enter appearance. The 2nd defendant swore that the process server was telling lies when he stated that he had indeed served them. Nothing could have been easier than the 2nd defendant to apply to have the process server cross-examined on the contents of his affidavits to determine its veracity. Upon evaluation of the facts of this case relating to whether service was effected on the defendants, I do hold that indeed the defendants were properly served. As stated earlier, even after reaching a finding that the defendants were properly served, this court has the discretion to set aside any the *ex parte* judgment. Have the defendants placed before this court sufficient grounds to enable this court set aside the said *ex parte* judgment?

The plaintiff's claim is in respect of monies that were allegedly advanced to the defendants pursuant to several hire purchase agreements. According to the plaintiff, the defendants partly repaid the amount advanced, but later defaulted in repaying the full amount. The plaintiff's claim is therefore for the balance that remained outstanding together with interest. In their draft defence, the defendants deny ever borrowing the said amount claimed from the plaintiff. The 2nd and 3rd defendants deny giving guarantees in respect of the loan which was allegedly advanced to the 1st defendant. In the alternative, the defendants pleaded that their failure to repay the loan in full was on account of the plaintiff's breach of contract in that the plaintiff failed to fully finance the hire purchase agreements as agreed. They complained that the plaintiff had failed to deliver copies of the hire purchase agreement to the 1st defendant for approval by its board of directors. They further averred that it was the plaintiff who was in actual breach of the hire purchase agreement on the basis that it had filed the present suit before exhausting all available remedies provided in the hire purchase agreement.

I have carefully considered the said proposed defence. It was clear to this court that the said defence

raises no triable issues. The defendants on the one hand deny that hire purchase agreements were entered between themselves and the plaintiff. On the other hand, they admit that such agreements were in fact entered into but were breached by the plaintiff. It was evident that the said defence is just meant to delay the just determination of this suit. Although the defendants allege that the plaintiff breached the hire purchase agreements, I think it was dishonest for the defendants to raise the issue of breach after a suit has been filed against them for the recovery of the outstanding balance. It was clear that the defendants owe the plaintiff the amount pleaded in the plaint. The defendants cannot plead in their draft defence that the plaintiff ought to have followed a particular cause of action in its bid to recover what is legitimately due to it. The defendants did not state what cause of action should have been taken place before the plaintiff filed the present suit. It was clear that the said defence, apart from being evasive, is contradictory and raised no issue capable of persuading this court to set aside the *ex parte* judgment.

In the premises therefore, having considered the merits of the defendants' application, I hold that the plaintiff would be prejudiced if the judgment, which was regularly entered, is set aside. The plaintiff established that it served the defendants with summons to enter appearance. The defendants failed to enter appearance within the requisite period. This court cannot exercise its unfettered discretion to set aside the judgment since the defendants have placed no grounds before this court to persuade this court to exercise discretion in their favour. The application dated 5th June 2008 lacks merit. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED at NAIROBI this 25th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE