REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL SUIT 341 OF 1992

NATIONAL BANK OF KENYA LTD.....PLAINTIFF/RESPONDENT

- VERSUS -

(1) COMPUTER WORLD SERVICES LIMITED

(2) MASIBO PROTUS WATIBINI

(3) SIMON MAUNCHO

(4) NATHAN BARASA

(5) MATHIAS KEAH……DEFENDANTS

RULING

A perusal of the record herein reveals presence of a copy of a plaint dated 8th of January 1992 filed on a date which is not visible from the photocopy. It appears to have been an annexture to some affidavit. The cause of action against the 4th defendant applicant is contained in paragraph 4 of the plaint which reads:-

"4. By continuing guarantee and indemnity in writing dated 1st August 1986 each signed by the second, third, fourth and fifth defendants and addressed to the plaintiff in consideration of the plaintiff affording and or continuing to afford to the first defendant time credit, banking facilities and accommodation as therein set out, the second, third, fourth and fifth defendants jointly and severally guaranteed and bound themselves to pay on demand. In writing all sums of money which might then or from time to time become due or owing to the plaintiff anywhere from or by the first defendant solely or jointly with any other person provided that the total amount recoverable from the second, third, fourth and fifth defendants should not exceed Kshs.440,000/=. Vide paragraph 5 that in pursuance of the arrangements in paragraph 4, thereof, the plaintiff allegedly advanced certain monies to the 1st defendant at its request, on diverse dates within the knowledge of the defendants; as a result of which by 31st October 1989, the first defendant was indebted to the plaintiff in respect of the aforesaid advances, loan, monies paid and interest in the total sum of Kshs.133,694.85, together with interest thereon culminating in the figure prayed for in the paint of Kshs.188,3030.80 together with interest thereon at 21% per annum from 1st November, 1991 until payment in full."

There is also traced on record the fourth defendants defence dated 21st day of April 1992. It is a brief defence. Paragraphs 2, 3 and 4 reads:-

"2. The 4th defendant denies the contents of paragraphs 4 of the plaint and puts the plaintiffs to strict

proof thereof.

3. The fourth defendant states that he ceased being a director of the first defendant in 1987 and cannot be held liable for debts incurred by the first defendant after June 1987.

4. The contents of paragraphs 5, 6, 7 and 8 of the plaint are denied and the plaintiff is put to strict proof thereof."

On record also there is an application by way of notice of motion brought under Order 35 Rule 1 of the Civil Procedure Rules dated 4th February 2004 and filed on 10th February 2004. It sought 2 prayers:-

"(1) Judgment be entered for the plaintiff against the 4th defendant as prayed in the plaint.

(2) The 4th defendant do pay the costs of this application."

The application was anchored on the grounds in the body of the application namely that the 4th defendants defence was a bare denial and did not raise any triable issue. The supporting affidavit sworn by one James Irungu Mwangi on 6th day of February, 2004 and filed on 10th February 2004 reiterated the content of the plaint and then added that by reason of maters deponed therein the 4th defendant indebted to the plaintiff/applicant.

The Court has not traced a response to the said application by the 4th defendant. It has however traced an entry on the record by Lenaola J, it reads:-

"*Order the application dated 4.2.2004 was served on 14.2.2004 and notice issued to the 4th defendant. I have looked at the application and I hereby enter judgment as prayed in prayer 1 of the application. Costs to the Plaintiff*".

The 4th defendant has now come to this court by way of notice of motion under Order XXXV Rule 10 Civil Procedure Rules and Section 3A of the Civil procedure Act seeking three reliefs:

(a) That the order of summary judgment entered against the 4th defendant/applicant Nathan Barasa be set aside.

(b) That the 4th defendant/applicant be granted leave to defend the plaintiffs claim.

(c) That costs of this application be in the cause.

The grounds in support are set out in the body of the application, content of the supporting affidavit, annextures, written skeleton arguments, oral submissions in court and case law. The salient features of the same are:-

(1) Indeed the applicant was one of the founder Directors of the first defendant.

(2) That in the year 1987 he resigned from his position as a Director of the first defendant which resignation was accepted.

(3) That he is not aware of any monies having been advanced to the 1st defendant by the plaintiff more so when the dates on which the said monies were advanced are not disclosed in the plaint.

(4) That after his resignation was accepted and change of Directors effected, him applicant was no longer obligated to meet any liabilities on behalf of the first defendant.

(5) He maintains that he was never served with summons to enter appearance with a copy of the plaint

and if any was served on Messers Cheloti/Etole Advocates on his (applicants) behalf the same was received without jurisdiction.

(6) That the purported entry for appearance and filing of the defence on his behalf by the said firm was without his knowledge as well as instructions and that is why the said Counsel never attended Court, on the date the application for summary judgment was recorded and allowed.

(7) That proof of lack of instructions to the said firm of Cheloti and Etole Advocates is evidenced by the fact that they declined to act for the applicant in another related matter involving a different plaintiff but against the first defendant.

(8) That he has a sound defence evidenced by a draft defence which was not annexed.

(9) That he came to know of the existence of the proceedings and entry of judgment against him when he was arrested by Court bailiffs for failure to pay the debt owed by him.

In their written skeleton arguments Counsel for the applicant stressed the following:

(i) It is true that judgment sought to be set aside was entered against the applicant more than 4 years ago but the court has to look at the reason given for not coming to court promptly, which reason the applicant has given as being:-

(a) He was never served with summons to enter appearance.

(b) He resigned from the Directorship of the first defendant.

(c) The mandate of Messers Cheloti & Etole Advocates acted for the first defendant generally which general acting did not mean that the said counsel had authority to act for the applicant in particular move so when it is in writing that the said firm of advocates had written to the applicant informing him that they would not act for him in a related matter but with a different plaintiff.

(d) Lack of instruction on the part of the said firm is confirmed by the fact that the said firm filed no response on the applicants on behalf. In opposition to the application for summary judgement against him, nor attend the hearing of the said application.

(ii) Further reason for reopening the matter for the applicant is fortified by the fact that liability of the applicant to the respondent is in doubt as it has not been disclosed as to when the said monies were disbursed to the first plaintiff and so there is nothing to show that they were given when the applicant was still a Director. The possibility that liability was incurred after the applicant had left the Directorship of the 1st defendant cannot be ruled out.

(iii) By reason of what has been stated in number ii above, it is necessary that the truthfulness of how the debt of Kshs.133,694.75 was incurred, when it was incurred and by whom be interrogated in a trial with the participation of the applicant.

(iv) The guarantee instrument ruled upon by the respondent as the basis of liability does not assist in ousting the applicants application because the plaintiff has not pleaded the express request for time credit and or banking facilities and accommodation made by the 4th defendant on behalf of the first defendant. Neither does it state when the demand in wiring was sent to the 4th defendant to meet the liability. The one relied upon by the Respondents was sent to a wrong address and was returned unclaimed.

(v) They intend that by reason of the afore stated maters in number i, ii, iii, iv the applicant has demonstrated that he is deserving of the reliefs of being sought.

In opposition to the application the respondent put in grounds of opposition dated 23rd May2008. There

is also an affidavit sworn by one Zipporah Kingonga Mogeka sworn on 29th May2008. The court did not notice this anomaly on time to invite the respondent to elect as to which processes contrary to the requirement of Order 50 Rule 16 (1) Civil Procedure Rules which reads:-

"*Order 50 Rule 16 (1). Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any, not less than here year days before the date of hearing."*

This court in the courses of its judicial duty has construed this provision severally and it has always held the view that there is no jurisdiction on the part of a litigant to file both process because of the use of the word "*or*" as opposed to the use of the word "*and*" it therefore follows that this court cannot take into consideration both process when determining the issues in controversy herein.

This court is however on a difficulty as it did not notice the anomaly before argument. It cannot choose one as opposed to the other on its own. It will set out the salient features of both but will rely on the points stressed by the respondents caused in the written skeleton arguments. Eight (8) grounds of opposition have been put forward namely:-

(1) The application is inordinately delayed. Judgment was entered in favour of the plaintiff on the 11th March 2004 more than four years ago.

(2) Prior to the filing of the suit, on the 5th December l989 and 26th September, l991 letters of demand were sent to the fourth defendant who was made aware of the existence of the debt due to the plaintiff but failed to make payment. The fourth defendant should not be allowed to defeat the judgment in favour of the plaintiff.

(3) The summons to enter appearance and a copy of the plaint were properly served on the fourth defendant. An appearance was entered and a defence filed on his behalf by the firm of Cheloti & Etole Advocates. The fourth defendant never changed his advocate or gave notice of his intention to act in papers as required by order 3 rules 6 and 9 of the civil procedure Act. The fourth defendants advocates did not also apply to withdraw from acting for the fourth defendant.

(4) The fourth defendant is therefore estopped from seeking to challenge the defence filed on his behalf by the firm of Cheloti & Etole Advocates.

(5) All the matters which the fourth defendant now seeks to raise should have been raised in the defence filed on his behalf and the fourth defendant should not be allowed to raise a new defence after such a long delay.

(6) No reasonable explanation has been offered as to why the firm of Cheloti and Etole failed to attend to court on 11th March, 2004 when the application for summary judgment was argued.

(7) The fourth defendant bound himself to repay on the demand the debt due to the plaintiff by a continuing grantee and indemnity which he signed on the 1st August 1986 and it is irrelevant that he ceased to be a director of the first defendant company at the time the suit was instituted.

(8) All the matters set out in the affidavit of James Irungu Mwangi sworn on 6th February 2004 and filed in court on 10th February 2004, are correct.

In their written skeleton arguments as well as oral highlights counsel stressed the following points:-

(i) That the court ought to dismiss the applicants application which is inordinately delayed as the judgement sought to be set aside was entered in favour of the respondent on 11th March 2004 more than 4 years ago.

(ii) They contend that in both the supporting affidavit as well as the supplementary affidavit sworn by the 4th defendant has not given any proper explanation as to why him the fourth defendant or his advocate failed to attend the hearing of the summary judgement application.

(iii) In consideration setting aside of the summary judgement under Order 35 Rule 10 Civil Procedure Rules, the court has to consider the reasons given for not attending court.

(iv) They contend that the fourth defendant is estopped from denying the existence of a defence dated 21st April 1992 properly filed in court because he never changed his advocate or give notice to act in person as it is required by Order 3 Rule 56 and 9 of the Civil Procedure Rules, neither have the firm of Cheloti & Etole ever applied to lease acting for the said fourth defendant to date.

(v) They maintain the court deliberated upon the claim against the fourth defendant and entered summary judgement in favour of the plaintiff.

(vi) The court is urged to take note of the fact that it has a duty to protect the interests of a successful litigant.

(vii) They do not agree with the contention of the applicant that summons to enter appearance were not served on him, as he has not explained how then the firm of Cheloti & Etole came to enter appearance and file a defence on his behalf.

(viii) Proof of service of summons to enter appearance has been hampered by the fact that the court file has disappeared mysteriously severally proved by the presence of reconstitution orders with the latest one having been made on 27th September 2007. For this reason they urge the court not to allow the fourth defendant to sue this fact to his advantage.

(ix) The plaintiff was not a party to NAIROBI HCCC 3935 OF 1989, CITY FINANCE BANK VERSUS COMPUTER WORLD SERVICES fortified by the fact that no pleadings have been annexed by the applicant to provide that link in order to assess the reasons advanced by the fourth defendant on authority by the firm of Cheloti and Etole to act for him. More so when the plaintiff is not privy to the client relationship between the fourth defendant and the said advocates firm and as such the plaintiff is not in a position to give evidence to the effect that the said firm had authority to erect for the fourth defendant. It is the fourth defendant who is in a position to adduce such evidence which they have not done.

(x) In the absence of proof as suggested in number (ix) above there is no basis for the fourth defendant applicant denying the validity of entry of appearance and the filing of the defence on his behalf by the firm of Cheloti & Etole Advocates.

(xi) In determining whether to set aside a judgement or not the court has to be satisfied that there is a good defence and cause for the delay in appearing has been shown. In the circumstances of this case fourth defendant filed a defence which was a bear denial and for this reason the fourth defendant is not deserving of the reliefs being sought.

(xii) The court is enjoined to be guided by the following principles established by case law cited to court normally:-

(a). The courts discretion in setting aside is not meant to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.

(b). There must be a good defence intended to be put forward.

(c). There must be a good explanation for the delay in appearing.

(d). Where there was a defence on record which was not cannot allow the fourth defendant to propose

another defence to support its case.

(e). They contend that the dates when the sums were advanced was indicated in annexture JM 1 attached to the affidavit of James Irungu Mwangi sworn on 6th February 2004 and filed in court on 10th February 2004.

(f). They contend that this court cannot be called upon to retry the same issue that it was called upon to deal with when dealing with the application for summary judgement.

(g). The fact that the fourth defendant resigned from directorship of the first defendant was no justification for him failing to meet his liabilities to the first defendant under the guarantee more so when the guarantee was continuing and there is no proof that he served a notice of intention not to be bound after the alleged resignation. On the basis of the foregoing the court was urged not to allow the application.

A reading of all items set out in the respondents skeleton arguments with the exception of item 19 which referred to the affidavit of Zipporah Mogaka, the rest were based on the grounds of opposition. As noted earlier on, the law does not allow a respondent to file both process. The court also noted that the error was not discovered earlier enough to allow it to ask the respondent to make an election. That not withstanding the court is not denied of its tools of trade to enable it resolve the problem. It will not hesitate to call into use one of its most ……tools of trade namely judicial discretion, whose only fetter to its exercise is that it has to be exercised judiciously and with reasons. Its exercise herein is for purposes of the court to determine which of the two processes filed by the respondent is to be taken into consideration when determining the application subject of this ruling. In this courts opinion the process to be saved for consideration is the grounds of opposition once it is the basis for the skeleton arguments. The affidavit of Zipporah Kinanga Mogaka sworn on 27th day of May 2008 and filed the same date is struck out.

On case law the applicants counsel relied on the celebrated case of SHAH VERSUS MBOGO AND ANOTHER [1967] EA 116 whose cardinal principle is that "*the courts discretion to set aside an exparte judgement is intended to be exercised to avoid injustice or lordship resulting from accident; in advertence or exercisable mistake or exhibit not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay, the cause of justice*."

The respondents counsel on the other hand in addition to the SHAH CASE (SUPRA) also referred the court to the case of PATEL VERSUS EA HANDLING SERVICES LTD. [9174] EA 75 where the appellant obtained a default judgment against the respondent which judgment was set aside by the High Court. On appeal against that order (Order for setting aside contended that before a default judgement can be set aside the court must be satisfied both that there is a good defence and that there was a cause for the delay in appearing. On that account the CA held that the discretion of the court is not limited.

Reference was also made on a treatise on the laws of guarantee by Kevin Patrick MC Guinness Carswell – Sweet & Maxwell Toronto-London 1986. page 164 paragraph 6.28 under sub heading limitation by time and cancellation the following was highlighted by counsel:- "*However in most cases a continuing guarantee will continue until notice of cancellation as given by the surety the creditor (that is until the surety notifies the creditor that he will no longer be liable for the debts of the principal and that the former after of a guarantee is no longer available for acceptance by the creditor by way of extension of further advances. . . . However cancellation for whatever reason will not affect rights that have accrued to the creditor prior to the termination of the guarantee. In other words cancellation is not the same as discharge; cancellation allows the surety to escape potential liability of which may arise in the future, but not liability which arsoe before the time of cancellation; discharge fees the surety from existing (although not necessarily all) liability under the guarantee. . . . (vide paragraph 6.30 page 166) when judgment is obtained by the creditor against the surety ona continuing guarantee, the contract of surety ship comes to amend; and the surety becomes primarily liable to the creditor on the judgment itself. Thus the mere giving of time to the principal debtor after the judgment is not obtained will not discharge the liability of the surety*."

On the courts assessment of the facts herein and after due consideration of the rival arguments herein the following matters are not in dispute herein namely:-

(1) That the 4th defendant/applicant was one of the defendants sued by the plaintiff/respondent herein.

(2) That at one time he was a director of the first defendant in the suit and he had allegedly resigned from the said directorship and that the said resignation was accepted by the then managing director of the 1st defendant in the suit was back in June 1987.

(3) That the directors had alleged signed a debenture in favour of the first defendant guaranteeing payment of monies advanced to the first defendant by the plaintiff on divers dates.

(4) Apparently the 1st defendant defaulted in the repayment leaving the plaintiff with no option but to follow up the directors to recover the same.

(5) That the suit was duly filed and although the 4th defendant/applicant alleges that he was not served with summons to enter appearance, the firm of Cheloti & Etole entered appearance and filed defence on his behalf.

(6) It is after the defence was filed that the plaintiff moved the court for summary judgment which was entered by the court on 11.3.2004.

(7) It is also not disputed that the counsel then on record as appearing for the 4th defendant/applicant neither filed a response to the application for summary judgement nor attended court on the date the said application was disposed off.

(8) It is not in dispute that the 4th defendant/applicant has come to court for 4 years later seeking to set aside the said summary judgement.

The application has been presented under Order 35 Rule 10 Civil Procedure Rules which reads:- "*Order 35 Rules 10 Any judgment given against any party who did not attend at the hearing of an application under this order may on application be set aside or varied on such terms as are just*." This courts construction of this provision 45 that jurisdiction exists to set aside such a judgment by the use of the word "*may*". This court has judicial notice of the fact that the use of the word "*may*" in normal circumstances denotes an lection to do or not to do some things, popularly known in judicial terms as the election to exercise the courts discretion or not to exercise the same in favour of a litigant.

Like all other provisions donating this power to the court the yardstick to be used by the court in determining whether to exercise the discretion or not to exercise the same is not in built in the provision. The yardstick has been developed by case law by the superior courts and as refined by the court of appeal. The principles for the exercise of the same have now crystallized and this court has judicial notice of the same. These are:-

(1) That the jurisdiction to exercise the same exists.

(2) The power to do so is donated by provisions of law.

(3) Whereas the yardstick for the mode of executing the exercise is provided by case law.

(4) The characteristics to be borne in mind when exercising the same are that:-

(i) The exercise of the discretion is unlimited or unfettered.

(ii) The only letter attached to it is that it has to be exercised judiciously and with reasons.

The court having owned itself with this power and bearing in mind the guidelines from the CA on how the same is to be exercised has to decide whether the applicants plea for the exercise of the discretion is to be acceded to or not.

The applicants is no other than that of a litigant knocking at the door to the seat of justice seeking leave of court to allow him participate in the proceedings once again the provision donating the power simply enjoins the court to set aside such judgment on such terms as may be just. The yardstick for determining what is just in order to determine qualification for the relief is not in built on the provision. Once again this has been refined by case law. The famous one is the case of SHAH VERSUS MBOGO (SUPRA). All that an applicant needs to do in order to qualify for the relief of setting aside is simply to demonstrate that facts presented to court have satisfied the ingredients required to be met. These are none other than those set by the decision in the SHAH VERSUS MBOGO CASE (SUPRA). These are:-

(1) That if not exercised in his favour he will suffer injustice or hardship.

(2) That failure to take action leading to the entry of summary judgment in the manner entered against him was as a result of an accident in advertence, excusable mistake or error.

(3) That he has not deliberately sought whether by evasion or otherwise the obstruct or delay the cause of justice. Additional also form case law are:-

(4) That the delay and or reason for non-appearance has been explained.

(5) In the case of a defendant like in the case subject of this ruling that he was a reasonable defence.

These have been applied to the rival arguments herein and the court makes the following findings on the same.

(1) On the ingredient of suffering injustice and hardship the applicant alleged that he is not obligated to meet the respondents claim as he had resigned from the 1st defendants directorship and his resignation had been accepted by the managing director of the first defendant. He has exhibited the said documentation namely a letter dated exhibit 1 which is the letter of resignation dated 23rd May 1987, exhibit 2 a letter dated 29th May 1987 from the managing director of the fist defendant to the applicant accepting his resignation and exhibit 3 dated 5th January of a year not very legible from Cheloti, Etole and Kokonya Advocates addressed to the managing director of the 1st defendant to the effect that if the too (applicant and managing director) then the said firm of advocates was going to cease acting for the said Nathan Barasa. The respondent countered that by saying that resignation peruse without a release by the plaintiff from the guarantee did not absolve the applicant from responsibility to meet debts incurred by the 1st defendant reliance was placed on the guarantee document. A copy had been annexed to the replying affidavit of Zipporah Mogaka which was struck out. However the court has traced a copy which had annexed to the affidavit of James Irungu Mwangi sworn on 6th day of February 204 and field on 10th February 2004. The copy is contained in a bundle of exhibits marked JM1. The court has schemed through this document and the court has observed the following:-

(1) In the column of the names and guarantors there is indicated the names of Mr. Nathan Barasa, P.O. Box 30646, Nairobi.

(2) In the column for signatures of guarantors there is a signature. It will therefore be necessary to establish that this is the signature of the applicant.

(3) Below the name of Nathan Barasa there space provided for the naming of a company. It is not clear whether it refers to the lending or the borrowing company.

(4) Below there is provision for the following words sealed with the common seal of limited.

This first day of August 1986.

Director

Director

Secretary

The common seal is not put and the limited company whether lending or borrowing company is not indicated. The space provided for two directors and a secretary is not endorsed.

In this courts opinion since this is the document on which the plaintiff has anchored its claim its validity as well as enforceability is a matter of permanent consideration. In this courts opinion a document that looks incomplete is questionable and it will therefore be unjust if a court of justice were to pin down a party to meet ones liabilities based on an incomplete document whose validity is questionable without allowing such a party an opportunity to be heard on the same.

It is further observed that the entity borrowing is indicated as Computer World Services Ltd. The resolution to borrow either by the board of directors or shareholders is not annexed. This court has judicial notice of the fact that a body corporate transacts its business through its board of directors or shareholders by way of resolution. In the absence a resolution the validity of the entire transaction becomes questioned.

There is also observation that the signatures of the lending company and its seal are missing from the said document issue will also arise whether the plaintiff can rely on that document which on the face of it appears to be invalid to assert its claim.

It had been contended by the applicant that the plaintiff had not indicated in its plaint the dates on which these amount were disbursed. The respondent responded to this by saying that the amounts are specified in the …….. annexed to the supporting affidavit. These are part of annexture JM 1. A perusal of the same reveals that it is account number 011029935 in the name of the 1st defendant held at Moi Avenue Branch presumably of the plaintiff. The fist entry reads 04.09.1986 shortly after the date of 1st August 1986 when the guarantee was allegedly given. The last entry reads 31st October 1991. The balance shown is Kshs.188,303.80. No doubt this is the amount indicated in the plaint.

The said statements are not backed up by any other document to show the nature of the account and who made these transactions. Since it is pleaded that the various sums were being disbursed from time to time, the requesting documents and the person who made the requests are not exhibited.

Further if the disbursements were being made on behalf of the first defendant a question would then arises to whether the requests for disbursements were made with authority of the 1st defendant through resolution of either the board or shareholders in the first instance. In the second instance issue will arise as to whether the said disbursements were made to authorized persons, and were expended an authorized activities of the company.

In view of the above assessment, and in the circumstances displayed herein shutting out the application being heard firstly on the very document on which the plaintiffs claim is anchored and secondly on the validity of the disbursements before he can be pinned down to meet the claim in favour of the plaintiff will not only be injustice, but also highly prejudicial and oppressive leading to a likelihood of injustice being suffered by him.

Also not to be treated lightly is his act of resignation. It will e necessary to look into the 1st defendants Articles and Memorandum of Association to determined the extend of liability of ex directors for the company's debts upon their ceasing from being such directors.

On the issue of deliberate move to evade or delay the cause of justice. Indeed 4 years have gone by since the summary judgment was entered. The applicant pleaded ignorance and lack of instructions to the firm which entered appearance in his behalf and failure for the said counsel to respond to the application and alert the applicant of entry of judgement. There is no explanation as to why the counsel backed off without even filing a notice to cease acting. As at now the court is not able to tell what the correct position is. A better way of letting the court know the correct position would have been to request for an affidavit from the said turn if it is still exists. None was availed. The onus to do so lay with the applicant. However whether this default is to be construed against him to the detriment of his application will depend on the courts findings on the earlier issues raised and the remaining two issues of delay and existence of triable issues.

Existence of triable issues can only be derived from a draft defence. The one filed earlier on raised one triable issue namely whether a director who has resigned form his directorship of the said company can be followed to make good those debts especially where now that it is apparent that the guarantee document is open to challenge as pointed out above.

The court appreciates with uttermost due respect to the learned Judge that the learned Judge was entitled to exercise his judicial discretion in the manner he did. The court also appreciates that it is not sitting on appeal over those orders. However since the aggrieved party has come to this court seeking orders that the doors to the seat of justice be opened for him to be heard, this court cannot shut its eyes to the mode of entry of that judgment and the reason given for entry of the same as these go to contribute towards the determination of existence of sufficient reason to either deny or accede to the request for setting aside. A revisit to the entry of the said entry on the record simply reveals that he learned Judge simply stated:- "*I have looked at the application and I hereby enter judgment as prayed in prayer 1 of the application*." There is no mention of scrutiny of the documents relied upon. In this courts opinion had the learned Judge scrutinized the guarantee document and noted the defects noted above by this court, it is doubtful if the entry of the said summary judgement would have been made in the demonstrated circumstances assessed by this court. In this courts view had the court looked at the defence on record and the guarantee document it would have declined entry of judgment on the ground that triable issues are raised.

It is trite law established by case law emanating from the court of appeal and as by the superior courts that this court has judicial notice, that even where only one triable issue has been raised the defendant should be granted either conditional or unconditional leave to defend. Irrespective of whether the defence put forward eventually succeeds or not, so long as it is triable.

Besides what was stated in the earlier defence, there is what has been determined by this court as a triable issue namely the validity of the guarantee document. The second is whether the transactions whose entries are contained in the bank statements exhibited in the supporting affidavit were duly authorized by authorized persons authorized to transact the same on behalf of the1st defendant and were for the benefit of the said 1st defendant, in order to bind the 1st defendant. Issue also arises as to whether the said borrowing was duly sanctioned by the 1st defendant in view of the fact that a resolution to so borrow was not annexed to the supporting affidavit.

As for existence of a reasonable explanation for the delay, this court has already ruled that has been put forward would have been fortified by calling for an affidavit from Chelotie, Etole & Kekonya Advocates to explain who gave their instructions to appear and file defence and why they took no steps in the mater thereafter, despite them not taking steps to remove themselves form the record. The court has ruled that failure to call for such an affidavit should be construed against the application and this would have been fatal to the success of the application had there not been other circumstances demonstrated which militate against refusal to grant the application especially the questionability of the validity of the documents on the basis of which the suit is founded to demonstrate that facts presented to court have settled the ingredients required to be met. These are non other than those set by the decision in the SHA VERSUS MBUGU case (Supra). These are:-

(1) that if not exercised in his favour he will suffer injustice or hardship

(2) that favour to take action leading to the entry of summary judgment in the mention entered against him was a result of an accident of an advertisement exercisable mistake or error.

(3) That he has not deliberately sought whether by aversion or otherwise to obstruct or delay the cause of justice

Additional also form case law are.

(4) That the delay and or reason for no appearance has been explained

(5) In the case of a defendant wherein the case subject of him suing that he was a reasonable defence.

These have been applied to the oral arguments herein and the court makes the following findings in the same.

(i) on the ingredient of suffering injustice and hardship the applicant alleged that he is not obliged to meet the respondent, claim as, he had resigned from the 1st defendants direction ship and his resignation had been accepted by the managing director of the first defendant. It has exhibited the said documentation namely a letter dated exhibit 1 in which his the letter of resignation dated 23rd May 1987, exhibit a letter dated 29th May 1987 form the managing director of the first defendant to the applicant accepting his resignation and exhibit 3 dated 5th January of year not very legible from Cheruto Otolo & Pokonya Advocate addressed to the Managing Director of the 1st defendant to the effect that if the two (applicant and Managing Director) then the said firm of advocate, was going to cease acting for the said Father Beraja. The respondent countered that by saying that resignation purse without a release by the plaintiff from the guarantee did not absolve the applicant from responsibility to meet debts incurred by the 1st defendant. Reliance was placed on the guaranteed document. A copy had been annexed to the replying affidavit of Ziporah Mugeka which was struck out. However, the court has traced a copy which had annexed to the affidavit of James Irungu Murungi signed on 6th day of February 2004. The copy in contained in a bundle of exhibits marked JM1. The court has schemed through this document and the court has observed the following:-

(i) in the column of the names and guarantors therein indicated the names of Mr. Nathan Beraja P.O Box 30646 Nairobi.

(ii) In the column for signatures of guarantors there is a signature. It will therefore be necessary to establish that this is the signature of the applicant.

(iii) Below the name of Nathan Beraja there space provided for the naming of a company. It is not clear whether it refers to the lending or the borrowing company.

(iv) Below there is provision for the following moves sealed with the common seal of limited. This first day of August 1986. Director

Dirctor

Secretary.

The common seal is not put and the limited company whether lending or borrowing company is not indicated. The space provided for two directors and a secretary is not endorsed.

In this courts opinion since this is the document in which the plaintiff has enclosed its claims its validity as well as enforceability in a matter of payment consideration. In this courts opinion a document that comes incomplete is questionable and it will therefore be unjust if a court of justice were to put dawn a party to meet and liabilities based on an incomplete document whose validity is questionable without allowing such a party an opportunity to be head on the same.

It is further observed that the entity borrowing as indicated as Computer World Services Ltd. The revolution to borrow either by the board of Directors or share holders is not annexed. This court has judicial notice of the fact that a body corporate transacts its business through its board of Directions or shareholders by way of resolution, in the absence of a resolution the validity of the entire transaction becomes questioned..

There is also observation that the signature of the lending company and its seal are missing from the said document issue will also arise whether the plaintiff can rely on that document which on the face of it appears to be invalid to assert its claim.

It had been contended by the applicant that the plaintiff had not indicated in its plaint the dates on which this comments were dismissed the respondent responded to this by saying that the aments are specified in the statements annexed to the supporting affidavit. These are part of annexture JM1. A perusal of the same reveals that it is account number 011029935 in the name of the 1st defendant held at Moi Avenue Branch presumable of the plaintiff. The first entry reads 04/09/86 shortly after the date of 1st August 1986 when the guarantee was allegedly given. The last entry reads 37/October 1991. The balance shown is Ksh 188,303.80. No doubt this is the amount indicated in the plaint.

The said statements are not backed up by any other document to show the notice of the account and who made these transactions. Since it is pleaded that the various sums were being disbursed from time to time, the documents and the person who made the requests are not exhibited.

Further of the disbursements were being made on behalf of the first defendant of question arise as to whether the requests for disbursements where made with authority of the 1st defendant through resolution of either the board or share holders in the first instance in the second instance. Issue will arise as to whether the said disbursements were made to authorized person, and were expended as authorized activities of the company.

In view of the above assessments and in the circumstances displayed herein shifting out the application being heard justly on the validity of the very document on which the plaintiff claims is adhered and secondly on the validity of the disbursement before he can be pinned down to meet the claim in favour of the plaintiff well not only be injustice but also rightly profiled and pressure leading to less a location of injustice being suffered by him.

Also not to be treated lightly is his act of resignation. It will be necessary to leave in to the 1st defendants articles and memorandum of a solution to determine the extend of liability of ex directors for the company's debts upon their ceasing from being such directors.

On the issue of deliberate more to evade or delay the cause of justice indeed 4 years have gone by same the summary judgment was entered. The applicant pleaded signature and list of instruction to the firm which entered appearance on his behalf and failure for the said counsel to respond to the application and alert the applicant of entry of judgement. There is no explanation as following the counsel caked of without ever filing a notice to cease acting. As at new the court is not able to tell what the correct portion is. A better way of letting the court review the correct portion would have been to review it for an affidavit from the said firm if it still exists none has availed. The aris to do so by which the applicant. However whether this defence is to be confirmed against him to the determined by his application will depend on the courts findings on the earlier issues raised and the remain tow issues of delay and existence of mable issues

Existence of mable issues can only be delivered from advert defence. The one filed earlier as raised one mable issue namely whether a Director who has resigned from his ownership of the said company can be followed to make good those debts especially where now that it is apparent that the guarantee document is as per to challenge appointed out above.

The court appreciates with at most due respect to the learned judge that, the learned judge was entitled to exercise his judicial directions in the manner he did. The court also appreciates that it is not

sitting on appeal over those orders. However since the afroved party has come to this court seeking orders that the doors to the seal of justice be opened for him to be heard, this court cannot shut its eyes to the made of entry of that judgment and the reasons given for entry of the same as there so to contribute towards the determination of existence of sufficient reason to either deny or evade to the request for setting aside. A resuit to the entry of the said entry on the record simply reveals that the learned judge simply stated " I have looked at the application and I hereby enter judgment as prayed in prayer of the application"

There is no mention of scritims of the documents acted upon. In this courts opinion had the learned judge structurized the guarantee document and noted the defects noted above by this court, it is doubtful if the entry of the said summons judgment named were been made in the demonstrated as discussed by this court. In this courts …had the court looked at the defence on record and the guarantee document it would have declined entry of judgment on the ground that mable issues are raised .

It is into law established by case law amending from the court of appeal and on di…… followed by the superior courts that this court has followed notice, that even where only one mable issue has been raised the defendant should be granted either conditional or unconditional leave to defend irrespective of whether the defence performed effectively succeeds or not, so long as it is mable.

Besides what was stated in the earlier defence, there is what has been determined by this court as a trouble issue namely the validity of the guarantee document. The second is whether the transaction whose entries are contained in the bank statements exhibited with supporting affidavit.

After existence of a reasonable explanation for the delay, this court has already ruled that has been put ….would have been fortified by calling for an affidavit form the …Etole & Company Advocates to explain who gave them instructions to appeal and file defence and why they form no steps in the matter thereafter, disputed from not taking steps to remove record. The court has ruled that failure to call for such an affidavit should be confirmed against the applicant and this would have been fetal to the success of the application had there not been others.

There was issue about new matters being raised in a new draft defence and yet these is one defence already on the record which has not yet been struck out or amended. This appears to have been annexed to the applicants further affidavit which unfortunately is not traced on the court record. This is so because the draft defence annexed annexture 4 to the supporting affidavit is for HCCC No. 3938 of 1989 between City Finance Ltd. Versus Computer World Services Limited, Mathias B. Keah, Nathan W. Barasa, Watuibini P. Masubmo and Simon Mauncho. This the plaintiff is different from the plaintiff herein, but the defendants are the same save that the order in which they are sued therein is different from the order in which they are sued herein.

The absence of the applicants further affidavit and its annexture not withstanding the court is of the view that there is sufficient material on record to enable it rule on the matter effectively. The court assumes that the annexed draft defence was meant to demonstrate the nature of the defence to be put forward by the applicant should he get a chance of being heard on the same.

On the question of unreasonable inordinate delay, there is no doubt that 4 years have gone by since the summary judgment was given. The applicant has given an explanation for the delay which has been attacked by the defence. As explained by this court in its own ruling delivered on 18th day of July 2008 in the case of CRESTED SEA AGECIES LIMTIED VERSUS MURANGA COUNTY COUNCIL setting aside of exparte orders depends on the reasons given for the delay and the decision to set aside and not to set aside as a matter of discretion on the part of the court, with the only fetter in the exercise of the same is that it has to be exercised judiciously and with reasons.

In the CRESTED AGENCIES LIMITED CASE (SUPRA) the applicant came to court 4 years later to set aside a consent judgment. Discussion of case law on unreasonable delay and exercise of the courts discretion runs from page 24 to 28. In summary at page 25 there is quoted with approval the case of ELITE EARTH MOVERS LTD. VERSUS KRISHNA BEHAL & SONS [2005] 1 KLR 379 a decision

by Emukule J. to the effect that the discretion of the court to set aside an exparte judgment is wide and flexible and it is exercised upon terms that are just. Whereas at page 20 there is quoted with approval the court of appeal decision in the case of CMC HOLDINGS LIMITED VERSUS NZIOKI [2004] 1 KLR 173. The guidelines established by that decision on the exercise of the courts discretion are as follows:-

(i). Discretion must be exercised upon reason and judiciously.

(ii). It should not be exercised wrongly in principle, neither should the court alt perversely on the facts.

(iii). It should be exercised to ensure that a litigant does not suffer injustice or hardship as a result of among other themes on excusable mistake or error.

(iv). It would not be proper use of such discretion if the court turns back to a litigant who clearly demonstrates such an excusable mistake, in advertence accident or error such as exercise of discretion would be wrong in principle.

(v). The court must consider not only the reason why the defence was not field or why the appellant (applicant) did not turn up for hearing but also whether the applicant has reasonable defence which is usually referred as whether the defence is filed already or a draft defence is annexed raises triable issues. In the own cited ruling of crested sea agencies limited the courts discretion was exercised in favour of the applicant who came to court four years later because failure to do so would have condoned fraud illegalities and irregularities and a reasonable explanation had been given for the delay.

Applying the same yardstick to the facts herein and for the reasons given in the assessment. The court is inclined to allow the applicants application dated 7th October 2007 and filed on 5th February 2008 because:-

(1) Though this court is not sitting on an appeal of the order of the learned Judge who granted the application for summary judgment (Isaac Lenaola J) a reading of the said order does not reveal that the learned Judge scrutinized the documentation that the applicant had anchored its claim on and on the basis of which the summary judgment was being sought.

(2) In this courts opinion had the court scrutinized the said documentations, it would have found the same questionable because of the following anomalies on the last page.

(i). The space where the name of the lending company is to be indicated is blank.

(ii). The space where the name of the borrowing company is to be indicated is blank.

(iii). The spaces provided for the signature of 2 directors and secretary are blank.

(iv). The space provided for the affixing of the seal of the borrowing company is blank.

(v). It is evident that the borrowing entity was a body corporate which trite law recognizes that it transacts its business through resolutions of either the board of directors or shareholders. It was therefore imperative for such a resolution to be annexed to support the authority to borrow. None was annexed.

(3) The defence on record then raised a triable issue namely whether a director who has resigned can be followed to meet liability for the debts of a company he has resigned from its directorship more so when some of these liabilities were incurred long after resignation had been accepted, when in fact the Memorandum and Articles of Association of the borrowing company had not been exhibited to show that such a director is not freed from liability upon resignation.

(4) Although failure on the part of the applicant to solicit an affidavit from the firm of Cheloti, Etole and Kokanga Advocates, to confirm lack of instructions to them to file defence and enter appearance on the applicants' behalf would have been used to disentitle the applicant of the relief sought as it was

incumbent upon him to prove reasonableness of the cause of the delay, nonetheless in the circumstances of this case and by reason of what has been stated in number 2 above, it will not be used to deny the relief sought, as in doing so will amount to condoning glaring irregularities and illegalities noted in the very document on which the plaintiffs suit is anchored.

(5) Allowing a judgement cemmented on an apparent questionable document will not only be causing injustice, but will be highly prejudicial and is likely to cause hardship and prejudice to the applicant.

(6) This court has had the advantage of looking at the intended draft defence and further affidavit of the applicant and finds that the further affidavit was responding to the Affidavit of Z.K. Mogaka which was struck out for the reason given. The annextures there to are similar to those annexed to the supporting affidavit for the application for summary judgement.

- the draft defence raises some issues observed upon by this court after considering the supporting evidence for the application for summary judgement which reviews the following issues.

(7) Even if it can be said that it was improper to annex an intended draft defence when there is already one on record. This in itself is not fetal to the application as the content confirm the basis of an amendment to include that which is not included in the defence already on record as it has not been struck out.but that not withstanding the court facts that there is sufficient data on the basis of which it can reach a suit conclusion of the matter as shown by the concluding finding herein.

(i). Whether the borrowing by the first defendant was properly sanctioned by a resolution of the 1st defendant.

(ii). Whether the guarantee document as displayed in the affidavit in support of the application for summary judgement is a questionable document because of the anomalies noted and whether on the basis of the said anomalies it could support a summary judgement as granted.

(iii). Whether the applicant can be followed for liabilities of the 1st defendant incurred after resignation inclusive of some which were incurred after resignation had been accepted.

(iv). Whether the plaintiffs failure to disclose the dates on which the various sums of money were advanced to the first defendant is fatal to his claim.

(v). Whether the exhibiting of the bank statements is sufficient proof of the indebtedness to the plaintiff, or in addition to the statements, there should be proof of persons who incurred these funds and an inquiry as to whether they were duly authorized to incurr them and were used for the benefit of the 1st defendant.

(vi). Whether the persons who incurred the expenses in number 1 above were duly authorized by resolution of the 1st defendant to so transact.

(8) In view of the fact that this court is of the opinion that had the learned judge scrutinized the documents the claim was anchored he may not have entered summary judgement, there is no justification to penalize the applicant to pay costs. Neither should the plaintiff /respondent be likewise penalized, as entry of the said summary judgment is a matter of the exercise of the courts' judicial discretion likewise the upsetting of that summary judgement is also an exercise of the judicial discretion of this court with reasons given. For

(9) this reason each party will bear own costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2008.

R.N. NAMBUYE

JUDGE