



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 79 of 1998

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

MINTO TRAVEL LTD

SAMSON KEENGU NYAMWEYADEFENDANTS

RULING

The Plaintiff in an amended plaint dated 18th February, 2000 and filed the same date sued the first defendant Minto Travels Ltd and the second defendant Samson Keengu Nyamweya. The cause of action against the second defendant is found in paragraphs 3A, and 3B of the amended plaint. It is averred in paragraph 3A that by a deed of guarantee in writing dated 22nd September 1995 and in consideration of the Plaintiff giving credit, banking facilities or other accommodation to the 1st defendant, the second defendant guarantee, payment of all sums of money at any time due on any account from/or by the first defendant to the Plaintiff together with interest thereon from the date of demand on the 2nd defendant under the guarantee together with bank charges. Vide paragraph 3B it is averred that by a letter dated 15th February, 1999 the Plaintiff demanded payment from the 2nd defendant of the sum of Kshs 4,000,000.00 being part of the amount due from the 1st defendant to the plaintiff and which is the amount payable by the 2nd defendant under the guarantee. The second defendant has failed to pay the said sum or any part thereof. The sum of 4,000,000.00 was to attract interest at 31% from 15.2.99 until.

In consequence thereof the Plaintiff claimed Kshs 4,000,000.00 against the second defendant being part of the amount claimed in (i) above with interest at 31% from 15.2.99, costs of the suit and interest thereon.

There is on record a defence dated 20th day of February, 2001 drawn by Osero and Company Advocates filed on 6th March 2001. The Key averments are found in paragraph 2,3,4,5 and 6 of the defence. The averments are to the effect that both defendants denied ever having requested the Plaintiff to advance them monies as alleged in paragraphs 3 of the amended plaint. That such deed or guarantee purportedly dated 22nd September, 1995 is non-existent. Hence interest accruing thereon is accordingly denied, both defendants averred that they are strangers to the allegation contained in paragraph 3B of the amended plaint which they deny in toto, the second defendant strongly contested the joining of the first defendant as the two are separate entities and if at all the first defendant entered into any transactions it should sue or be sued in its own capacity as it is still a legal entity in existence, denied the claim in paragraph 4, of the amended plaint, denied having been served with the demand notice. In consequence thereof prayed for

the suit to be dismissed with costs to the defendants.

Notice of change of advocates dated 13th July, 2001 was filed on the same date of 13th July 2001. It shows clearly that both defendants had appointed M/S Violet Barasa & Col Advocates, to act for them in this suit in lieu of M/S Osero and Co Advocates. The Plaintiffs filed a list of documents dated 16th day of May 2002 filed on 24th May 2002 in readiness for the trial. Then the Plaintiff issued a hearing notice dated 6th day of June 2003. It indicated that the case had been scheduled for hearing on 24th and 25th November, 2003 at 9.00 O'clock. The hearing notice was served on M/S Violet Barasa and Co. Advocates on 9th June 2003 at 1.50 p.m. and it was acknowledged by endorsing on the reverse of the notice by the said from. A return of service to that effect was filed on 15th October, 2003. The date of service indicated in the said R/S tallies with what is indicated against the stamp for the defence advocates.

Turning to the Court record of the proceedings it is evident that neither the defendants nor their Counsels appeared at the time of trial. The Court was satisfied that there was proper service and allowed the Plaintiff to proceed with the case. Evidence was given and judgment entered in favour of the Plaintiff. In the said judgment the defendants were condemned by being judged liable to pay all the sum of money claimed as well as the full taxed costs of the suit. A decree was drawn dated 10th March 2004.

There is an application on record dated 23rd September, 2004 by way of Chamber Summons for change of advocate. The supporting affidavit had been deponed by the 2nd defendant and indicates that he had just learned that judgment had been entered against him in default of attendance at the trial by himself and his then Advocates on record and wished to change Advocates on record. The affidavit does not indicate exactly when he become aware of the said judgment. That application was allowed by consent on 6.7.2005.

The second defendant has filed this application by way of chamber summons under Section 3A and 63(e) Civil Procedure Act order IXB rule 8 Civil Procedure Rules seeking orders that the judgment entered against the second defendant on the 16th day of December, 2003 be set aside and that costs of the application be provided for. The grounds are set out in the body of the application supporting affidavit and oral submissions in Court. The major ones are:-

- That the 2nd defendant was not initially sued in these proceedings.
- The Plaintiff thereafter filed an application to amend the plaint but no specific order was sought to enjoin the second defendant to these proceedings.
- That the application to amend the plaint was granted on condition that the same be filed and served on the first defendant within a specified time which appears not to have been complied with and no amended plaint was filed subsequent to that order. Hence the summons were served on the basis of the draft amended plaint.
- That matters of failure to comply with the orders of the Senior Deputy Registrar of 16.11.2000 have not been denied and so they are deemed to have been admitted.
- They contend that there is no basis for the claim against the second defendant by virtue of failure of the Plaintiff to comply with the order of 16.11.00.
- That on the merits of the replying affidavit the 2nd defendant provided guarantee for a loan which had previously been granted to the first defendant and so this is past consideration which is not enforceable in law and this is a triable issue as past consideration is not good consideration.
- That there is no specific response by the Respondent as regards the filing of an amended plaint. They have not specifically pleaded that they filed on amended plaint.

- That on the basis of the facts stated the applicant is entitled to the courts discretion to have the application allowed.

The Plaintiff/Respondent has opposed that application on the basis of the grounds set out in the replying affidavit, annexures, oral submission in court and legal authorities. The major ones being:-

- That the applicant was all along aware of the suit but chose not to appear at the hearing.
- That the orders of 16.11.2000 were complied with as summons to enter appearance were taken out and the second defendant entered appearance and filed a defence. At no time did they challenge the amended plaint at the earliest opportunity.
- Hearing notice for the trial was duly served on Counsel appointed by the 2nd defendant who willingly failed to show up at the trial together with the 2nd defendant. This was willful disregard of the hearing notice and this disentitles the applicant a right to have the judgment regularly entered set aside.
- The applicant is guilty of unreasonable delay in moving to court to set aside the said judgment and no reasonable explanation has been given of that delay.
- They contend that no useful purpose will be served by setting aside of the said judgment as the defence contains mere denials and no injustice will be suffered by the applicant as he has no defence to the plaintiffs claim and he is merely seeking to obstruct justice.
- The documentation exhibited show that there was the letter of offer and acceptance between the plaintiff and the first defendant for a loan facility guaranteed by the 2nd defendant.

To fourthly their stand the Respondent relied on the case of **KEN FREIGHT (EA) LIMITED VERSUS STAR EAST AFRICA CO. LTD [2002] 2 KLR 783** which dealt with an application for review and the court held *inter alia* that a delay for three months in seeking review was unreasonable. Also the case of **ATLANTIS INSURANCE BROKERS LTD VERSUS KWETU COFFEE ESTATE LTD NAIROBI MILIMANI COMMERCIAL COURT CIVL CASE NO. 1600 OF 2001** where Kasango J quoting from the case of **MAINA VERSUS MURUIRI 1984 KLR 409** lauded a cardinal principle on setting aside of *ex parte* orders namely:- “*The discretion to set aside ex parte judgment is intended to be exercised to avoid injustice or hardships resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought to obstruct or delay the course of justice*”. In this quoted case the defendant was served but returned summons to the Plaintiff’s Counsel. On that basis the court made findings that there was no sufficient cause why the court should exercise its discretion in its favour.

Kasango J. in the quoted case also considered another ingredient for setting aside *ex parte* judgment. At page 7 paragraph 2 of the ruling which is to the effect that “*before an ex parte judgment can be set aside, it must be satisfied that there is a valid defence.*” In the quoted case no intended defence had been annexed and so the court was not in a position to speculate what the defendant’s defence would be if the court’s discretion was exercised in his favour. The Court declined to exercise the discretion to set aside in favour of the applicant as the same could not be exercised in a vacuum.

In response to the Respondents submissions Counsel for the applicants distinguished the first case of **KEN FREIGHT (EA) LTD VERSUS STAR EAST AFRICA. CO LTD (SUPRA)** because it dealt with an application for review and not setting aside, that the 2nd defendant’s defence can only be faulted if there is a proper document served on him, it is there stand that *prima facie* defence can arise from the submissions on the replying affidavit. They maintain no injustice will be suffered as the Plaintiff can pursue the first defendant as the second defendant pursues his remedy.

On the courts assessment of the facts herein upon hearing both parties it is clear that the applicant herein seeks to avail himself of the provisions of Section 3A of the Civil Procedure Act which is a saving clause

which empowers the court to invoke its inherent powers to do justice and prevent abuse of the court process. Section 63(e) empowers the court to make such interlocutory orders as may appear to the court to be just and convenient while order IXB rule 8 Civil Procedure Rules empowers the court where judgment has been entered or the suit has been dismissed on application by summons, may set aside or vary the judgment or order upon such terms as are just.

Applying the foregoing provisions of law on to the facts of this application it is clear that the applicant has advanced various reasons for wanting this court to exercise its discretion in setting aside the regular ex parte judgment entered against him. The first of this is that the suit was not initially filed against him. This assertion is correct. The original plaint is missing as the current file containing proceedings is a constructed file. A copy of the same is annexed as annexure J.AOI to the application for reconstruction. The defendant initially sued by the Plaintiff is Minto Travels Ltd the current first defendant. On the basis of this first plaint, the applicant has moved to fault his fact of having been joined to these proceedings as being without basis. Further that no valid claim can lie against him by virtue of him not having been properly joined to the proceedings.

The second defendant was joined to the proceedings vide the application dated 18th February, 2000 filed on 18th October, 2000. It sought three prayers namely leave to amend the plaint in terms of the annexed draft, the annexed amended plaint to be deemed as duly filed and that costs be provided for. This is the draft which introduced the second defendant to the proceedings. Paragraph 4, 5 and 6 of the supporting affidavit to the application for amendment gives reasons as to why the second defendant was joined to the proceedings which was because as at the time the plaintiffs counsel received instructions to file suit the guarantee document was not included among the documents required for filing of the suit. This guarantee document was allegedly filed at a later date and upon perusal of the same it was found necessary to enjoin the 2nd defendant to the proceedings because the cause of action against him arise from the same transaction as the cause of action against the first defendant. The 2nd defendant is aggrieved by that application because there is no prayer in the body of the application to enjoin him and so order 1 Civil Procedure Rule has been contravened. Order 1 rule 3 Civil Procedure Rules reads “All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise Order VIA rule & (2) on the other hand reads “*All amendments shall be shown by striking out in red in all deleted words but in such a manner as to leave them legible and by underlying in red ink all added words*”

Applying these two provisions to the Plaintiffs application for amendment dated 18.10.2000 I find that the deponements in paragraph 4, 5, 6 and 7 of that application satisfies the ingredients in order 1 rule 3 Civil Procedure Rules because if separates trials were to be held for each defendant the same question of law and fact concerning the loan advanced guarantee, obligations of the loanee and the guarantor in respect of the said transaction, whether paid or not, who is obligated to pay and how much each if to pay would arise at the time of trial which question would be common to both suits. This satisfies order 1 rule 3 Civil Procedure Rules. As for order VIA rule 7(2), the Draft amended plaint attached to the application had deletions crossed out in red ink but left legible while new additions were underlined in red. The court finds that the mode of amendment effected and allowed by court on 16.11.2000 has not been faulted. Further the best way to fault that amendment is by attacking the court order allowing it. The current applicant has not attacked this order so long as the orders of 16.11.2000 stands the mode of amendment is free from attack.

The next complaint is that the orders of 16.11.2000 were not complied with and so as far as they were concerned, there is no amended plaint because an amended plaint filed in pursuance to the orders of 16.11.2000 should bear a date of amendment as well as filing date after that. It is their stand that in the absence of the above any plaint drawn earlier than 16.11.2000 and filed earlier than that is invalid as the same was filed without orders and cannot hold. Prayer 2 of the application for amendment dated 18.2.2000 and filed on 18.10.00 prayed for an order that the amended plaint be deemed as duly filed. The orders granted by the Senior Deputy Registrar on 16.11.2000 were as follows “**Application filed on 18.10.00 be and is hereby allowed in terms of prayer 1 of the application. Such amended plaint be**

filed and be served on defendants advocates within 15 days from today. 1st defendant do have liberty to file amended defence within 15 days from the date of service of amended plaintiff costs in the cause.

This Court has perused the record and traced an amended plaintiff dated 18.2.00 and filed on 18.10.00. It is trite law and this court has judicial notice of the fact that amendment take effect from the date the order of amendment is made. it follows that since prayer 2 of the amendment application which sought to deem the plaintiff to be duly amended was not granted, the plaintiff was obligated in pursuance to the orders of 16.11.00 to file an amended plaintiff bearing an amendment date of 16.11.00 and filed after that date or on the same date. A search of the record reveals a receipt dated 18.10.00 No.J644392 for the filing of the application for amendment. A further search reveals the existence of a receipt No.K428340 dated 14.1.98 which is a copy of a receipt marked JA01 annexed to the application for reconstruction of the file. It is in respect of suit No.78/98 whose copy was also marked as JA01 to the application for reconstruction. The exhibit was marked way back in May 2000 and definitely it is incapable of being deemed to be payment in respect of the amended plaintiff. It is this court's opinion and finding that since the plaintiff/respondent has exhibited a receipt for the payment of filing of the original plaintiff, he was expected to have exhibited a receipt for the filing of the amended plaintiff. This court takes judicial notice of the fact that a pleading acquires *locus standi* in any proceedings upon it being properly filed and paid for. It is therefore correctly submitted by the Counsel for the second defendant that the amended plaintiff on record was not filed in accordance with the orders of 16.11.00. Since it was filed before 16.11.00 it is deemed to have been filed without, authority or legal basis. It is indicated to have been amended on 18th day of February, 2000 without leave of court. The current amendment should read the date on which the amendment order was made which is 16.11.00. The scenario is further complicated by the fact that there is no evidence of filing as no receipt has been exhibited as evidence for filing of an amended plaintiff. Neither has it been argued that the receipt for payment for the filing of the original plaintiff was to operate as payment for the amended plaintiff. This being the state of affairs it is the finding of this court that there is no amended plaintiff on record amended on 16.11.00 and filed within 15 days from 16.11.00. The net result of this is that there being no amended plaintiff validity filed in accordance with the orders of 16.11.00 any proceedings subsequent to 16.11.00 in so far as it purports to take cognizance of the purported amended plaintiff on record is invalid and of no consequences and does not bind the second defendant because he is the one who has complained through the consequences of non compliance have far reaching effects on the proceedings. The non-binding effect operates irrespective of the invalid amended plaintiff having been served and responded to by the complaining defendant.

For purposes of the record the 2nd defendant also raised complaint that there is no reasonable cause of action against him as the purported claim raised against him relates to past consideration which in law was not good consideration. Guidelines of what amounts to a reasonable cause of action are found in the case of **DT DOBIE & COMPANY (KENYA) LTD VERSUS MUCHINA [1982] KLR 1** where it was held *inter alia* that:-

- The words reasonable cause of action in order VI Rule 13 (1) means an action with some chance of success when the allegation in the plaintiff only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.
- The words “*cause of action means an act on the part of the defendant which gives the plaintiff his cause of complaint.*”

Applying these two principles to the facts of the application it is clear that the plaintiffs' complaint in the invalid amended plaintiff was that he had guaranteed the loan and upon default the plaintiff sought to have the purported second defendant make good his guarantee. Proceedings against a guarantor alongside those of the loanee where there is documentary proof gives rise to a reasonable cause of action capable of going to trial. There is a defence on record filed on the mistaken assumption that there was a valid amended plaintiff on the file. Since this is not the correct position the 2nd defendants on record can only be treated as a draft defence. Perusal of the same as outlined herein does not reveal any averment to the effect that the guarantee is past consideration and not good consideration in law hence inability to enforce the same. The correct position in law is that a party is bound by his own pleadings inclusive draft pleadings. A perusal of the defendants defence (now a draft defence) shows that existence or non

existence of a request to advance monies and the attendant guarantee is a triable issue on paragraph 2 of the defence; knowledge of the allegation in paragraph 3B of the purported amended plaint raises triable issues in paragraph 3 of the defence. Issues of joinder or misjoinder of parties to the proceedings raised in paragraph 4 of the defence is a triable issue. It therefore follows that had there been a record amended plaint on valid this court would have taken into consideration existence of triable issues in the defence in order to justify the openings of the proceedings for the 2nd defendant to be heard on the same.

As for delay in seeking intervention being unreasonable as raised by the plaintiffs Counsel it is clear that judgment was delivered on 16.12.2003. The applicant deponed in an affidavit in support of the application for change of advocates sworn on 23.9.2004 that he had become aware of the existence of a judgment against him but does not state when he became aware of the judgment. Leave to change advocates was granted on 6.7.2005. Notice of change was filed on 1.12.05, while the application for setting aside was filed on 19th December, 2005 and heard on 12.3.2007. When time is computed it is clear that the applicant took 9 months from the date of judgment to the filing of the application for change of advocate. When orders for change were given the applicant took 5 months to file the current application. The total came to one year and 2 months. The application for change of advocate took 9 months to be heard while the current one has taken one year and 2 months to be heard total one year and 11 months. When compared the greater blame goes to the delay caused by the process of disposal by the court. It therefore follows that although the court in the cited case of **KEN FREIGHT (EA) LIMITED VERSUS STAR EAST AFRICA CO LIMITED [2002] KLR 783** supra found a delay of three months to be un reasonable in an application for review, a delay of almost 6 years in this case is excusable as the greater blame goes to the court systems for failing to process the application speedily may be due to congestion or backlog of work or evidence of a bloated judiciary. This delay would not therefore have operated to deny the second defendant having the matter reopened for him to be heard on his defence. There is no evidence that there is a calculated move to obstruct or delay the course of justice. If anything it is the Plaintiffs conduct of failing to comply with the orders of 16.11.00 as regards the filing of an amended plaint and allowed proceedings to proceed to finality on the basis of an annexed amended plaint which has resulted in the delay of the cause of justice.

The last consideration is whether in view of the circumstances displayed herein this court is to exercise its discretion in favour of the applicant or not? It is this courts finding that firstly despite the judgment sought to be set aside having been regularly entered after proper hearing which proceeded ex parte after due notice to the applicant's advocates on record whose failure to attend court on that date has not been explained up to date, and second despite this court having found that the mode of amendment of the plaint and joinder of the second defendant to these proceedings was regulate, thirdly despite this court having ruled that allegation of past consideration cannot be used to oust the judgment as it was advanced only in the submissions, nonetheless, room and justification exists to warrant this court to exercise its discretion in favour of the applicant and have the said judgment set aside for the following reasons:-.

1. Paragraphs 2, 3 and 4 of the defence on record which for purposes of this ruling should be treated as a draft defence for the reason that the process leading to its filing has been faulted raises triable issue.
2. The applicant cannot be blamed for non attendance at the hearing which gave rise to the ex parte judgment. That blame goes to the applicants advocates then on record whose workmanship the applicant had hired and the exercise of which the applicant had no control over and so he cannot be blamed for the advocates poor workmanship in the handling of the matter.
3. The applicant cannot be blamed for failure to seek intervention in setting aside the ex parte judgment for a period of 6 years because it is not known when the applicant became aware of the judgment having been passed against him and the five months he took to file the current application after being granted leave to change advocates is not unreasonable in the peculiar circumstances of this case, more so when the greater blame for the failure to speedily dispose off intervening application lies with the judicial process.
4. The plaintiffs conduct of failure to comply with the orders of 16.11.00 which required them to file an amended plaint and pay for it within 15 days from 16.11.00 and instead chose to proceed with the hearing

of the case on the basis of an invalid amended plaint not procedurally filed though it cannot be termed as a deliberate obstruction of justice, it definitely qualifies to be termed the substantial cause of the delay of the cause of justice in this case. There is no excuse for this and the plaintiff has to carry its own cross up to Calvary un aided by Simon the Cerene, the intended second defendant.

In the net result the following orders are made by this court:

- (a) The application dated 19.12.2005 and filed the same date be and is hereby allowed with costs to the applicant.
- (b) The ex parte judgment entered herein against the applicant on 16.12.2003 has been found to be invalidly entered on the basis of an invalid amended pleading and the same is set aside in so far as it relates to the intended second defendant.
- (c) There will be no order as to thrown away costs to the applicant as he had no *locus standi* in the proceedings due to him having been un procedurally joined to the proceedings. In invalid proceedings do not confer rights to any party.
- (d) To speedy up the proceedings in view of the age of the case this court in the exercise of its discretion under Section 3A Civil Procedure Act for ends of justice to be met and for prevention of abuse of the court process it is inclined to extend the period granted by Senior Deputy Registrar on 16.11.00 to a period of 21 days from the date of this ruling for the respondent to comply with the order of 16.11.00.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2007.

R. NAMBUYE

JUDGE