



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 222 of 2004**

**EAST AFRICAN BUILDING SOCIETY LIMITED..... PLAINTIFF**

**VERSUS**

**JOYCE MUKUHI NJENGA .....**

**DEFENDANT**

**RULING**

This is an application by the Defendant by notice of motion dated 13<sup>th</sup> November 2006, brought under Order 9B rule 8 of the Civil Procedure Rules, seeking an order to set aside the *ex parte* judgement entered against her on 24<sup>th</sup> March 2006. On that date the suit was coming up for hearing. There was no appearance for the Defendant. The application is brought upon the grounds:

- 1. That the Defendant did not receive hearing notice until 4<sup>th</sup> May 2006.**
- 2. That the Defendant's former advocates ceased acting for her without timeously informing her of that fact.**
- 3. That the Plaintiff should have formally proved its case and that, therefore, without tendering necessary evidence, judgement was improperly entered in its favour.**
- 4. That the Defendant has a good defence to the claim.**
- 5. That it is in the interests of justice that the *ex parte* judgement be set aside as the Defendant was condemned unheard.**

There is a supporting affidavit sworn by the Defendant. To it are annexed a number of documents.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by one MICHAEL GITHINJI TANU, who has described himself as a senior legal officer of EABS BANK LTD., which is said to be the successor of the Plaintiff. The grounds for opposing the application are:

- 1. That hearing notice had been duly served upon both the Defendant and her advocates as ordered by the court.**
- 2. That the *ex parte* judgement was regular and in accordance with the law.**

3. **That there has been inordinate delay in bringing the application.**
4. **That given the history of this matter the application is intended to delay the cause of justice.**
5. **That the application otherwise lacks merit.**

I have considered the submissions of the learned counsels appearing, including the cases cited. The court has a wide discretion under rule 8 of Order 9B aforesaid; it may set aside or vary the *ex parte* judgement upon such terms as are just. It is nonetheless a judicial discretion which must be exercised judicially upon settled principles. Those principles are:

1. **The court will exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error.**
2. **The court will not exercise the discretion to assist a person who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice.**

See the well-known case of **SHAH VS MBOGO [K], [1967] EA 116.**

The history of this matter is this. In its plaint the Plaintiff sought judgement against the Defendant as follows, *inter alia*:

- (a) the sum of KShs. 10,852,142/72;
- (b) leave to sell the suit property, LR NO. 330/1059, Gitanga Road, in Lavington, Nairobi.

On 14<sup>th</sup> April 2005 the court granted leave for the Defendant to be served with summons to enter appearance by substituted service. I cannot see any memorandum of appearance on the court record. But a statement of defence dated 18<sup>th</sup> May 2005 was filed on that date by counsels representing the Defendant. On 7<sup>th</sup> November 2005 a hearing date was taken by consent for 7<sup>th</sup> March 2006. On that date counsel for the Defendant informed the court that she wished to withdraw from representing the Defendant as she had not responded to their letters. The Court (Ransley, J.) then ordered as follows:

**“Order: the Defendant to be served with application of 06/03/2006 by registered post and for hearing on 24/03/2006. The hearing notice to be served by Plaintiff on the Defendant by registered post the same to be set down for hearing at 11.00 a.m. on 24/03/2006”.**

The application of 6<sup>th</sup> March 2006 was a chamber summons under Order 3 rule 12 of the Civil Procedure Rules by the Defendant’s advocates for leave to cease acting for her. So, by the order of 7<sup>th</sup> March 2006 aforesaid, both the application and the suit itself were fixed for hearing on 24<sup>th</sup> March 2006. As it happened, there was no appearance for the Defendant on that date. The court record for that day reads as follows:

**“Coram: Ransley, J.**

**Court Clerk – Kipkurui**

**Miss Dar for Plaintiff**

**No Appearance for Defendant**

**9.00 a.m.**

**Miss Dar: Hearing notice served.**

**S. O. to 2.30 p.m.**

**The Defendant has not appeared.**

**Judgment under O9B rule 3 as the Defendant has not appeared after the matter had been called outside the court. I give judgement as prayed.”**

The issues I must decide in this application are as follows:

- 1. Is there any inadvertent or excusable mistake or error on the part of the Defendant?**
- 2. Is the Defendant guilty of such conduct as would disentitle her to the discretion of the court?**
- 3. Was the *ex parte* judgement properly and regularly entered?**

I will consider all the issues together. The Defendant’s case is that owing to health problems she was experiencing, she was not in contact with her advocates for a long time, and they therefore sought leave of the court to cease acting for her (paragraph 6 of the supporting affidavit); that due to her said poor health she was not able to check her post office box for a long time, and that therefore she did not receive a copy of the application by her advocates for leave to cease acting for her and hearing notice of the suit (both of which have been sent by registered post) until 4<sup>th</sup> May 2006 (paragraphs 7, 8, 9 and 10); that upon receipt of the documents she arranged to peruse the court record at the registry, and did so on 8<sup>th</sup> May 2006 (paragraph 11); and that she then became aware of the orders entered on 7<sup>th</sup> and 24<sup>th</sup> March 2006 (paragraphs 12, 13 and 14). It is her further case that she then wrote to court objecting to issuance of decree because the Plaintiff ought to have led and called evidence to prove its case in view of the pleadings in the statement of defence (paragraphs 15 and 16). She then instructed a new counsel who came on record by leave of the court granted on 14<sup>th</sup> November 2006. The present application had been filed the previous day. I am inclined, with the materials placed before the court, which have not been controverted, that the Defendant received her counsels’ application for leave to cease acting for her and hearing notice of the suit long after the *ex parte* judgement had been entered. However, no explanation at all has been given in the supporting affidavit why the Defendant, who is apparently an advocate of this court, waited about six months to instruct new counsel, and to move the court to set aside the *ex parte* judgement. Having said that, however, all persons are equal before the law, and an advocate of this court who happens to be a litigant will not be treated any differently from any other litigant.

The court will not exercise its discretion in favour of an indolent litigant, and there is no doubt that the Defendant was indolent for about six months as seen above. But there is another aspect of this case that I must look at. The Defendant’s previous counsels never prosecuted their application for leave to cease acting for her; therefore, when the *ex parte* judgement was entered, they were her advocates on record. They were under a duty to prosecute that application. Had they done so on 24<sup>th</sup> March 2006, the court would probably have been inclined to adjourn hearing of the suit to another date to enable a fresh hearing notice to be served upon the Defendant who would then have been acting in person. I have no hesitation in concluding that the failure of the Defendant’s advocates to attend court on 24<sup>th</sup> March 2006 to prosecute their application for leave to cease acting for her was probably the main cause why the court proceeded the way it did. The advocates’ failure in this regard therefore gravely prejudiced the Defendant. It is a factor to be considered in her favour.

In regard to the first two issues therefore, I am satisfied that there was an excusable mistake or error on the part of the Defendant, that mistake or error being the Defendant’s advocates’ failure to attend court on 24<sup>th</sup> March 2006 to prosecute their application for leave to cease acting for her. I have also found that the Defendant was guilty of delay in bringing the present application. The delay was about six months and has not been explained. But is this delay conduct that should disentitle her to the discretion of the court? The judgement entered against the Defendant is for the sum of KShs. 10,832,114/72. This is not a small amount of money. That sum, being the amount originally advanced to the Defendant by the Plaintiff plus accrued interests, was secured by what appears to be an equitable mortgage over the Defendant’s

property, land parcel L.R. NO. 330/1059, Gitanga Road in Lavington, Nairobi. The Plaintiff got judgement not only for the amount claimed, but also an order to sell the property. That order to sell the property was not granted in the alternative as it had not been sought in the alternative. By the *ex parte* judgement therefore the Plaintiff will be paid twice over. This is not, and cannot be, just. The Plaintiff's learned counsel readily and properly conceded that prayer (b) of the plaint should not have been granted. But he submitted that this is an error that can be rectified by an appropriate variation of the judgement, and that therefore it is not a sufficient reason to set aside the *ex parte* judgement. I have considered this submission. I have also looked at the plaint, the statement of defence, the Plaintiff's statement of issues dated 5<sup>th</sup> August 2005 (which sets out some 14 issues to be tried) and the Plaintiff's list of documents dated 5<sup>th</sup> August 2005 (to which a bundle of some 32 documents is attached). The statement of defence raises many triable issues. The Plaintiff appears to agree that this is so, otherwise it would not have prepared and filed a statement of issues setting out some 14 issues to be tried. Given the nature and circumstances of this case, it is desirable that the dispute be tried. The proper thing to do therefore would be to set aside the *ex parte* judgement, which is irregular on the face of it, at least in regard to prayer (b) of the plaint.

Having considered all relevant matters placed before the court, I find that this application has merit. I will allow it. The *ex parte* judgement entered on 24<sup>th</sup> March 2006 is hereby set aside. Regarding costs, I hold that justice will be served by awarding to the Plaintiff half of its costs of this application, and I so order. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH 2007.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 2ND DAY OF MARCH, 2007**