



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI ALW COURTS)
CIVIL SUIT 1521 OF 2005

HASS SCIENTIFIC & MEDICAL SUPPLIES LTD.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA.....DEFENDANT

RULING

The Plaintiff filed a plaint herein dated 19th December, 2005 filed the same date seeking general damages, special damages of US Dollars 634,000.00, costs of the suit and any other or further relief this Honourable Court may deem fit to grant. Summons to enter appearance were taken out on 21.12.2005 and were served because there is a Memorandum of appearance filed on 17th January 2006. The return of service filed on 3rd February 2006 indicated that the summons were served on 12th January 2006. On the same 3rd February a request for judgment was made addressed to the Deputy Registrar. The reasons for the request as indicated in that letter is that the defendant had failed to file a defence in time having been served and filed a memo of appearance on 17.1.2006. On the strength of the Plaintiff's letter of 3rd February, 2006 the Deputy Registrar of this Court entered interlocutory judgment on 6th February 2006. The salient feature of that entry of judgment reads "*enter judgment as prayed. The award of costs should await judgment when the suit will be set down for formal proof*". The following day of 7.2.2006 the matter was fixed for formal proof for hearing of the same on 3rd April, 2006. In the meantime the defendant filed a defence dated 7.2.2006 and filed the same date. On 27th February, the defence filed an amended defence amended on 13th day of February, 2006. Vide letter ref. BPM/H SMS/4/1/2004 dated 14.2.2006 addressed to the defence lawyer and filed in court on 22.2.2006 the defence was informed that their defence filed on 7.2.006 was in consequential as interlocutory judgment had already been entered in the matter on 6.2.20056 and the matter had been fixed for formal proof on 3.4.2006.

It is against the foregoing background that the defendant moved to court under certificate of urgency and filed application subject of this ruling dated 1.3.2006 and filed on 2.3.2006 brought under order IXA Rules 10 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and other enabling provisions of the law. The orders sought are:-

- The interlocutory judgment entered on 6th February, 2006 in the suit herein be set aside on such terms as are just.
- The time for file defence be extended.

- The amended defence be deemed to be filed.
- The costs of the application be provided for.

The grounds in support are gathered from the grounds in the body of the application, supporting affidavit and oral submissions in court and the major ones are:-

- That upon service of the plaint and summons to enter appearance, they duly entered appearance, filed defence and then an amended defence.
- That at the time they filed the defence and amended defence on 7.2.2006 and 27.2.2006, they were not aware that the Plaintiff had applied for interlocutory judgment on 6.2.2006
- That their defence raises triable issues and they should be allowed to defend
- That delay is not much and this Court should extend the time upto the time the amended defence was filed.
- That they should be excused as they were late by one day before judgment was applied for.
- They rely on the authorities cited to support their case.

The Plaintiff/Respondent has opposed the application on the grounds set out in the replying affidavit, stated in oral submissions and legal authorities cited to court. The major grounds are that:-

- The application is defective as it has not complied with order 15 rule (2) Civil Procedure Rules
- The defendants admitted that there was a six day delay which they have not explained the cause.
- Interlocutory judgment regularly entered as their claim is liquidated and the Registrar duly satisfied himself of this fact before entering the judgment.
- The defence has no defence to the Plaintiffs claim as he has admitted the wrong in annexure AW 1,2 and 3 annexed to paragraphs 2,4 and 5 of the replying affidavit.
- That the authorities cited by them support their case.

In response to the Plaintiff/Respondent's submissions Counsel for the defendant maintained that the supporting affidavit sworn by Counsel for the defence has not been faulted as it has not deponed to facts but simply states the action taken by them. In relation to the filing of the defence sought to be validated

- That at this stage of the proceedings the court is enjoined to look at the pleadings only and not documents of alleged admission which are matters of evidence to be tendered and proved at the trial.
- That they are willing to compensate the other side with costs.

The application has been brought under Order IXA rule 10 and 11 which state:

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

11. *Application under this order shall be made by summons" The use of the words "may set aside"*

In rule 10 denotes existence of a discretion in the part of the court to grant or refuse to grant setting aside.

The Plaintiff/Respondent attempted to fault the application by saying that the applicant has not complied

with order 15 rule 2 Civil Procedure Rules. The Court has perused the same and found that the provision relates to deposit of witnesses of withdrawn expenses in court which does not apply herein at this stage as the proceedings have not reached the trial stage. The Plaintiff/Respondent also took issue with, the supporting affidavit having been deponed to by the advocate. The court has perused the same and finds no fault in it as it deponed mainly on the action taken by the office as relates to the filing of the defence. It does not touch on the facts of the case and so the deponement is proper and can be relied upon in support of the application for setting aside.

Having found that order IXA rule 10 gives the court a discretion to grant or not to grant an application to set aside interlocutory judgment, the court can be guided further on this issue by principles established by both the High Court and Court of Appeal. A land mark case on this is the case of **SHAH VERSUS MBOGO [1967] EA 116** which held inter alia “*Applying the principle that the Courts discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake, or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused*”

Since the decision in **SHAH VERSUS MGOGO 1967 supra** there has been a wealth of other decisions on the subject. Both sides herein referred the court to numerous of them. The court has gone through all of them and considered them in relation to this ruling but it will just high light a few. In the case of **ABRAHAM K. KIPTANUI VERSUS DELPHIS BANK LTD AND NYALUGUNGA TRADERS NAIROBI HCCC NO.1864 of 1999 MILIMANI** Commercial Court the request for interlocutory judgment was on the basis of failure to file a defence within the stipulated period though served. On application for setting aside interlocutory judgment, Mr. Justice A.G. Ringera as he then was, was faced with two issues namely:-

- Whether the interlocutory judgment entered therein should be set aside as a matter of right and
- Whether if the same is not set aside as of right, it ought to be set aside or varied in the exercise of the courts unfettered discretion.

After evaluating the case law presented to the Judge and applying to the facts of the case before him the learned Judge stated from the bottom of pg.10 “*such a judgment (an irregular judgment) is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process. In the case of RAMCO LTD VERSUS MISTRY JADUA PARBAT AND CO. LTD AND OTHERS [2002] 1 E.A. 23* where it was held inter alia that if there is no proper or any service of summons to enter appearance the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* without exercising discretion. If the default judgment is a regular one the court has unfettered discretion to set aside such judgment upon such terms as are just. In exercising the discretion the Courts concern should be to do justice between the parties avoid hardship resulting from accident, inadvertence excusable mistake or error and not to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the cause of justice. Further that to deny a person a hearing should be always the last resort of the court. In the case of **TREE SHADE MOTORS LTD VERUS D.T. DOBIE AND COMPANY (K) LTD AND JOSEPH RADING WASAMBO NAIROBI C.A. 38 OF 1998** the Court of Appeal ruled that where a draft defence is tendered with the application to set aside the default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the Plaintiffs claim. If it does, the defendant should be granted leave to enter and defend. In the case of **J.H. RAYNER (MINCING LANE) LTD AND ANOTHER VERSUS CAFERTE SA, IMPORTADORA AND OTHERS [1999] 2 A E.R. 577** where application for setting aside was filed 7 years after entry of interlocutory judgment, it was held that where the Court had concluded that there was a safe defence on the merits which carried some degree of conviction, it was strongly inclined to allow a default judgment to be set aside even if the defendants conduct could be strongly criticized. Thus once such a defence had been identified, it required some very special feature for the court to conclude that judgment should not be set aside, and the passage, of time alone could not preclude a defendant from having a default judgment set aside. It followed that in the instant case the seven year delay could not in itself prevent the judgment from being set aside more over the court could not conclude on the evidence that IBC had taken

a deliberate tactical decisions not to challenge the default judgment. Even if IBC had taken such a decision, it was not right that it should have to live with the consequences in view of the size and complexity of the litigation, and the primary consideration remained whether there was a defence on the merits.

The defence referred the Court to the Court of Appeal decision **No.220/1995 NAIROBI KINGSWAY TYRES AND AUTOMART LTD VERSUS RAFIKI ENTERPRISES LTD** where at page 2 of the Judgment the Court said “*the jurisdiction (to set aside an ex parte judgment) is exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error (See **SHAH V. MBOGO**) [1967] E.A. 116*”, At page 5 of the judgment the Court observed at paragraph 3 that “*there are ample authorities to the effect that notwithstanding the regularity of it, a Court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. In the case of **KISYA INVESTMENTS LTD AND ANTOEHR VERSUS KENYA FINANCE CORPORATEION LTD AND OTHERS NAIROBI HCCC 3504 OF 1993, SIMON ISAAC NGUI VERSUS OVERSEAS COURIER SERVICES K LTD NAIROBI HCCC NO. 1632/97 AND EAST AFRICAN FOUNDRY WORKS (K) LTD VERSUS KENYA COMMERCIAL BANK LTD NAIROBI HCCC NO. 1077/2002 MILIMANI COMMERCIAL COURTS NAIROBI.*** The holding in all these three cases is that it is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit. By deposing to such matters the advocate courts an adversaries invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be Counsel and witness in the same case:

Applying the foregoing principles to the facts of this case it is clear that in determining this matter this court has to determine the following:-

- (1) Whether the interlocutory judgment is irregular in which case the court receives the invitation to set it aside as of right.
- (2) Determine whether the interlocutory judgment is regular in which case the Court receives an invitation to exercise its unfettered discretion to set it aside or not to set it aside.
- (3) Since it is the advocate who deposed the supporting affidavit do decide whether he has deposed to matters of evidentiary value and if so then he loses the right to be an Advocate and assumes the role of a witness thus robbing the application the right of being supported by a properly deposed affidavit.
- (4) In deciding on No.2 above to have regard on the defence and determine whether it has triable issues or not.
- (5) Not to lose sight of the fact that denying a party from being heard should be used as the last resort by a Court of law.

This Court has taken into account consideration of all these factors in the light of facts displayed herein and makes the following findings:-

- (i) As regards whether the judgment was regular or irregular this court has had occasion to revisit order IXA rule 5 which states “*where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear the court shall on request in form no 26 of Appendix C enter interlocutory judgment against such defendant and the Plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be. On the other hand order IXA rule 3 states 3(1) “where the plaint makes a liquidated demand only and the defendant fails to appearthe court shall on the request in form No.26 of Appendix C enter judgment against the Defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit at such rate as the court thinks reasonable to the date of judgment and costs (2) where the plaint makes a liquidated demand together with some other claim, and the defendant fails or all the defendants fail, to appear as*

aforesaid, the court shall on request in form No.26 of Appendix C enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim”

Applying the provisions of Order IXA rule 3 and 5 Civil Procedure Rules to the pleadings herein it is clear that entry of regular interlocutory judgment on a demand similar to that of the Plaintiff falls under order IXA rule 3(2) which governs demands of a liquidated claim in addition to some other claims. The plaint presented herein contains a liquidated demand of US\$ Dollars of 634,000.00 in addition to general damages, costs and any other or further relief this Honourable court may deem fit to grant. In order for entry of interlocutory judgment under this rule to be regular, the Deputy Registrar has to comply with the directive therein namely “enter judgment for the liquidated demand and interest thereon as provided by sub rule (1) but the award of costs shall await judgment upon such other claim.” The entry of interlocutory judgment made by the Deputy Registrar on 6.2.2006 reads:-

“Interlocutory judgment: The defendant herein Barclays Bank of Kenya limited having been duly served with summons to enter appearance and file the defence and having, failed to enter the defence within the stipulated period and on the application by the Plaintiff’s Advocate dated 3rd February 2006 enter interlocutory judgment against the said defendant as prayed. The award of costs should await judgment when the suit will be set down for formal proof.

Dated 6th day of February, 2006

Deputy Registrar:

This entry contravenes Order IXA rule 3(2) as it entered interlocutory judgment against the defendant as prayed” when it should have entered interlocutory judgment for the liquidated demand plus interest only. Likewise the plaintiffs Counsels request for interlocutory judgment dated 3.2.2006 was framed wrongly and it is its contents which misled the Deputy Registrar. It simply asked the deputy Registrar to kindly enter judgment for the Plaintiff as against the Defendant who has failed to file defence within the time specified having filed memorandum of appearance on 17.1.2006. It should have specified that entry of interlocutory judgment was to be for the liquidated claim only. This being the case it is the finding of this court that the entry of interlocutory judgment by the Deputy Registrar on 6.3. 2006 and as requested for by the Plaintiffs Counsel is irregular and the defendant is entitled to have it set aside as of right. This disposes off question 1 and 2 for determination.

As regards question 3 whether the Counsels, action of deponing the supporting affidavit in support of the application faults the application, this court has already made observations to the effect that a perusal of the affidavit reveals the steps the office took in filing defence and upon discovery of interlocutory judgment having been entered. It does not deal with the merits of the case. In this sense it is not based on controversial issues likely to shift the advocate from his privileged position to the witness box. In that regard the court makes a finding that the supporting affidavit sworn by the defence lawyer is regular.

Having made a finding that the entry of interlocutory judgment is irregular does not preclude this court from going into question 4 and 5 which deal with issues whether the defence raises triable issues and whether he should be denied a right of being heard. This leads me to the pleadings, of the parties. Paragraph 6 of the plaint pleads that through negligence, recklessness and/or breach of duty by the Defendant bank, the afore said cheque was dishonoured and or unpaid rendering the plaintiffs tender disqualified and affecting his credit worthness, paragraph 7, that the defendant in a blatant breach of contractual duty and without the Plaintiffs authority debited a further US Dollars 58,553.23 to the detriment of the Plaintiffs account, paragraph 8 that the defendant without impunity and acting in bad faith went ahead and charged interest of US Dollars 8.19 and commission of US Dollars 52.50 on the Plaintiffs account. The responses of the defendant are found in paragraph 3 of the amended defence that the cheque was dishonoured because the paying bank had not received the notification of payment from the defendant, paragraph 5(a) in addition to the denial that as soon as its attention was drawn to the dishonour it remitted the transfer consequently the plaintiff suffered no loss or damage, paragraph 6 that the transaction was reversed thereby occasioning no loss to the plaintiff. The Plaintiff claims to have

suffered loss as a result of the defendants actions which actions the defendant alleges that were rectified immediately and so the entity suffered no loss. These are triable issues.

As for the delay the court finds that 6 days is not un reasonable in the circumstances and in fact had the judgment been regularly entered the court would still have gone ahead and opened the door for the defendant to defend the claim.

In conclusion the court is inclined to set aside the interlocutory judgment entered here in for the following reasons:-

1. Being a claim comprising both a liquated demand and other claims it fell under the provisions of order IXA rule 3(2). This rule obliged the Plaintiff advocate to request for interlocutory judgment on the liquated demand only plus interest and not for the entire claim. It also obliged the Deputy Registrar to enter interlocutory judgment on the liquated demand plus interest only and not as prayed. The entry of interlocutory judgment having been irregular it qualifies to be set aside as of right.
2. The fact of Counsel deponing the affidavit in support of the application has not faulted the affidavit and application as it is based on routine activities on how the delay in filing of the defence occurred. This was not a matter within the knowledge of the client. It does not touch on the facts of the case. It deals with matters within the competence of the Counsel. It therefore does not remove the said Counsel from the privileged position of Counsel into the witness box.
3. Since the Plaintiffs claim is based on less suffered by the Plaintiff as a result of the defendant's actions and since the defendant has pleaded that actions were reversed promptly and thus the Plaintiff suffered no loss or damage raises triable issues. Indeed the Plaintiff's Counsel has annexed certain correspondences to the replying affidavit emanating from the defence which tend to indicate an admission of wrong doing on the part of the defence. However as submitted by the defence Counsel what the Court is called upon to look at in law at this interlocutory stage are pleadings and not matters of evidentiary value. The correspondences annexed to the replying affidavit are matters of evidentiary
4. than value which need to be tested on cross-examination.
5. The delay in filing of the defence and amended defence was not in ordinate and excusable.
6. The Plaintiff will be compensated for by payment of costs. In awarding costs to the Plaintiff the court is alive to the fact that interlocutory judgment is irregular. However it is the defence which necessitated that irregular interlocutory judgment to arise by not filing their defence in time.
7. For purposes of speedy disposal of the matter since the plaintiff wants to move fast the court is inclined to extend the time of filing the defence upto the time the amended defence was filed on 27.2.2006.

In the premises the application dated 1.3.2006 and filed on 2.3.2006 be and is hereby allowed on the following terms.

- (1) The interlocutory judgment entered herein on 6.2.2006 be and is hereby set aside for reasons given herein.
- (2) Time for filing defence extended upto the time the amended defence was filed on 27.2.2006, which amended defence is deemed to be duly filed.
- (3) The Plaintiff/Respondent will have costs of the application.
- (4) Thereafter parties to proceed according to law.

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

N. NAMBUYE

JUDGE