REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 271 OF 2007

ORIENTIAL COMMERICAL BANK (K) LTD ……..... APPLICANT

VERSUS

MAENDELEO PHARMACY 2006 (K) LTD.…1ST RESPONDENT

GIDEION MWITI IREA……..……2ND RESPONDENT

MICHAEL NGIGI KARIUKI……3RD RESPONDENT

FRANCIS OMURWA MANYIBE……4TH RESPONDENT

ANGELO MUNG'ORRI M'INOTI……..…..….5TH RESPONDENT

MUTEITHIA MWITI…….……..6TH RESPONDENT

STEPHN NYAMU MBIJIWE……...7TH RESPONDENT

KENYA AKIBA MICRO-FINANCE LTD…...…8TH RESPONDENT

RULING

The Plaintiff filed this suit on the 30th May 2007 seeking judgment in the sum of Kshs. 20,252,097/55 with interest at 25% per annum from 1st May, 2007 being the sum of money advanced to the Defendants at their request in the form of overdraft facilities, through the bank account held by the 1st Defendant in the Plaintiff's Bank. After serving the

Defendants with the summons, the firm of J. M. Njengo & Company Advocates filed a memorandum of defence on 8th June 2007. No defence was however filed and after a request for judgment by the Plaintiff, the Court entered an *ex parte* judgment against all 8 Defendants on the 5th July 2007.

The Defendants have by a chamber summons dated 12th July, 2007 brought under Order IXA Rules 3(1), 10, 11 of the Civil Procedure Rules, Section 3A and 63(e) Civil Procedure Act, sought two prayers, one, a stay of execution of the judgment and decree and, two, that the ex parte judgment and all consequential orders be set aside and that leave be granted to the Defendants to file their defence. There are six grounds cited for this application as follows:

(a) The Plaintiff has obtained ex parte judgment against the Defendants in default of Defence.

(b) The Defendants duly filed Memorandum of appearance and subsequently prepared an appropriate defence to the claim but which was never filed within time.

(c) Failure to file the Defences in time was as a result of inadvertent and excusable mistake which is not attributable to the Defendants.

(d) Both parties were at all material times involved in out of court negotiations and counsel for the Defendants inadvertently overlooked the filing of the defence.

(e) The Defendants have a plausible defence to the Plaintiff's claim.

(f) It is in the interest of justice that the Defendants should not be condemned unheard.

The application is supported by two affidavits. One affidavit is sworn by **J. M. NJENGO ADVOCATE** in which he annexes correspondences exchanged between his firm and the Plaintiff's Advocate as proof that both parties were engaged in an out of court settlement. The Advocate also depones that he was under a mistaken belief that he had filed a defence on behalf of the defendants until he perused the court file on 11th July 2007.

The second affidavit is by **GIDEION MWITI IREA**, the 2nd

Defendant who confirms that all eight Defendants instructed the firm of **J. M. NJENGO & CO. ADVOCATES** to act on their behalf, after the 2nd Defendant received the summons to enter appearance on behalf of all the Defendants. The deponent also confirms that the two parties were engaged in out of Court negotiations through their Advocate. The deponent depones further that the Defendants have a plausible defence which raises *prima facie* triable issues. He sets out five triable issues as follows:

(a) Whether the 1st Defendant has any relationship with Maendeleo Pharmacy Limited which was allegedly advanced the Bank facility.

(b) Whether the 2nd to 7th Defendants inclusive did execute legally valid instruments of guarantee and indemnity to cover the alleged debt.

(c) Whether a cause of action arises as against the 8th Defendant.

(d) Whether any moneys were disbursed by the Plaintiff and who was the beneficiary.

(e) Whether all the Defendants are truly and justly liable <u>either for</u> the alleged debt.

The 2nd defendant has also annexed a copy of the draft defence as "**GMI -1".**

The application is opposed. The Deputy General Manager of the Plaintiff Company, **ATUL KUMAR I. DAVE** has sworn a replying affidavit. In the said affidavit, it is deponed *inter alia* that the negotiations between the parties begun on 27th June 2007, which was five days after the Defendants defence was due for filing. In paragraph 5 of the replying affidavit the deponent answers to paragraph 12 of the affidavit sworn by **GEDION MWITI IREA** (Paragraph 12 is already set out in this ruling) as follows:

(i) The Defendants' draft defence does not raise any triable issues or at all.

(ii) As to whether the 1st Defendant has or had any relationship with Maendeleo Pharmacy Limited I tender in evidence as exhibit "AID 2" a true copy of certificate of change of name issued on 26th April, 2006 clearly confirming that Maendeleo Pharmacy Limited had changed its name to Maendeleo Pharmacy 2006 (K) Limited, 1st Defendant herein.

(iii) As to whether the 2nd to 7th Defendants respectively did execute legally valid instruments of guarantee and indemnity to cover the debt, I tender in evidence as exhibit "AID3" true copies of the guarantee and indemnity instruments executed by the said Defendants.

(iv) As regards the alleged triable issue as to whether a cause of action arises as against the 8th Defendant I tender in evidence as exhibit "AID 4" true copies of the guarantee and indemnity instrument and Resolution executed and passed respectively by the 8th Defendant under which it guaranteed and undertook to pay to the Plaintiff the sums due from the 1st Defendant.

(v) As regards the issue whether any moneys were disbursed by the Plaintiff and the beneficiary thereof I tender in evidence as exhibit "AID 5" a true copy of the 1st Defendant's statement of account evidencing the disbursements made by the Plaintiff to the 1st Defendant.

(vi) As regards whether all the Defendants are truly and justly liable for the debt I tender in evidence as exhibit "AIDS 6" various correspondence from the Defendants in which they acknowledged the 1st Defendant's indebtedness and further made settlement proposals to the Plaintiff which they did not honour.

The application was urged by Mr. Odede Advocate, on behalf of the 1st Defendants and Mr. Karogu on behalf of the 2nd to 8th Defendants while Mr. Bundotich Advocate represented the Plaintiff/Respondent. Mr. Odede argued two points. First point was that the mistake of the Counsel for the Defendants to file the defence on time ought not to be visited on his clients. The second point urged is that the Defendants defence was not hopeless that it was arguable and that it raised triable issues. I have already set out the discerned triable issues as set out in the 2nd defendant's affidavit. Mr. Odede in attention raised issue with the averment at paragraph 5 of the replying affidavit stating that since the claim in the plaint exceeds the guarantees relied upon, that that raises a triable issue which should go to trial. Counsel relied on the case of **PITHON MAINA V MUGIRIA** [1982-88] I KAR 171 at page 172 where Potter JA quotes from three previous cases with approval as follows:

"***There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just … The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.'***

'***This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.'***

'***I consider that under Order 9, rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."***

Mr. Karogu raised issue with the guarantees upon which the claim is made. Counsel submitted that the loan in issue in this suit was advanced to a company which did not exist and further that the Company Resolution accepting the terms of the loan was by the non-existent company and therefore not binding on the 1st Defendant as there was no assignment of the debt from the non-existing company to the 1st Defendant. Counsel relies on the case of **ABDI RASHID SHERIFOW V ARSHAD NIAZ MOHAMED HCCC No. 589 of 2004** in which **Hon. Waweru, J.** set out principles upon which Interlocutory judgment entered against a Defendant as set out by the Court of Appeal in the case of **MAINA VS MUGIRAI [1983] KLR 79** as follows:

"***(a) that there are no limits or restrictions on the judge's discretion except that it should be based on***

such terms as may be just because the main concern of the court is to do justice to the parties…"

Mr. Karogu also relied upon the case of **KICOMI 1993 LTD VS KENYA ORIENT INSURANCE CO. LTD HCCC NO. 136 of 2004** where **Hon. Warsame, J.** quotes from the Court of Appeal for Eastern Africa in the case of **PATEL vs E.A. CARGO HANDLING SERVICES** [1974] E.A. 75. That case was cited in the case of **PITHON MAINA V MUGIRIA**, supra, and **ABDI RASHID SHERIFOW**, supra, and I need not repeat them here.

Mr. Bundotich for the Respondent opposed the application. Counsel urged the court to consider that the judgment entered in this case was a regular one, and that the only issue to be determined is whether the mistake, which occurred, was excusable and secondly whether there was a defence on the merits. In that regard, Mr. Bundotich sought to distinguish the cases relied upon by the Applicants, i.e**. ABDI RASHID SHERIFOW**, supra, and **KICOMI 1993 LTD**, supra, on ground that in both cases irregular judgments had been entered. Mr. Bundotich also submitted that the negotiations between the parties given as an excuse for failure to file defence on time were ongoing negotiations entered into long before the suit was filed, as evidenced in the bundle of documents annexed as "**AID 6"** in the replying affidavit. Counsel urged the court to find that based on the negotiations in the said correspondences, the Defendants had no defence.

Mr. Bundotich relied on the case of **NATIONAL BANK OF KENYA VS NDZAI KAYANIJONATHAN HCCC No. 775 of 2002** where **Hon. Ringera J**, as he then was stated:

Should I exercise the Court's discretion to set aside the exparte judgment? First, no reason is given for failure to enter appearance or file a defence in time. That is understandable when it is remembered that the defendant's stand was that he had not been served. All I can infer from that is that the Defendant is not a candid litigant: he has denied being served when he was. Secondly, his so called defence on the merits is exposed by the affidavit of Mary Ngatia to be a hollow sham. The genesis of the Defendant's indebtedness to the plaintiff is explained. And then his admission of debt and his unhonoured promises to repay is exhibited.

In the final analysis this to me is a case where a defendant who was duly served did not take the step of entering appearance or filing a defence in time. He has no explanation for the default. And he has no defence on the merits of the suit. In those circumstances it cannot be in the interest of justice to set aside the judgment obtained by the plaintiff on any view of the jurisprudence pertinent to setting aside default judgment. To accede to the Defendant's request would be to assist a person who is obviously bent on delaying the course of justice. That, I refuse to do."

Counsel also relies on the case of **CHARLES CHEGE NJOROGE VS TRANSNATIONAL BANK LTD HCCC No. 2708 of 1996** where **Hon. Waweru, J**. stated:

"***But before I can exercise my discretion in favour of the Plaintiff I must determine if he has a credible or arguable defence to the counterclaim. If he has no such credible or arguable defence it will be futile to set aside the interlocutory judgment which was otherwise properly and regularly entered. There is no draft defence to the counterclaim annexed to the application. In the supporting affidavit there is not a single thing stated as to what the Plaintiff's defence to the counterclaim might be. In his submissions learned counsel for the Plaintiff merely stated that the Defendant will be unjustly enriched by the judgment on the counterclaim. He did not state what the Plaintiff's defence to the counterclaim might be.***

Where an interlocutory judgment has been properly and regularly entered it is incumbent upon an Applicant who applies to set aside such judgment to demonstrate that he has a credible or arguable defence."

Mr. Bundotich urged the court to find that statements of fact made in the replying affidavit were not answered and therefore stood unchallenged

Part of what was unchallenged is the fact that the debt was admitted irrevocably and an offer to liquidate the debt made as evidenced in the letter by the 1st Defendant to the plaintiff annexed as "**AID 6".** Also not challenged is fact the 3rd and 5th Defendants by a Board Resolution admitted the same debt and offered further security as evidenced at page 74 of the annexure "**AID 6".** Mr. Bundotich also urged the Court to find that the change of name of the 1st Defendant was communicated to the Plaintiff by the Defendants as evidenced in "**AID 6"** and other correspondences and that in the circumstances it was a non-issue, that Board Resolutions by the Directors of previous company were binding on the Defendants and finally that all the guarantees were binding. Counsel urged the court to find that the Defendants had no defence.

I have considered the submissions by Counsel to the parties, their divergent views, the authorities cited, the pleadings on record and the applications.

The principles that apply to the application are well settled as set out in the cases relied upon by the parties. The only distinction which needs to be made is that where the interlocutory judgment is irregular, the judgment should be set aside *ex debito justitiae. W*here however the interlocutory judgment was a regular one, then the court should consider whether the failure to enter a defence is excusable and secondly whether there is a defence on the merits.

The Defendants have given an excuse for the failure to file a defence which is one, the mistake of Counsel and secondly the fact parties entered into out of court negotiation. The Defendants advocate, **J. M. NJENGO** has deponed that the prepared a defence and gave it to his clerk to file in Court on time but that the said clerk proceeded on leave before filing it. We do not have an affidavit from the said clerk, **PETER MUREITHI MWANIKI,** not just to confirm the averments by **NJENGO,** but to explain why he never filed the defence as directed. There is therefore no proper explanation given for the failure to file the defence on time. The second excuse given is that the parties entered into out of Court negotiations and that in the process of that engagement, it did not occur to the Advocate that the defence had not been filed until it was too late.

The Deputy General Manager of the Plaintiff Bank in his replying affidavit, has annexed several correspondences exchanged between the two parties. "**AID-1"** is the first correspondence from the Defendant's Advocate to the Plaintiff's Advocate after the suit was filed, and is dated 27th June 2007. This letter was written five days after the Defendants defence was due to be filed in Court. The correspondences in "**AID-6"** *inter alia* prove that the Defendants had been communicating with the Plaintiff Bank over their indebtedness to the bank long before the suit was filed. The reason given that the Defendants failed to file their defence in Court due to out of Court negotiations is therefore neither bona fide nor inexcusable in the circumstances.

A draft defence is annexed to the affidavit sworn by **GIDEION MWITI IREA,** the 2nd Defendant herein. I have perused the draft defence and the issues raised which, according to the deponent **GEDION MWITI IREA,** are *prima facie* triable issues and which makes the defence, in his view, arguable. In paragraph 3 of the defence the Defendants aver that the 1st Defendant has no connection with Maendeleo Pharmacy Limited. The 2nd Defendant deponed that this is a triable issue. I have considered "**AID 2"** annexed to the replying affidavit. This is a copy of a certificate of change of Name evidencing that "**MAENDELEO PHARMACY LTD** had changed its name to **MAENDELEO PHAMACY 2006 (K) LIMITED,** as of 26th April 2006. The Defendants have not filed any response to deny or challenge the authenticity of the annexed certificate. There is therefore undoubted proof that the 1st Defendant changed its name from MAENDELEO PHARMACY LIMITED, the company which was advanced the banking facilities in issue. The two companies are connected and the averment in paragraph 3 of the defence denying the connection is therefore a sham

In paragraph 4 of the defence, the 2nd to 8th defendants deny knowledge of matters pleaded in paragraph 4, 5, 6 and 7 of the plaint. Paragraph 4 of plaint gives description of the 8th Defendant. In paragraph 5 the plaint gives particulars of an account No. 101042006 which it is averred is held by the 1st

Defendant.

I see from the replying affidavit **ANNEXURE "AID-5"** being statement of account No. 101042 006 for period between 1st December, 2006 to 31st July, 2007 in the name Of the Maendeleo Pharmacy Ltd. I also see at page 78 of 'AID-6" a letter written by the 3rd, 4th, 5th and 6th Defendants dated 3rd June, 2006 in which the account number is quoted.

In paragraph 6 of the plaint, it is averred that on 11th May, 2006 the Plaintiff agreed to grant the 1st Defendant at its request, overdraft and other banking facilities subject to a limit of Kshs. 1 million. In that regard I see annexed as "**AID-6",** a letter signed by the 6th, 4th and 3rd Defendants and dated 11th May, 2006 in which the three Defendants applied for an overdraft facility from the Plaintiff Bank on behalf of the Maendeleo Pharmacy Ltd.

In paragraph 7 the plaint sets out a term of the agreement between the Plaintiff and 1st Defendant to the effect that the parties agreed that the overdraft facility would fluctuate widely with no dormancy and would be payable on demand.

The agreement is at page 57 to 73 of the plaintiff bank's replying affidavit. At page 59 is clause 4 **Repayment and Review,** where the said term is contained. Having considered the averment in paragraph 4 of the plaint, the pleadings and annexures to the affidavits by both parties, I find the same to be a sham.

In paragraph 5 the defendants deny requesting for the overdraft facilities from the plaintiff as indicated in paragraph 6 and 7 of the plaint. The letter requesting for the facility is annexed as "**AID-6"** at page 56. It is signed by the Chairman and two Directors of the 1st Defendant i.e. the 6th, 4th and 3rd Defendants respectively. That letter has not been disowned by any of the Defendants to this suit. Paragraph 5 of the defence is therefore a sham. In paragraph 6 and 7 of the defence, the 7th Defendant denies executing a chattels mortgage over motor vehicle registration No. KAV 253F, as alleged in paragraph 9 of the plaint. The Chattels Mortgage is not included in the annexed documents.

In paragraph 8, the 1st Defendant denies paragraph 10 of the plaint in which the Plaintiff avers that the 1st Defendant, in breach of the overdraft and other banking facilities agreement overdrew sums in excess of the agreed limits and defaulted in repayments.

I have perused the pleadings and annexures in the case. There are several documents in which the Defendants not only acknowledges that the 1st Defendant is indebted to the plaintiff Bank but, in addition, seeks indulgence to liquidate the debt in installments. "**AID-4"** is a Board Resolution in which the 8th Defendant communicated a Board Resolution made on 3rd June 2006, in a letter on its letterhead. In that Resolution, the Board acknowledges the 1st Defendant's indebtedness to the Plaintiff in the sum of Kshs. 20 million.

At page 74 of the Plaintiff's annexure "**AID-6"** is another Board Resolution by the 1st Defendant's Directors, dated 3rd June 2006, acknowledging the indebtedness of the 1st Defendant to the Plaintiff to the tune of Kshs. 20 million. At page 75 of same annexure is a Board Resolution by Directors of the 1st Defendant dated 3rd June 2006 also acknowledging the same debt. The importance of both resolutions (pages 74 and 75) is that the Directors of the 1st Defendant were agreeing to give personal and corporate guarantees to cover the debt. More importantly the Directors admit that the reason the overdraft was created in excess of the agreed limit was due to return of cheques drawn on the 1st Defendants account and which the Plaintiff allowed withdrawals.

There are two hand written documents at page 78 and 81 of "**AID-6"** In which various Directors of the 1st Defendant acknowledge how the debt of Kshs. 20 million to the Plaintiff Bank arose, and fact the said debt remains unpaid. Considering all these annexures, and bearing in mind that the Defendants did not, in response to the replying affidavit in which the documents were annexed, I find that the Defendants

defence at paragraph 8 is hollow and a sham.

In paragraph 9 the Defendants deny ever passing a resolution on 3rd June 2006 or at all, acknowledging the alleged debt. They also deny executing any valid guarantee and indemnity instruments in favour of the Plaintiff as alleged in paragraphs 11 and 12. I have already gone through the Board Resolutions of the 3rd June 2006 when dealing with paragraph 8 of the defence. As for execution of guarantees, the guarantees are contained in pages 4 to 39 of the annexures to the replying affidavit marked "**AID-3".**

At page 4 is the guarantee signed by the 2nd Defendant. At page 10 is the guarantee signed by the 3rd Defendant.

At page 16 is the guarantee signed by the 4th Defendant.

At page 22 is the guarantee signed by the 5th Defendant.

At page 28 is the guarantee signed by the 6th Defendant.

At page 34 is a guarantee by the 7th Defendants. In this guarantee form however no particulars were entered in the entire document, including the names of the guarantor and the particulars of the execution and witness at page 39 of the document. It is therefore not a validly executed guarantee.

The guarantees by the 2nd to 6th Defendants are executed as required under the Registration of Titles Act, and are *prima facie* valid documents. Except for the 7th Defendant the denial by the 2nd to 6th Defendants that they did not execute guarantees in favour of the Plaintiff, to cover the 1st Defendant's debt to it is a sham.

In paragraph 10 the 2nd defendant admits depositing his title to land No. Kajiado/Kaputiei-North/1668 with the Plaintiff, but denies doing so to secure the 1st Defendant's indebtedness to the Plaintiff as averred at paragraph 13 of the plaint. The letter in which the 2nd Defendant forwarded to the Plaintiff Bank the title deed to the said property is found at page 81 to 83 of annexure "**AID-6",** and is in hand-written form. The letter is very clear as to the purpose of the deposit of the said title and states as follows at page 82:

"…***thus causing overdrawn position in the account. I am offering my property title Number KJD/Kaputiei-North/1668 area 28.3 hectares as security for the said companies liabilities with you."***

At the top, the letter's reference is:

"***RE: OVERDRAWN POSTION IN ACCOUNT NUMBER 101042 006 – MAENDELEO PHAMRMACY WITH YOU"***

The letter is addressed to the General Manager of the Plaintiff Bank.

In addition to the clear terms on which the title was offered by the 2nd Defendant to the Plaintiff Bank, is the Board Resolution at page 74 of AID-6 aforementioned, in which it is agreed that the 2nd Defendant, among other directors should give personal guarantee for Kshs. 20 million each to cover the 1st Defendant's liability to the Plaintiff Bank.

Having considered all these annexures to the Plaintiff's replying affidavit, which are not challenged or controverted by any of the Defendants and more particularly the 2nd Defendant, I do find that the averment in paragraph 10 of the draft defence is a sham.

In paragraph 11 and 12 of the draft defence, the defendants deny the sum claimed in the plaint and also

deny that the plaint discloses any course of action.

As was the principle set out in the Court of Appeal case of **MAINA V MUGIRIA**, supra:

"***(e) some of the matters to be considered are the facts and circumstances of the case, both prior and subsequent to the entry of judgment, including the respective merits of the positions of the parties, the nature of the action the defence, if one has been brought to the attention of the court, however irregularly;***

(f) the court will consider also if the plaintiff can be reasonably compensated by costs for any delay that would be occasioned by setting aside the judgment; and

(g) the court will bear in mind that to deny a litigant a hearing should be its last resort."

I too have considered all the facts and circumstances of the case as presented before the Court. The fact that the 2nd to 7th Defendants who are Directors of the 1st Defendant resolved to apply for overdraft facilities from the Plaintiff Bank, on behalf of the 1st Defendant. The facility was granted as a result of which the 2nd to 6th Defendants gave personal guarantees. The facility was enjoyed by the 1st Defendant to the extent that the limit was surpassed, when the Plaintiff Bank paid cheques deposited in the 1st Defendant's account but which cheques were later dishonoured. I have considered the fact that the 1st to 6th Defendants have no defence and that the issues raised in the draft defence are a sham, except for the case of the 7th Defendant. The 7th Defendant, Stephen N. Mbijiwe did not sign any guarantee in favour of the Plaintiff Bank, and has not signed any of the correspondences sent to the Plaintiff by the Defendants, including the Board Resolutions of the 1st defendant. Except that his name appears in the letter dated 11th May 2006 as one of those who were present in a meeting of the Board of the 1st Defendant, in his capacity as General Manager, and who, it was agreed in the Board Meeting, was one of those who were to sign a personal guarantee in favour of the Plaintiff Bank. He did not however sign any personal bond, he did not sign the form of acceptance nor does his name appear in the latter Board Resolutions. Apart from the 7th Defendant whose liability is in doubt, the 2nd to 6th Defendants were fully involved in the transactions that led to the debt in question and bound themselves, through various documents, to the 1st Defendants indebtedness to the Plaintiff. In regard to the 7th Defendant, paragraph 4 and 11 of the draft defence are a reasonable defence raising triable issues.

In regard to the case against the 8th defendant, a Board Resolution dated 3rd June 2006 is annexed to the replying affidavit as "**AID-4".** That Resolution does not indicate who the Board members were. The persons who sign the Resolution are not identified. Annexed to it as part of "**AID-4"** is a document which has no title. It appears to be a guarantee in favour of the Plaintiff for banking facility granted to the 1st Defendant in the sum of Kshs.20 million. It is given by the 8th Defendant. The execution part does not have any particulars of who signed and neither is it witnessed. The document would need to be scrutinized further. In that regard, as far as the 8th Defendant is concerned, the averments at the draft defence, in paragraph 4 and 11 is a reasonable defence which raises serious triable issues which need to be ventilated further.

In addition I am satisfied that the Respondent can adequately be compensated with an award of damages, if the *ex parte* judgment entered against the 7th and 8th Defendants are set aside. I am satisfied that the Respondent will not suffer any prejudice if the application by these two Defendants is allowed.

I do find that the 1st to the 6th Defendants have no defence on the merits, and that the draft defence annexed hereto, as far as it touches on these six Defendants, is a sham. The draft defence has no merits, to the favour of the 1st to the 6th Defendants. In addition these Defendants have admitted the debt and any promises made to repay the same as exhibited in the annexed correspondences were dishonoured.

In the final analysis the 1st and 6th defendants have no acceptable or excusable explanation for the

default in filing their defences and no defence on the merit. The 7th and 8th Defendants equally have no acceptable explanation for the default in filing defence in time. However, since their defence *prima facie* has merit as it raises triable issues, I will accede to their request to set aside the *ex parte* judgment. The co-Defendants 1st to 6th, cannot enjoy that right as to do so would be sanctioning delay of the cause of justice and would not serve the interests of justice.

The upshot of this application is that the 1st to the 6th Defendants' application is denied and the application dismissed with costs to the Respondent. The application by the 7th and 8th Defendants is allowed and the ex parte judgment entered against both set aside together with all the consequential orders. The 7th and 8th Defendants are granted leave to file and serve their defence within 14 days from the date herein.

The 7th and 8th Defendants will pay throw away costs and the costs of this application to the Respondent in any event before filing their respective defences.

Dated at Nairobi this 18th day of December, 2007.

LESIIT, J

JUDGE

Read, signed and delivered in presence of:

Mr. Amadi for the Defendant

Mr. Bundotich for the Plaintiff/respondent

In the open Court

WARSAME, J

JUDGE