REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 219 OF 2004

NATIONAL BANK OF KENYA LTD……PLAINTIFF

VERSUS

ERNEST KIPKORIR KILEL……DEFENDANT

RULING

The defendant made an application to this court under the provisions of **Order L rule 1, Order XXI rule 22** of the **Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking to have the order issued by this court on the 31st of January 2005 together with all the consequential orders set aside. The application is based on the grounds stated on the face of the application which are that summary judgment was entered by this court on the 31st of January 2005 in the absence of either the defendant or his counsel. The defendant contends that he was not informed of the said date when the application for summary judgment was listed for hearing. He stated that he only became aware of the judgment entered against him on the 1st of February 2006 when he was served with a notification of sale of his property. He contends that he has a good defence and counterclaim which raises triable issues and which should be heard and determined on merits. The application is supported by the annexed affidavit of Ernest Kipkorir Kilel, defendant.

The application is opposed. Samuel O. Odiyo the Manager of the plaintiff's Nakuru branch has sworn a replying affidavit in opposition to the said application. In it, he has deponed that the summary judgment was entered against the defendant after the court was satisfied that the defendant was properly served. He deponed that after obtaining the said judgment, the plaintiff taxed its costs after serving the counsel for the defendant who was then on record. Subsequently thereafter, the defendant was served on the 1st of September 2005 with a notice of settlement of terms of sale of the properties known as ***Kericho/Chesinende S.S. 308, 309 and 310***. He swore that the defendant received the said notice and on the 20th of September 2005 visited the bank and made proposals as to settlement. The defendant further saw the advocates of the plaintiff on the 28th of September 2005 and made further proposals. He deponed that the defendant therefore filed this application to frustrate the plaintiff from selling the said properties in satisfaction of the decree of this court. He denied that the plaintiff had any valid defence or counterclaim which raised any triable issue. He urged this court to dismiss the application with costs.

At the hearing of this application, I heard the submissions which were made by Mr. Ngure, learned counsel for the defendant and by Mr. Kiburi, learned counsel for the plaintiff. I also read the entire pleadings filed by the parties in this case and the record of the court. I have also considered the decided cases which were referred to me by the counsels for the parties to this application. The issue for determination by this court is whether the defendant has established a case to enable this court exercise discretion in his favour and set aside the order issued on the 31st of January 2005 which allowed the application filed by the plaintiff for summary judgment to be entered against the defendant as prayed in the plaint. From the outset, this court would like to state that the defendant ought to have made the application under the provisions of **Order IXB rule 8 of the Civil Procedure Rules**. No matter. This court will still consider the application by the defendant filed on its merits.

Both the plaintiff and the defendant appreciated the applicable law. They both submitted that this court has unfettered discretion to set aside any *ex parte* order issued provided that the ends of justice would be served. In the case of **Municipal Council of Meru –vs- National Housing Corporation & Anor C.A. Civil Appeal No. 161 of 2000 (Nyeri)** *(unreported)*. The Court of Appeal held at page 10 of its judgment, as follows:

"***…. the consideration that the discretion of the court to set aside default judgments is unfettered and the primary concern of the court is to do justice between the parties; that the 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 a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (see SHAH –VS- MBOGO [1967] EA 116 and PATEL –VS- EAST AFRICAN CARGO HANDLING SERVICES LTD [1974] EA 75), that it is a fundamental principle of our procedural law that unless and until a judgment has been pronounced on merits or by consent the court is to have the power to revoke the expression of its coercive power when the power has been obtained only by failure to follow any rules or procedure (EVANS –vs- BARTLAM (supra), and that it should be***

the last resort of a court of justice to drive a litigant away from the judgment seat unheard."

In this case the defendant's counsel who was then on record Mr. Karigo Thuo was served with the application for summary judgment which was fixed for hearing on the 31st of January 2005. The said advocate of the defendant did not file any grounds in opposition to the application for summary judgment. Neither did he attend court. This court was satisfied that the defendant was properly served and granted the plaintiff's application for summary judgment to be entered against the defendant as prayed in the plaint. The sum which the plaintiff obtained judgment as pleaded in the plaint was Kshs 4,453,135/=, costs and interest at bank rate.

The plaintiff filed his bill of costs and served the defendant with the same. The defendant failed to attend court and the bill of costs was taxed as drawn on the 5th of April 2005. The defendant was personally served with a notice of settlement of terms of sale by the plaintiff on the 1st of September 2005. He acknowledged service. On the 20th of September 2005 the defendant saw the branch manager of the plaintiff bank and made proposals on how he was going to pay the amount owing. On the 28th of September 2005 he saw the advocate of the plaintiff and made further proposals to him.

Now the defendant wants this court to believe that he only became aware of judgment entered against him in this suit on the 1st of February 2006 when he was served with the notice of sale of the said parcels of land. After evaluating the evidence adduced by way of affidavits, it is clear that the defendant was aware that judgment had been entered against him as at the 1st of September 2005. The defendant was not surprised that judgment had been entered against him. Indeed he appeared to have expected it. That is why he made proposals to pay the decretal sum to the plaintiff.

In the submissions made before this court, the defendant wants this court to believe that his advocate who was on record failed to inform him of the progress that was made in the case. This court has ruled on several occasions that litigants are the owners of their cases and not their advocates. It is always their duty to follow up the progress of their case and know what steps have been taken. This court does not believe the contention by the defendant that for a whole year he never saw his former advocates then on record to be briefed on the progress of his case. The defendant cannot now conveniently blame his erstwhile advocate for his non-attendance to court during the hearing of the said application for summary judgment. He cannot blame his advocate for failing to inform him of the said hearing date. If the defendant was keen in pursuing his case, he would have known that he was required to swear a replying affidavit to the said application filed by the plaintiff. I find no merit in the submissions made by the defendant that it was the mistake of his counsel that made him not to be aware of the date the suit was scheduled to be heard on the plaintiff's application for summary judgment. The authorities supplied by the defendant on this aspect of the case are not applicable (*See* **Maina –vs- Muriuki [1984] KLR 407).**

Furthermore, it is clear that the defendant has been guilty of laches. He became aware of the judgment that had been entered against him as early as at 1st of September 2005. He did nothing other than to visit the plaintiff with a view of making futile proposals as to settlement. The defendant has written several letters to the plaintiff acknowledging the fact that he owes the decretal sum to the plaintiff. So far he has made no payment. When he was served with notice of the sale of his parcels of land, that is the time he woke up to the reality that he was no longer in a position to postpone the day of reckoning. It is when he got a brainwave that he should seek to set aside judgment which was entered against him. The defendant woke up to this reality more than five months after he first became aware that judgment had been entered against him.

I agree with the plaintiff that this is yet another attempt by the defendant to frustrate the plaintiff from enjoying the fruits of its judgment. The defendant has been indolent and has not shown any good faith in the conduct of his case. This court cannot exercise its unfettered discretion in favour of a litigant who wants steal a match from his opponent or who wants to obstruct or delay the course of justice. The defendant says he has a good defence which should be heard and ventilated on merits. I have looked at the said defence and the counterclaim filed. I have also looked at the correspondences which were written by the defendant to the plaintiff concerning the said debt. In the said correspondences which were annexed to the affidavits sworn in this application, the defendant admits owing the debt to the plaintiff.

He cannot turn around and plead that the amount which was entered as judgment against him was not the amount which was advanced to him by the plaintiff. The defendant was aware that the plaintiff was a bank and whose business is to lend money and charge interest for the sum lent. He cannot therefore claim that the figures differ from what was lent to him. In the circumstances of this case, I find no merit in the defence and counterclaim filed. It would therefore serve no useful purpose if this court were to exercise its discretion and re-open the case.

In the premises therefore, I find no merit whatsoever in the application filed by the defendant to set aside order of this court allowing the summary judgment to be entered against the defendant as prayed by the plaintiff. His application is therefore dismissed with costs.

DATED at NAKURU this 29th day of March 2006.

L. KIMARU

JUDGE