REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial 5 of 2005

DAVID BETT LANGAT & 5 OTHERS…….....…..APPLICANTS

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LIMITED…….RESPONDENTS

RULING

The defendant, by its application dated 10th May 2005 and brought under Order 9A Rules 10 and 11 of the Civil Procedure Rules as well as under Section 3A of the Civil Procedure Act, seeks the setting aside of the ex-parte interlocutory judgment entered herein against it and that the defence if filed on 9th March 2005 be deemed as properly filed. The application is based on the grounds that the judgment was not only prematurely and irregularly entered but also that the Deputy, Registrar had no jurisdiction in the first place to enter it.

When the application came up for hearing before me counsel for the plaintiffs raised what he called a preliminary objection notice of which he had given. I immediately overruled it and said that I would give my reasons for that in this ruling.

The grounds of the preliminary objection were that:

"1. It will be superfluous to proceed with the application dated 10th May, 2005 before the part-heard application dated 17th January 2005 is fully heard and determined.

2. Unless there is shown an application for stay of proceedings issued pursuant to a formal application the court cannot entertain a fresh application filed subsequent to the application dated 7th January 2005.

3. To proceed with the defendant's application dated 10th May 2005 will cause injustice to the plaintiff considering that the plaintiffs have finished presenting the application dated 17th January 2005."

I found the objection frivolous. These are grounds of opposition and do not amount to a preliminary objection as we know it. As was stated by the Court of Appeal in Mukisa Biscuit Manufacturing Company Limited – Vs – West End Distributors Limited.

"… a preliminary consists of a point of law which has been pleaded, or which arises from clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Counsel argued that if this application is heard before that of his clients great prejudice will be occasioned to his client. That is still not a ground of a preliminary objection but a ground of opposition. That is why I immediately overruled the objection and proceeded to hear the application.

Having given the reasons for overruling the preliminary objection I now turn to the application itself.

As I have said the application is based *inter alia* on the ground that the judgment was both irregular and premature. The defendant argues that having entered appearance on 14th February 2005 judgment in default of defence could not be entered until after 15 days. I agree with that entirely. The summons to enter appearance issued by the court in this case gave the defendant 15 days within which to enter appearance. That summons read with Order 9A Rule 9 gave the defendant another 15 days from entry of appearance within which to file a defence. The entry of interlocutory judgment on 22nd February 2005 before that period expired was therefore premature and irregular.

Counsel for the plaintiffs argued that time started to run in this case from 1st February 2005 when counsel for the defendant filed a notice of appointment of advocate. I find no merit in that argument. Counsel did not cite any authority in support of that argument and I know of none. Judgment in default of appearance or defence can only be entered as provided for in Order 9A. The interlocutory judgment in this case having been entered contrary to the provisions of that Order the defendant is entitled to have it set aside *ex debito justitiae* and I hereby set it aside on that ground. The defence on record is hereby deemed as properly filed. That being my view of the matter I do not need to go into the other points raised in the application except the one on costs.

On costs counsel for the plaintiffs wrapped his arguments by submitting that even if the interlocutory judgment is set aside, the defendant should be condemned to pay the costs of this application. This, he said, is because the defendant's advocates were not diligent. The period within which they should have filed the defence having expired they should have perused the court file to confirm that judgment had not been entered before they filed the defence on 9th March 2005. If the defence had been filed within the prescribed time, that is on or before 1st March 2005, that argument would have had no basis. Having not done so, the defendant should have ascertained that default judgment had not been entered before filing its defence. The plaintiffs themselves are, however, entirely not without blame. They caused interlocutory judgment to be entered long before it was due. In the circumstances the fair order to make on costs is that each party bears its costs of this application.

Orders accordingly.

DATED and delivered this 26th day of May 2006.

D. K. MARAGA

JUDGE