REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2708 of 1996

CHARLES CHEGE NJOROGE…….....……..PLAINTIFF

VERSUS

TRANSNATIONAL BANK LIMITED…….....……..DEFENDANT

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by the last vacation of the court and my recent illness and hospitalization. The delay is regretted.

In this application by chamber summons dated 27th February, 2003 the Plaintiff seeks an order to set aside the interlocutory judgment entered in favor of the Defendant upon its counterclaim and all consequential orders, and that he be granted leave to defend the counterclaim. Defence and counterclaim, which is dated 29th July, 1996, appears to have been filed a year later on 29th July, 1997. The same was served upon the Plaintiff on 20th August, 1997. The counterclaim was for the sum of KShs.4,388,455/60 together with interest accruing at 34% per annum from 1st July, 1997 until payment in full. The same was pleaded to be monies advanced to the Plaintiff by the Defendant and accrued interests. Interlocutory judgment upon that counterclaim was not sought by the Defendant for over 4 years. The request for the same was filed on 2nd December, 2001. The interlocutory judgment was entered on 13th December, 2001.

The application is erroneously made under Order 9B rule 8 of the Civil Procedure Rules. That rule caters for the setting aside or varying a judgment or order of dismissal entered in default of attendance at hearing of the suit. It is not applicable to the present application. The application should have been brought under rule 10 of Order 9A which provides for the setting aside of interlocutory judgments entered in default of appearance or defence. But that is a defect that is curable under rule 12 of Order 50 which provides that no application shall be refused merely by reason of a failure to state, in effect, the correct rule under which the application is made. I am satisfied that the application was meant to be brought under rule 10 of Order 9A, and I shall proceed on that basis.

The main ground of the application, as can be seen in the grounds on the face thereof and in the supporting affidavit sworn by the Plaintiff's learned counsel, is that failure to file defence to the counterclaim was occasioned by an oversight. The oversight is said to have been brought about by the protracted third-party proceedings which distracted the Plaintiff's learned counsel. In the course of arguments learned counsel for the Plaintiff pointed out that the same third-party proceedings appeared to have also distracted the Defendant's learned counsel, as interlocutory judgment upon the counterclaim was not sought and obtained until more than four years after it became available.

The court has a wide discretion to set aside ex parte judgments on such terms as are just. It is well established that the discretion is intended to be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But the discretion is not intended to assist a party who has deliberately sought to obstruct or delay the course of justice. In the present case I find nothing on the record or the arguments tending to show that the Plaintiff, by this application, deliberately seeks to obstruct or delay the course of justice. I am satisfied from the material placed before the court that indeed the failure to file defence to the counterclaim was occasioned entirely by an oversight on the part of his advocate occasioned by the protracted third-party proceedings. The Defendant's counsel appears to have suffered the same distraction. The Plaintiff's advocate has offered to personally meet all

the thrown away costs of the Defendant, and pleads that his client should not be punished for his advocate's oversight. I also find that in the circumstances of this case there has not been any inordinate delay in bringing the application.

But before I can exercise my discretion in favor 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. The Plaintiff herein has not even attempted to do that. I am therefore unable to see if by setting aside the interlocutory judgment the ends of justice will have been served or simply delayed. For this reason I must refuse the application by chamber summons dated 7th February, 2003. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 12TH DAY OF MAY, 2006.