



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 835 of 2003

DAIMA BANK LTD.....

**PLAINTIFF
VERSUS**

PATRICK MWAU MUSIMBA.....

.....DEFENDANT

R U L I N G

The defendant has applied for the setting aside of the judgement which was entered against him on 12th April 2005.

In his supporting affidavit the defendant conceded that he had been served with the plaint and summons to enter appearance. Immediately after being served, the defendant approached the plaintiff's advocates for purposes of without prejudice negotiations.

The advocates for the plaintiff are said to have insisted that the defendant should put forward proposals in writing, for consideration by the plaintiff. Whilst the parties were still negotiating, the plaintiff applied for and obtained judgement.

In the defendant's mind, he only made a mistake by not filing a defence, at the time when the negotiations were ongoing. Being a layman, the defendant believes that his said mistake is excusable. He says that he did not deliberately attempt to obstruct the plaintiff's case.

The defendant also says that there was a delay in bringing this application only because he was unable to raise legal fees immediately. And, even after he raised the requisite legal fees, the defendant explained that the court file went missing for a while. It is his case that his advocates only managed to trace the file at the stage when a Notice To Show Cause was scheduled for 4th August 2005, whilst the defendant had only been aware of the date for the hearing of the objector's application.

If the judgement was not set aside, the defendant says that he may have to pay out a sum in excess of KShs. 17.0 million. In the event that that happened, the defendant feels that he would have been condemned unheard.

At the same time, the defendant holds the view that if the judgement was set aside, the plaintiff will still be accorded every opportunity to prove his entire claim. Any delay which may be occasioned by such setting aside could be compensated by an award of costs, and also the interest which would continue accruing on the sums which might be due to the plaintiff.

In any event, the delay of five months is said to be excusable.

And, the defendant then goes on to complain that the judgement herein was not regular. The reason

for that assertion was that in the Plaintiff's prayer for interest was that it be awarded at the rate of 15% per annum from 1st July, 2003, which was not the date when the suit was filed. By pleading a date which was not when the suit was filed, the plaintiff is said to have rendered his claim to be unliquidated. Therefore, pursuant to the provisions of Order 9A rule 3 of the Civil Procedure Rules, the defendant contends that it was wrong for the court to have entered interlocutory judgement against him.

Another issue which was raised by the defendant was in relation to the verifying affidavit. The said affidavit was said to be fatally defective, as the deponent did not state his place of abode, as is required by Order 18 rule 4 of the Civil Procedure Rules. The omission was said to be one of substance, as opposed to form.

The defendant also pointed out that the original plaintiff had been amended. However, notwithstanding the said amendment, the plaintiff did not file another verifying affidavit. For that reason, the defendant contends that the judgement herein was founded on a defective pleading.

But in the event that this court were to find that the judgement was regular, the defendant still prays that it be set aside, as he has a good defence. He denies the plaintiff's assertion that it provided him with any facility. And, he states that whilst the claim was for KShs 12.0 million, the only document which the plaintiff had adduced in evidence was in relation to a facility which was not to exceed KShs. 250,000/=. The defendant also says that he denies not only the sum claimed but also the rate of interest claimed as well as the date when any such interest was calculable.

For all those reasons, the defendant feels that he should be granted an opportunity to defend himself, after the judgement herein is set aside.

In response to the application, the plaintiff submitted that the judgement herein was regular. As far as the plaintiff was concerned, the fact that the parties were holding some negotiations was not reason enough to cause the defendant not to file his defence. In any event, the plaintiff emphasises the fact that it did expressly notify the defendant that if he did not make acceptable proposals, the plaintiff would proceed with the process of recovery.

In that regard, there is no doubt that by its letter of 29th March 2005, the plaintiff stated, inter alia, that:

“Kindly let us have your payment proposal showing how you intend to repay the outstanding debt.

Please note that if we do not hear from you within fourteen days from the date of this letter we shall proceed with the recovery process.”

To my mind, although the said letter does not explicitly tell the defendant that the plaintiff would proceed to apply for judgement, the defendant should have become aware that if his proposals were not acceptable, the plaintiff could take further steps to recover the money which it believes is owed by the defendant. Therefore, the plaintiff cannot be faulted, for making an application for judgement thereafter. The only aspect of the matter about which the plaintiff could be legitimately faulted is that whilst he allowed the defendant some fourteen days to come up with an acceptable proposal, the defendant applied for judgement within seven (7) days .

Would the fact that the defendant was unable to raise legal fees good enough to excuse his delay in bringing this application?

First, the defendant herein does not allege that the plaintiff had any idea that he could not raise legal fees. Therefore, any steps which the plaintiff undertook were without the benefit of the knowledge about the defendant's financial circumstances.

Secondly, whether or not the plaintiff would have been aware of the defendant's financial incapacity, I do not think that the plaintiff would have been under any obligation to withhold further legal action against the defendant.

On the other hand, I do accept the fact that the defendant has not suggested that the plaintiff was under an obligation to withhold action during the period of time when he could not afford to pay legal fees to his own lawyer. All that he is saying is that he did not file this application as soon as he would have liked, because he could not afford to hire a lawyer. But the plaintiff asks why the defendant did not act for himself, if he could not afford an advocate at that time.

To my mind, the question, by the plaintiff is valid, for parties do not have to engage advocates in order to respond to claims against themselves. They could easily represent themselves. And especially when a judgement had been entered against somebody, I should have thought that it is in his own best interests to take action soonest, with or without the benefit of an advocate.

I also note that the delay was for a period of some five months. That is a considerable length of time. And whereas the defendant has attributed part of the period to the time spent in trying to trace the court file, he did not explain what portion was utilised in the search for the said court file. Had he done so, and had it been demonstrated that a considerable portion of the five months was taken up in the search, the court may have found that the delay had been reasonably explained. But on the material placed before me, I am not satisfied that the defendant has given a reasonable explanation for the delay of five months.

As regards the omission of information about the place of abode of the deponent of the verifying affidavit, the plaintiff says that the same was not a ground for setting aside the regular judgement. I note that by so saying, the plaintiff did not directly answer to the defendant's contention that the verifying affidavit was fatally defective.

In **JOVENNA EAST AFRICA LTD V. SYLVESTER ONYANGO & 4 OTHERS HCCC NO. 1086/02** the Hon. Nyamu J. held that if a verifying affidavit failed to disclose the true place of abode of the deponent, that was not an irregularity in form which was capable of being regularised under Order 18 rule 7 of the Civil Procedure Rules. He held that such an omission was a substantive irregularity which went beyond the provisions of Order 18 rule 7.

In **BANKRUPTCY & WINDING UP CAUSE NO. 5 of 2005, IN THE MATTER OF AMARCO (KENYA) LTD**, the Hon. J.K. Serگون held as follows:

“It is not denied that the verifying affidavit of Raha Mwambela Jilo is defective. The same did not disclose the sources of information nor his belief. The affidavit did not also indicate the deponent's true place of abode. What is the effect of these apparent defects? The East African Court of Appeal restated the position in the case of *Premchand Raichand Ltd Vs. Quarry Services & Others [1969] E.A. 514* as follows:-

“It has repeatedly been said by this court that affidavit based on information must disclose the source of information. This is not merely a matter of form but goes to the essential value of the affidavit

But since the source of information may have been unreliable, the affidavit can have no evidential value.”

In my view an affidavit which does not comply with the provisions of Order XVIII RULES 3(1) and 4 is incurably defective. The only remedy is to have such affidavits struck out, which I hereby do.”

As Order 18 rule 4 requires the deponent of an affidavit to state, inter alia, his true place of abode, Serگون J. was saying that the failure to do so rendered the affidavit incurably defective.

I am in agreement with the decisions arrived at in the two cases cited above, and do hold that since the verifying affidavit of Angela Mwendu Musuva did not state her place of abode, it was fatally defective.

However, that still begs the question as to whether the fact that the verifying affidavit is now being held to be fatally defective, could tender the judgement herein irregular.

To my mind the defect in the verifying affidavit could not render the judgement irregular. The defect could only provide the defendant with material to attack the pleading. Until that was done, any steps which were taken, such as the entry of judgement, were regular.

I note that in the draft statement of Defence, the Defendant has asserted that the suit herein is fatally defective. By so doing, the defendant may be deemed to be saying that he has a good defence, founded on the defect in the verifying affidavit, amongst others.

The Defendant also faulted the Amended Plaintiff for not having a verifying affidavit. That proposition is not legally sound, in my considered view. First, because there is no statutory requirement that an Amended Plaintiff be accompanied with a verifying affidavit, for Order 6 rule 2 of the Civil Procedure Rules is only expressed to be in relation to a plaintiff. Secondly, for the sound reasons advanced by the Hon. J.B. Ojwang J. in **MWANGI V. MWANGI & ANOTHER, HCCC NO. 2711 of 1998**. At page 4 of his ruling the learned Judge pronounced himself as follows:-

“..... If it is assumed, as it must be, that there was good cause for the amendment which introduced rule 2(3), then logically, a quite substantially amended plaintiff could well require a verifying affidavit, whereas a minor or purely formal amendment might not require such an affidavit. Would it serve any purpose for a most limited and purely formal amendment to the plaintiff, for instance, one involving only the spelling of a word, or rectifying labels, to be accompanied by a verifying affidavit? If that were the case it would simply proliferate paper-work and add to the copious materials which the judge must read; and that could very well cause delays in disposal of cases. I think that the court must have discretion as to what extent of the proposed amendment to the plaintiff would call for the filing of a verifying affidavit.”

I concur with that holding. And, applying it to this case, I find that the amendments constituted no more than the removal of the names of three named individuals who had initially been enjoined into the suit as part of the team who carried out business as **“Sports Aspirations.”** In the circumstances, no verifying affidavit was needed in relation to the Amended Plaintiff.

But even assuming that a verifying affidavit was needed in respect to the Amended Plaintiff, its omission could not have rendered the judgement irregular.

Thus, I hold that the judgement herein was regular. So, should it be set aside?

In **KINGSWAY TYRES & AUTOMART V. RAFIKI ENTERPRISES LTD [1995 – 1998] 2 EA 143 at 144**, the Court of Appeal made the following pronouncement:

“The principles upon which a court exercises its discretionary jurisdiction under Order IXA, as well as Order IXB, rule 8 of the Civil Procedure Rules are well settled. The jurisdiction is exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error (see Shah v. Mbogo [1967] E.A 116)”

In this case there have been two mistakes, in my view. First, the defendant failed to file a defence. Secondly, the defendant delayed for five months before bringing the application to set aside the judgement.

As the judgement is regular, it would not be enough to hold that if the defendant has advanced an explanation which constituted an excusable mistake, as he has submitted, the judgement should be set aside. In **TREE SHADE MOTORS V. DT DOBIE & ANOTHER [1995-1998] 1 EA 324 at 326**, the Court of Appeal held as follows:

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff’s claim. Where a draft defence is tendered with the application to set aside a default judgement, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim.

.....
There are ample authorities to the effect that, notwithstanding regularity of it, a Court may set aside an ex parte judgement if a defendant shows he has a reasonable defence on merits.”

In this case, the defendant has alleged, in his Defence, that he had only requested an overdraft facility to the extent of KShs. 100,000/=. He therefore asserts that he could not be owing KShs. 12,900,364/79, as claimed by the Plaintiff. That line of defence was countered by the plaintiff through a letter dated 4th January 2002, through which the defendant admitted owing Shs. 227,880/88 and Shs. 9,271,140/44 in two separate accounts. To my mind, the said letter from the defendant put paid to his allegation that he had obtained no more than KShs. 100,000/=. Therefore, I do not find the draft defence to be reasonable in the circumstances. Accordingly, I find no basis for setting aside the judgement herein. I therefore decline to set aside the judgement for the reasons that it is regular; the defendant filed this application after a period of 5 months, a delay which was not reasonably explained; and because the defendant has not demonstrated that he has a reasonable defence to the plaintiff’s claim.

The application dated 13th September 2005 is hereby dismissed, with costs.

Dated and Delivered at Nairobi this 4th day of May 2006.

FRED A. OCHIENG

JUDGE