



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Case 2 of 1998**

**TRANS-NATIONAL BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**WILLIAM KANDIE SUTER ..... 1<sup>ST</sup> DEFENDANT**

**GABRIEL KIPTORUS CHEBIATOR ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

Trans-National Bank Limited, which is the plaintiff in this suit and which I shall now refer to as 'the bank', obtained an order for summary judgment on 5/10/1999, in the sum of K.Shs. 851,239 together with costs and interest thereon against William Kandie Suter and Gabriel Kiptorus Chebiator, who are named as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively.

Suter who feels aggrieved by the said order, and who had obtained an order for stay of execution prior hereto has now moved this court and he seeks the following orders:

- Ø That the summary judgment and the consequential orders be set aside.
- Ø That the time within which he should file his defence to the amended plaint be enlarged.

He bases his application on the grounds inter alia, that though he was served with the summons to enter appearance and the original plaint, he was exonerated when the suit was amended to include the 2<sup>nd</sup> defendant, who took over the liability in full, with the full knowledge and consent of the bank. It is also his ground that he was not served with the amended plaint or the application on the basis of which the order for summary judgment was granted, and neither was he served with Notice of Entry of the said judgment.

The bank is however opposed to the application. It is its contention that the 2<sup>nd</sup> defendant was joined to the suit as he was the guarantor of the loan which it had advanced to Suter; that Suter's counsel was served with the amended plaint.

I have perused the record and it is evident that:

- Ø 7/1/1998 – the bank institutes this suit against Suter and prays for judgment for inter alia K.Shs. 851,239.75.

Ø 26/1/1998 - Suter's counsel entered appearance.

Ø 10/6/1998 - the bank and Chebiator enter into a consent order to join Chebiator as the 2<sup>nd</sup> defendant in the suit and also that summary judgment be entered against him as prayed in the suit.

Ø 30/7/1998 – the amended plaint is filed against the 2<sup>nd</sup> defendants and the bank prays for judgment against the two jointly and severally in the sum that appears in the initial plaint.

Ø 4/6/2002 – warrants of arrest in execution issued against both defendants.

Ø 21/3/2000 - Notice of taxation of party and party bill of costs is served upon Suter's Counsel.

Ø 28/3/2000 - the said bill is taxed.

I have gone to great length to list the chronological events, with a view to establishing whether Suter's claim that he was not aware of the on goings in the suit, can lie.

It is evident that, though represented, neither Suter nor his counsel were ever served with notice to attend court on the day when the bank prosecuted its applications and obtained orders to amend its plaint to join Chebiator as the 2<sup>nd</sup> defendant, nor were they aware that the application for summary judgment was to be heard on 5/10/1999. The bank has not been able to provide proof that Suter's counsel was ever served with the amended plaint. Of more interest is the fact that at the time when the bank entered into the aforementioned consent order, which did not involve Suter, there was no suit against Chebiator on the record.

Faced with the above, it can be safely assumed that the bank proceeded *ex parte* in a matter where the defendant had entered appearance, yet it was incumbent upon the bank to notify the counsel and to issue relevant hearing notices in good time.

It is a trite rule of natural justice that no party shall be condemned unheard, yet that is exactly what seems to have happened in this case. Where a party is condemned unheard, all orders issued against him are void and cannot be sustained, and in view of the legal position that "*any judgment, given against any party who did not attend at the hearing of an application under this Order, may, on application be set aside or varied on such terms as are just*" (Order XXXV rule 10 of the CPR), I do find it fit to set aside the order of summary judgment entered against Suter on 5/10/1999, which I hereby do. This order shall also apply to all orders consequential to the said thereto.

The bank, which shall bear the costs of this application, should serve the amended plaint, within the next seven days, after which Suter shall be at liberty to file his defence within 14 days of service.

Dated and delivered at Eldoret this 16<sup>th</sup> June 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kathili for the 1<sup>st</sup> defendant/applicant

Mr. Shivaji for the plaintiff/respondent