REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 53 OF 1996

NATIONAL BANK OF KENYA LTD………………..………………..PLAINTIFF

VERSUS

RICHARD K. SEREM…………………………………………….DEFENDANT

RULING

The defendant, Richard Kiplangat Serem, has filed an application under the provisions of **Order XXXV Rules 2(1), 4, 7 and 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the orders of this court to set aside the ex-parte summary judgment entered on the 23rd of July 2003 (in actual sense the 30th of July 2003) upon such terms as the court may deem fit. Pending the hearing of the said application, the defendant sought temporary stay of execution of the decree. He further sought to be granted leave to defend the suit. The grounds upon which the said application is based are that the defendant denied that he had ever borrowed money from the plaintiff, National Bank of Kenya. He stated that he had a good defence and would suffer loss and damage if the application is not granted. He further stated that the application to strike out his

defence was not served on him. The application is supported by the annexed affidavit of the defendant, Richard Kiplagat Serem. The application is opposed. The plaintiff through its Branch Manager Nakuru Branch, Samuel Odiyo has sworn a replying affidavit opposing the application filed by the plaintiff.

In his submission before court, Mr Rono Learned Counsel for the defendant stated that the application for summary judgment which is sought to be set aside was not served upon the defendant or his advocate. This was inspite of there existing a court order which mandated the plaintiff to serve the defendant with the said application for summary judgment. He argued that the hearing notice which was purportedly served on the defendant mentioned that the case that was to be heard was the main suit and not the application for summary judgment. He reiterated that since the application was not served, the interest of the defendant in having the case heard on merits was interfered with. The defendant submitted that this fact was not denied by the plaintiff.

In response, Mr Kiburi, Learned Counsel for the plaintiff submitted that by the time he came on record, the application for summary judgment had already been served on the defendant; what was pending was the obtaining of a hearing date from the court. He submitted that once the date was taken, the defendant's advocate was served by registered post as provided by **Order IX Rules 7(1) & (2) of the Civil Procedure Rules** which gave an allowance for such service. Learned Counsel for the plaintiff argued that the defendant was not being truthful that he was not served because subsequent to the summary judgment being entered, the defendant was served with the draft decree for his approval. He was further served with a hearing notice of the date which the bill of costs of the plaintiff was scheduled to be taxed. A notice to show cause was also served upon the defendant. The defendant chose not to attend court in all these instances. It was submitted that the defendant only reacted when a warrant of his arrest was sought to be executed. He argued that the defendant had not been diligent and had made this application only to seek to buy time. The plaintiff contended that the substantive issues which were raised by the plaintiff in the application for summary judgment were not addressed by the defendant. The defendant filed a blanket denial. The plaintiff submitted that the defendant's counsel had prior to filing the application in court to set aside the summary judgment, sought to discuss the outstanding issues with the plaintiff. It was submitted that the defendant's application should be rejected as the defendant had been indolent and

mischievous. The plaintiff relied on the case of **Ruaha Concrete Co. Ltd –vs- Rajni Patel t/a Trans Nzoia Best Contractors Nrb HCCC No. 6493/1991 (unreported)** in support of its argument. I have considered the submissions made before me. I have also read the application and the affidavits filed by the parties to this application. The issue for determination is whether on the facts placed before me, the exparte proceedings leading to the summary judgment being entered against the defendant should be set aside. It is not disputed that the hearing notice which was served upon the defendants counsel Mssrs J. K. Rono & Company Advocates indicated that the main suit was to be heard. The hearing notice served was not in respect of the application for summary judgment which was heard on that particular day. The said hearing notice was served by registered post. The said hearing notice was sent to the firm of J. K. Rono & Company Advocates on the 20th of May 2003. The plaintiff has argued that it was allowed by law to send the said hearing notice by registered post. Learned Counsel for the plaintiff quoted **Order IX Rule 7(1) & (2) of the Civil Procedure Rules**.

While it is not denied that the rules allow for such service, it has been restated severally by the Court of Appeal and by various courts of record that the best mode of service which should be adopted as a matter of practice is personal service. In the instant case, the defendant has denied that he was not served with the hearing notice in question. This court cannot verify that the allegation made by the defendant is untrue. However from the submissions made, there was evidence that after summary judgment was entered, the defendant was served with the draft decree. He was subsequently also served with the notice of taxation of the plaintiff's bill of costs. He was further served with notice to show cause. In all the above instances the defendant chose not to react to the fact that judgment had been entered against him. He was awoken from his slumber when he discovered that the plaintiff had obtained a warrant for his arrest in execution of the decree issued by this court. The defendant, through his counsel then attempted to see the plaintiff's counsel possibly with a view of seeking some reprieve. It is only after the defendant had failed in his attempt to discuss the issue with the plaintiff, that he filed the application to set aside the summary judgment entered.

I have considered the facts of this case. This court has unfettered discretion to set aside any exparte order entered. (See Mbogo –vs- Shah 1968 EA 93, Kimani –vs- Mc Connell [1966] EA 547). The said discretion should however be exercised judicially. In the instant case, the defendant was served with the wrong hearing notice. The hearing notice which was sent to his advocate indicated that the main suit had been listed for hearing for the 23rd of July 2003. There is evidence that the defendant received the said hearing notice. He however chose not to attend court. If the defendant had made the application to set aside the entry of summary judgment immediately upon being aware that the said judgment had been entered against him, this court would have been inclined to exercise its discretion in favour of the defendant. However there is evidence that the defendant was served with the draft decree; taxation notice and notice to show cause. All these legal instruments should have alerted the defendant to come to court and make an appropriate application to set aside. The defendant chose not to exercise his legal rights. In fact he slept on his rights. The defendant only awoke from his deep slumber when he realised that the plaintiff had obtained a warrant for his arrest in execution of the decree of this court.

Now the defendant seeks to move this to set aside the exparte judgment. The defendant came to this court when much water had passed under the bridge. He has been indolent. This court cannot reward an indolent litigant. From the affidavit evidence on record, the defendant was aware that judgment had been entered against him. He chose to do nothing for over one year. I will not exercise my discretion in his favour. I have looked at the application which the plaintiff had filed seeking that summary judgment be entered against the defendant. I am satisfied that Lesiit, J considered all the facts of the case and arrived at a proper decision on the 30th of July 2003, notwithstanding that the defendant had not attended court. To reopen this case would not serve any useful purpose. The defendant has to come to terms with the fact that the day of reckoning is now at hand. I therefore decline to exercise my discretion in his favour. The application filed by the defendant is therefore dismissed with costs to the plaintiff.

DATED at NAKURU this 18th day of February 2005.

L. KIMARU

JUDGE