



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – NAIROBI

CIVIL CASE NO.623 OF 1999

RELIANCE BANK LIMITED.....PLAINTIFF

VERSUS

JOSEPH WAWERU NJOROGE.....DEFENDANT

RULING

Before me is an application expressed to be brought under Order 1, Order 1XA Rule 8 Order 1XB rule 8, Order XIX Rule 1, Order XXI Rule 18, Order XL Rule 1 of the Civil Procedure Rules, the Companies Act Cap 486 and the Banking Act Cap.488, Section 3A of the Civil Procedure Act and all enabling powers and provisions of the Law.

Prayers 1 and 2 of the application have already been granted. This ruling is therefore in respect of prayers 3, 4, 5 and 6. Prayers seeks an order to restrain the Respondents from collecting rental amounts or continuing with the receivership and/or management of Plot No.4/31 Mathare North and that the same do revert to the Plaintiff.

Prayer 4 is for accounts and deposit into Court of sums collected from the said premises from 1st June 2004 to date pending further orders of this Court.

Prayer 5 seeks to set aside the decree dated 20th August, 2001 and issued on 17th May 2004 and the suit do proceed to hearing and determination on merit.

Prayer 6 is for costs. The grounds for the said application in so far as they are relevant to the remaining prayers are as follows:-

- 1) That the Defendant has never been served with summons to Enter Appearance in this suit.
- 2) That the decree was irregularly issued in breach of the provisions of the law.
- 3) That the appointed receiver is mismanaging the estate to the detriment of the Defendant
- 4) That accounts are a core issue for the determination of this matter.
- 5) That the Plaintiff is fatally defective.

The application is supported by an affidavit sworn by the Defendant.

The application is not opposed. It came before me for hearing on 6th December, 2004 and was argued by Mr. Kago Learned Counsel for the Defendant. Counsel argued that the plaint was defective as it sought appointment of a receiver and sell of the suit property at the same time.

Counsel further argued that the decree was irregularly obtained. The Plaintiff's Counsel merely wrote to Court that there was no appearance and requested for judgment whereupon a decree was issued. This contravened Order 1XA Rule 8 read together with Rule 3. In Counsel's view judgment should not have been entered without formal proof. Regarding accounts, Counsel submitted that since 1st June 2004 the suit premises have been in the hands of the receiver and according to the Defendant no funds have been remitted to the Plaintiff at all by the receiver.

Counsel further submitted that the Defendant was not served with Summons to Enter Appearance. The default judgment was therefore irregular.

Finally Counsel submitted that the Plaintiff bank was in liquidation and before requesting for the judgment they should have sought leave of the Court or applied for amendment to change its capacity.

The position as presented by the Defendant has not been challenged. It is the Defendant's case that he was never served with Summons to Enter Appearance. The judgment obtained in the absence of service was therefore irregular and ought to be set aside as of right.

Even if the Defendant had been served with summons to Enter Appearance in my view the judgment entered and the decree that was subsequently issued were final. This could only have been possible if the Plaintiff claimed a liquidated demand. But the Plaintiff's claim was for an order for appointment of a receiver and for a declaration that the Plaintiff do sell the suit property. The Plaintiff could only have proceeded under Order IXA Rule 8 as read with Order IXB Rule 1 of the Civil Procedure Rules.

Having found that the judgment/decree against the Defendant was irregular, I have no alternative but to set the same *ex debito justitiae*. As a consequence of this finding, I grant prayer 3 of the Chamber Summons dated 19th November, 2004 with the clarification that the order is granted pending the hearing and determination of this suit.

I decline to grant prayer 4 of the Chamber Summons at this interlocutory stage. The Defendant has however liberty to apply.

As I have set aside the default judgment, the Defendant is at liberty to deliver and serve its defence without waiting for service of Summons to Enter Appearance within fourteen (14) days of today.

The Defendant shall have the costs of this application.

Those then are the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2005.

F. AZANGALALA

JUDGE