



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

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 258 OF 2004

ABERDARE CHEESE FACTORY LTD.....1ST PLAINTIFF

JOTHAM GICHU KANYANGO.....2ND PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK (formerly Delphis Bank).....DEFENDANT

R U L I N G

The plaintiff has moved the court by a chamber summons brought under Section 3A of the Civil Procedure Act and Order VIII Rule 10, and 1XA Rule 10 and 11 of the Civil Procedure Rules.

The plaintiff seeks an order that the interlocutory judgment entered in favour of the defendant on its counterclaim be set aside.

The plaintiff's grounds of that application are, in part, that the plaintiff's suit sought to stop the defendant claiming arrears of kshs 7 million and the defendant filed a counterclaim for kshs 9 million; that subsequent to the filing of the counterclaim the parties entered into an out of court negotiation; and during those negotiations the plaintiff's counsel inadvertently failed to file a defence to the counterclaim within time; that it is in the interest of justice that the interlocutory judgment be set aside.

The plaintiff's supporting affidavit, sworn by the then advocate representing the plaintiff, deponed that the defence was prepared and given to the court clerk of the firm who through a mistake failed to file, the same, in court.

Plaintiff's counsel in argument said that, there are three triable issues raised by the plaintiff: firstly, that a loan which was initially for kshs 2.2 million had risen to kshs 9 million which was evidence that the defendant had not applied the correct rate of interest; secondly; that the defendant failed to serve the plaintiff with statutory notices of sale; thirdly, that the defendant intended to proceed with the auction of the charged property without having a recent valuation.

The defendant opposed the application. In so doing the defendant argued that the plaintiff's application must fail for having failed to come under Order 49 rule 5 to seek for enlargement of time; that the plaintiff failed to pray for the setting aside of the consequential orders issued to the defendant after judgment, such as the costs that were certified; that the judgment entered in favour of the defendant did not relate to the statutory notices since the judgment related to the plaintiff's contractual obligation to pay the amount owed to the defendant; that it was not sufficient to say that the court should exercise its discretion in favour of the plaintiff of because its counsel's negligence and that similarly the defendant needed the court's protection and should not be removed from the judgment seat because there was no

sufficient reason for so doing.

The plaintiff relied on the case of PITHON WAWERU MAINA V THUKU MUGIRIA CIVIL APP NO. 27 OF 1982 wherein the court of appeal approved the principles involved in setting aside judgment as enunciated in the case of JESSE KIMANI V MCCONNEL (1966) E.A. 547 as follows: -

“.....the facts and circumstances both prior and subsequent, and all the respective merit of the parties together with any material factor which appears to have been entered into the passing of the judgment which would not or might not have been present had the judgment not been ex parte.....”

The defendant relied on the unreported case of EDNA S. OUMA V THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT: HCCC (MILIMANI) 160 of 2004: where the court considered the aim of setting aside judgment and stated:

“.....the aim being to do justice between the parties the court has been given wide unfettered discretion but, to be exercised judicially.....” See MBURU KINYUA- V – GACHINI TUTI (1978) KLR 70.

The plaintiff in its plaint claimed amongst others, that it had paid kshs 1 million towards the loan and that the plaintiff had applied exorbitant interest not in conformity with the contract.

The defendant filed a defence and counterclaimed wherein there is no denial, that the defendant has paid an amount, towards the loan, but the defendant described the payment as erratic. On the issue of interest the defendant stated that the rate of interest was at the absolute discretion of the defendant. It is the working out of that interest that led the defendant to claim that the plaintiff is indebted to it for kshs 9, 069, 866. 96 and for which it has an exparte judgment.

In considering whether a party is entitled to the prayer for setting aside the court should bear in mind whether the party has deliberately sought to obstruct or to delay the cause of justice and if the answer is in the negative the court should set aside for ex parte judgment to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. Additionally the court should consider whether there is a reasonable defence, which raises triable issues. In the case of CMC HOLDINGS LTD V NZIOKI (2004) 1 E A 23, the court of appeal held that the court can set aside judgment even where a party has a right to sue its counsel for a mistake which resulted in the entry of exparte judgment.

I have considered the reason, uncontradicted, given by the then plaintiff's counsel and the plaintiff, and I accept that the defence to counterclaim was not filed due to excusable mistake of the plaintiff's counsel.

Although judgment on the counterclaim was entered on 10th June 2004, the plaintiff stated that the application to set aside judgment was made immediately the entry of the judgment was brought to its counsel's notice by a notice sent by defence counsel. Consequently I do find there was no undue delay by the plaintiff in making the application.

The defendant's argument that the plaintiff's application is defeated by failure to seek extension of time is I believed misconceived. The plaintiff has come under order 1XA Rule 10 which rule empowers the court to set aside exparte judgment and all consequential orders. The court once it grants order of setting aside can then in exercise of its discretion grant leave to file a defence out of time. The defendants argument, therefore that the plaintiff failed to seek orders for the setting aside of consequential orders to the exparte judgment, is also misconceived since that order is obtainable under Order 1XA Rule 10. In any case the minute in the court proceedings entered on 22nd July 2004, incorrectly stated that costs were certified in favour of the plaintiff. It therefore follows that such costs cannot be recovered by the defendant, whether or not they are set aside.

Having considered the plaintiff's application I am of the view that it is proper to exercise my discretion in its favour for indeed I find that there are triable issues raised by the plaintiff which of necessity ought to

be ventilated at a hearing, also I find that the plaintiff is not guilty of seeking to delay the cause of justice. In regard to the facts of this case I can do no better than quote from the case Haji Ahmed Sheikh t/a HASA HAULIERS V HIGHWAY CARRIERS LTD CIVIL APP NO. 46 OF 1986 where Gachuhi J.A. said in respect of counsel's mistake:

“It must be clear that the court is to administer justice through the procedure laid down. It is important in administering justice that the suit is between two litigants and the counsel is merely putting the case of his client forward. The litigant may not be aware of the failure of his advocates. In complying with the rules he is at the mercy of his advocate. It is the law of agency that the principal is bound by the acts of his agents. Yet in administering justice, why should the litigant suffer due to the mistake and errors of his advocate. If the court should be inclined to punish the advocate, it should state so, and choose the appropriate punishment without injuring the litigant's rights.....”

The orders of this court are that:

- (1) That the ex parte judgment entered herein upon the defendant's counterclaim is hereby set aside.**
- (2) That the plaintiff is granted leave to file and serve a reply defence and defence to counterclaim within 7 days from the date of reading of this ruling.**
- (3) That the costs of the application dated 3rd August 2004 are awarded to the defendant in any event.**

Dated and delivered at **NAIROBI** this 27th June 2005.

MARY KASANGO

JUDGE