



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION –MILIMANI
CIVIL CASE NO.141 OF 2001**

BANK OF INDIA.....PLAINTIFF

VERSUS

ABDUL KARIM WABUTI.....1ST DEFENDANT

GEORGE ELAM WEKESA.....2ND DEFENDANT

SELINA N. WEKESA t/a LAMBANO MARKETING.....3RD DEFENDANT

RULING

This is an Application by the 3rd Defendant to set aside a judgment entered against her on 22nd December 2003 at the request of the Plaintiff on the basis that the 3rd Defendant had failed to file her defence within the prescribed period. The Plaintiff had in its plaint prayed for judgment for a sum of Kshs 1,340,160.85 with interest thereon at 27% p.a. from 1.8.2000 until payment in full being money had and received by the Defendants from the Plaintiff.

The Application is expressed to have been brought under the provisions of Order III Rule 9A, Order 1XA Rule 10, Order XLIX, Rule 5 of the Civil Procedure Rules and Section 3A of the civil Procedure Act. The Application is supported by the 3rd Defendant's affidavit sworn on 17th March 2005. The Application is opposed and there are Grounds of Opposition filed by Counsel for the Plaintiff. The Application is made on the grounds that judgment was entered in default of defence due to failure by the 3rd Defendant's Advocates to act diligently and that the 3rd Defendant has a defence on merit. As regards failure to file a defence within the prescribed time, the 3rd Defendant depones that she does not know the reason why her advocates did not file a defence. She claims that she came to know of the judgment on 10th December, 2004 when auctioneers went to her premises and proclaimed her property. She had not otherwise been notified of the entry of judgment against her.

As regards the defence on merits, the 3rd Defendant has annexed to her Application a draft defence in which she denies being indebted to the Plaintiff as alleged and states inter alia that the 1st and 2nd Defendants applied for and or received a loan of Kshs 500,000/= or other lesser figure from the Plaintiff without her participation and she is therefore not liable. She further claims that the Plaintiff's claim is excessive and unlawful being in contravention of the express provisions of the law. She further avers that the Plaintiff's suit is misconceived and misdirected at her and should be dismissed.

The Plaintiff on its part maintains that the 3rd Defendant's Application is misconceived and incompetent as it has been filed by Advocates who have not obtained leave to come on record. The Plaintiff further states that no good grounds have been disclosed by the 3rd Defendant in her affidavit to warrant the setting aside of the judgment. It also maintains that at all material times the 3rd Defendant was a partner

in the business name of Lambano marketing and was also the wife of the 2nd Defendant and her application should be refused.

I have considered the Application including the submissions made before me by the Learned Counsels for the parties. Having done so, I take the following view of the matter. The record shows that on 28th August, 2003 the 3rd Defendant entered appearance through M/S Juma Nyaga & Co. Advocates.

On 12th September, 2003, the said firm of Advocates filed an application by way of Notice of Motion seeking an order that the Plaint in this suit be struck out as not disclosing a cause of action and the suit be dismissed. That application was opposed by the Plaintiff and its advocates filed Grounds of Opposition in which they stated that the 3rd Defendant had not filed any defence disputing the Plaintiff's claim against her. It is clear therefore that in case Counsels for the 3rd Defendant had forgotten to file a defence, they were by the said Grounds of Opposition put on notice. The said Advocates did absolutely nothing regarding the filing of a defence for the 3rd Defendant. What did they do? They proceeded to fix the said application for hearing on 13th October, 2003 with the knowledge that there was no form of defence on the record.

On 13th October, 2003, the 3rd Defendant's Advocates instructed a Mr. Mwangi Advocate to attend to the said application. Mr. Mwangi for the 3rd Defendant/Applicant withdrew the application on the basis that the same was defective.

On 15th October 2003, the 3rd Defendant's said Advocates filed another application by way of Chamber summons this time round and sought the same order sought in the earlier application. On 24th October 2003 Counsel for the Plaintiff once more objected to the application pointing out that the 3rd Defendant had not filed any defence disputing the Plaintiff's claim. Again the Advocates for the 3rd Defendant did not see the necessity of filing a defence. They instead fixed the fresh application for hearing on 20th November, 2003. The application was placed before Ringera J. as he then was for hearing on the said date and Counsel for the 3rd Defendant prosecuted the same maintaining the position that the Plaintiff had no reasonable cause of action and its statement of claim was vague and unsustainable causing the 3rd Defendant to be unable to file her defence. This submission in my view showed that failure to file a defence for the 3rd Defendant was not by any mistake on the part of her Counsel but was a deliberate and calculated decision not to file any defence in the light of the Plaint.

Counsel for the Plaintiff loudly submitted that there was no defence on the record challenging the Plaintiff's claim. The Learned Judge delivered his ruling on the spot dismissing the 3rd Defendant's application observing that if the 3rd Defendant was in need of further and better particulars that was a bridge to be crossed at the right time. That ruling did not provoke Counsel for the 3rd Defendant to do anything about filing a defence. There was therefore no impediment to the Plaintiff when on 21st November, 2003, through its Counsel applied for judgment against the 3rd Defendant in default of defence. The record shows that Counsel for the 3rd Defendant may have contemplated appealing against the said ruling of Ringera J. as there is on record a request for a certificate of delay in terms of the Court of Appeal Rules which confirms that the 3rd Defendant's Advocates were minded to appeal against the Ruling of Ringera J. on the basis that it was wrong for the Learned Judge not to hold in their favour that in the light of the Plaint's as pleaded the 3rd Defendant could not be able to file a defence. In the light of the above facts I find and hold that Counsel for the 3rd Defendant did not make an inadvertent mistake when they failed to file a defence for the 3rd Defendant. They deliberately decided not to file a defence. It is therefore not surprising that the 3rd Defendant's application dated 16th December, 2004 and filed by her former advocates was withdrawn as there was no explanation as to why a defence for the 3rd Defendant had not been delivered.

In my view this application has not changed the circumstances given above. It cannot be true that the 3rd Defendant's failure to file defence within the prescribed time is excusable and or wholly inadvertent. It cannot be said that failure to file defence for the 3rd Defendant was due to her Counsel's mistake. There is no affidavit by her former Counsel explaining the reasons for the failure to file defence. In my view even if the 3rd Defendant had personally not been served with notice of entry of judgment this alone would not have entitled her to the orders she seeks. The record however, has a copy of the notice of entry

of judgment sent under a certificate of postage.

My above findings notwithstanding, should I exercise the Court's discretion to set aside the ex-parte judgment? First I have found that failure to file defence was deliberate.

The 3rd Defendant cannot therefore rely on her former Counsel's mistake. The said Counsel has offered no explanation for the said failure. Secondly, the 3rd Defendant's proposed defence in my view is not an answer to the Plaintiff's claim predicated on the fact that the Defendants are liable to it as partners for money had and received.

The discretion to set aside a default judgment is unfettered. Such discretion is however to be exercised in order to do justice between the parties. In exercising this discretion, the Court has to consider inter alia the reasons if any why the particular default occurred, the conduct of the parties in particular such conduct as would have a bearing on the course of justice in the case, whether or not the applicant has a defence on merits, whether or not the respondent can be compensated by costs for any delay and of course, I bear in mind the principle that to deny a party a hearing should be the last thing for a Court to do.

On the basis of the above principles and in the peculiar circumstances of this case I find and hold that the 3rd Defendant is not deserving of the Court's discretion as I have found no inadvertence or excusable mistake or error. I have detected a deliberate design on the 3rd Defendant's Counsel to delay the course of justice. The 3rd Defendant got what she bargained for. She cannot hide behind, the screen of her Counsel's mistake. I have also found that she does not have a defence to the Plaintiff's claim on merit.

In the result the application dated 7th April, 2005 is dismissed with costs to the Plaintiff/Respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2005.

F. AZANGALALA
JUDGE

Read in the presence of:-