REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CIVIL DIVISION

CIVIL CASE 292 OF 2004

KODAK KENYA LIMITED …….……...… PLAINTIFF

VERSUS

EDWARD KAMAU NDUNGI T/A EDKAN PHOTO STUDIO …….. DEFENDANT

RULING

The Chamber Summons dated 11th March 2005 is expressed to have been brought under the provisions of Order IXB Rules 10 and 11, Order XX11 Rule 22(1) and (3) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling powers and provisions of the Law. The primary prayer remaining for determination is prayer 4 which seeks an order that the judgment, decree and all consequential orders herein be set aside and the judgment-debtor be given leave to defend the suit.

The main grounds for the Application are that:-

1. ***The Defendants draft defence raises triable issues.***

2. ***The Defendant should not be visited by consequences of his Counsel's mistakes.***

3. ***The Defendant is ready to comply with terms as the Court may deem just to impose.***

The application is supported by an affidavit sworn by the Defendant/Applicant. The Application is opposed and there is a Replying Affidavit sworn by one Loyce Mwangi the Plaintiff/Respondent's Credit Controller.

The Application was canvassed before me on 9th June 2005 by Mr. Memusi Learned Counsel for the Applicant and Mr. Bugo Learned Counsel for the Plaintiff/Respondent. The gist of the Applicant's application is that although his previous advocates had his instructions to defend the suit, for reasons best known to themselves they did not file any defence leading to his current predicament. He believes he has a viable defence and if given a chance he can demonstrate that he does not owe the amount alleged and in any event the Plaintiff will suffer no loss if the Application is granted. Reliance was placed upon the case of **PHILIP KEPTO CHEMWOLO AND MUMIAS SUGAR CO. LTD –V- AGUSTINE KUBENDE [1982] 1 KAR 1036** for the proposition that in an Application such as the one at hand the main concern is to do justice to the parties and that cases should be determined on merit.

The application is opposed on the grounds that the same does not meet the requirements for setting aside a judgment regularly obtained and has in any event been filed too late in the day without explaining the

delay. The Respondent is also of the view that there is no defence to its claim. Reliance was placed upon the case of **EXPRESS (KENYA) LTD –V- MANJU PATEL: C.A. No.158 OF 2000 (UR)** for the proposition that a judgment entered properly cannot be set aside on the mere say so of the Applicant. The applicant has to explain plausibly the cause of delay and must show that the proposed defence has merits and the Court ought to be satisfied that the Applicant is not applying to set aside a regular judgment with a view to delaying the inevitable.

Further reliance was placed upon the case of **SHAH –V- MBOGO AND ANOTHER [1967] E.A.116** for the proposition that the jurisdiction to set aside a regular judgment should not be exercised to assist a party who has deliberately sought to obstruct or delay the cause of justice.

Finally there was reliance placed upon the case of **STANDARD CHARTERED BANK KENYA LTD –V- SAMUEL NKONGE KIRERA AND 2 OTHERS: HCCC No.1729 OF 1997 (UR)** in which Khamoni J. refused to set aside a default judgment observing that the Defendant in that case changed his advocates to have an opportunity to blame the previous advocates.

The Applicant has invoked Order 9B Rules 10 and 11. There are no such rules under Order 9B. The Applicant has also invoked Order 22 Rules 22 (1) and (3). This Order does not have the rules cited. In any event I do not see the relevance of the entire Order 22. However, as there was no objection raised against the incorrect invocation of the Court's jurisdiction I will say no more. I will consider the application on the basis that the same has been made under Order IXA Rules 3(1), 9 and 11 of the Civil Procedure Rules. The Law applicable is settled. It is this: If there is a regular judgment, setting it aside or not is a matter of discretion. The discretion is unfettered. However, like all judicial discretions it should not be exercised arbitrarily or whimsically.

In this case it is clear from the record that on 21st June 2004, M/S Wachira Mburu, Mwangi & Co. Advocates entered appearance for the Applicant but did not file a defence. No explanation has been offered as to why no defence was filed. In the absence of a defence on the record the Respondent was entitled to apply for judgment and this was done on 9th July 2004. The Deputy Registrar duly entered judgment in default of defence on 15th July 2004. There is therefore no doubt that the judgment entered against the Applicant is a regular judgment. Should I set it aside? The record shows that before an attempt to arrest the Applicant was made execution had previously been levied against him. The first attempt at execution was objected to by one Wilson Nganga Ndungi. The second attempt at execution yielded nothing as the goods attached when sold did not even cover the auctioneer's costs. This was in November, 2004. These attempts at execution did not provoke the Applicant to move the Court to set aside the judgment. It is only when a Warrant of Arrest was issued that the Applicant moved the Court with the present application. In those premises, I cannot escape the conclusion that the Applicant is guilty of prolonged delay and as stated in the case of **SHAH –V- MBOGO AND ANOTHER (SUPRA)** the discretion of the Court to set aside a default judgment is not intended to assist a person who has deliberately sought to obstruct or delay the cause of justice. In the Application at hand, the Applicant has not offered any explanation for delay.

I have also perused the proposed defence. In my view it does not raise *bona fide* friable issues. The alleged defence is to be found in paragraphs 4 and 5 of the draft defence. The Applicant at paragraph 4 avers that he had made substantial payment of the loan and in the spirit of the guarantee and denies defaulting. He does not state the sum paid and what is owing. In paragraph 5 he admits the guarantee but denies agreement on the mode of servicing the same. This is not an issue that should go for trial in the light of the averments in paragraphs 3,4,5 and 6 of the Plaint.

I am alive to the fact that to deny a person a hearing should be the last resort of a Court. However, I am also aware that the Court's discretion is intended to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error. There is no accident, inadvertence or excusable mistake or error in the matter at hand. I have found that the Applicant has deliberately sought to obstruct or delay the course of justice.

In the result I am not inclined to exercise my discretion in favour of the Applicant. His application dated

11th March 2005 is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2005

F. AZANGALALA

JUDGE