REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 1013 of 2000

SUSAN NJUGUNA……….…......………………........….PLAINTIFF/APPLICANT

VERSUS

B.K. TERER…………………………….....….1ST DEFENDANT/RESPONDENT

REGENT MANAGEMENT LTD. …........…......2ND DEFENDANT/RESPONDENT

CHEMUSIAN COMPANY LTD. ……......…...3RD DEFENDANT/RESPONDENT

RULING

The plaintiff's application by Chamber Summons dated 16th June, 2004 and filed on 17th June, 2004 was brought under Order IXA, rule 8 and 10, Order IXB, rules 3 and 8, and Order XXI, rule 22 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21).

The applicant's substantive prayer is that —

> *"this Honourable Court be pleased to set aside the judgement entered against the plaintiff in default of filing a defence to the counterclaim on 21st June, 2002 and all consequential orders thereon, and the plaintiff be given leave to defend the counterclaim."*

The applicant prays that her defence to counterclaim annexed to the application papers, be deemed to be duly filed and served on payment of the requisite Court fees. She prays that the Court be pleased to reinstate her suit, which had been dismissed on 27th November, 2002.

The application is founded on the grounds that: the defendants who won ex parte judgement on account of failure on the part of the plaintiff to file a defence to counterclaim, have now commenced execution proceedings against her, and she is apprehensive that her property will be attached. The plaintiff had not been aware of the counterclaim as the same was allegedly served not upon her, but on her former advocates who never brought it to her attention. She has a good defence against the 3rd defendant's counterclaim which takes the form of claims in rent for the suit premises, and in respect of repair costs. The rents claimed are said to have been duly paid, and the repairs alleged are averred not to have been carried out by the 3rd defendant. The said ex parte judgement is said to have been obtained without a formal application having been filed, or formal proof having been undertaken. Although the plaintiff's suit was struck out on 27th November, 2002 the plaintiff was not aware of any application to strike out the plaint. The plaintiff was, moreover, not aware that the matter was coming up for taxation, as neither she nor her advocate was served with a notice of taxation, yet taxation took place on 16th March, 2004.

The applicant states that she has come to Court timeously, seeking an opportunity to defend against the 3rd defendant's counterclaim, and that the taxed costs be set aside ex debito justitiae. She avers that her failure to defend the counterclaim and oppose the application for striking out her plaint, was

occasioned by the mistakes of her former advocate and not of herself. She avers that the orders sought herein will not prejudice the defendants in any manner and they can, if need be, be compensated by costs.

Supporting evidence is in the depositions of the applicant. She had, on 30th June, 2000 instructed the firm of Maseki & Co. Advocates to file suit against the defendants herein together with Chamber Summons seeking injunctive relief. On the basis of the Chamber Summons application, the plaintiff won injunctive orders against the landlord's harassments on 18th July, 2000. But the defendants, on 8th August, 2000 filed an application to have the injunctive orders discharged. Her advocates, M/s. Maseki & Co. Advocates had not informed the plaintiff of the outcome of the defendant's application. But she thereafter experienced harassment by the landlords, and so filed an application initiating contempt proceedings against the defendants. This application, dated 7th March, 2001 was discontinued on 7th November, 2001 by a notice of discontinuance; it was overtaken by events when the plaintiff vacated the suit premises; and the plaintiff's advocates advised that the matter had been finalized, with the said notice. She lost contact with her advocate, who was said to have left the country for Botswana.

The applicant depones that it came to her as a surprise when, on or about 22nd May, 2004 she received a "Notice To Execute Decree", the content of which was, that the defendants had obtained judgement against her for the sum of ***Kshs.319,136/90*** plus costs in the sum of ***Kshs.112,334/=.*** When she re-established contact with ***Mr. Maseki*** of M/s. Maseki & Co. Advocates he informed her that he was not aware of any judgement. He undertook to peruse the Court file, and on that basis later informed her:

> ***that the defendants had filed a defence and counterclaim on 10th May, 2002 and purportedly served it upon Mr. Maseki's secretary on 14th May, 2002; on 18th June, 2002 the 3rd defendants made a request for judgement for failure to file a defence to the counterclaim, and judgement was entered on 21st June, 2002 and signed by the Registrar on 12th July, 2002; the defendants applied on 30th September, 2002 for the plaintiff's plaint to be struck out, served this on Mr. Maseki on 3rd October, 2002 and the application was heard on 27th November, 2002 and an order issued on 13th January, 2003; and thereafter the defendants applied for taxation of costs.***

The Applicant was informed by ***Mr. Maseki*** that he had not received service of the defendant's counterclaim as he was at the material time out of the country; and neither had he been served with the application to strike out the plaint, as he was out of the country; and for the reason of such non-service, he had not advised the applicant of the progress of the case.

The deponent now instructed the firm of M/s. Igeria & Co. Advocates to peruse the Court file and to advise her as necessary. The advocates thus advised:

> ***defence and counterclaim had indeed been filed, and there was an affidavit of service showing service upon Mr. Maseki's secretary; a request for judgement on the counterclaim led to entry of such judgement on 21st June, 2002; the plaint was struck out, and there was an affidavit of service showing that the application for the same had been served upon M/s. Maseki & Co. Advocates; the bill of costs was taxed, and an affidavit of service showed that notice of taxation was served upon the plaintiff on 3rd March, 2003.***

The plaintiff instructed M/s. Igeria & Co. Advocates to move the Court to have the default judgement and the taxation set aside, and her suit reinstated. She depones that neither she nor her advocates had been served with a notice of entry of judgement, and neither was she served with a notice of taxation. She has never met the process server who depones to have served her with taxation notice at her residence in Kileleshwa, Nairobi.

The plaintiff depones that she has now collected her file from her former advocates, M/s. Maseki & Co. Advocates, and she has noted that her advocates had already marked the file "closed", even though it is now evident that the suit is still pending.

Boniface Kibiy Terer, 1st defendant and director of 2nd defendant which manages 3rd defendant, swore a replying affidavit on 13th July, 2004. He deposes that the applicant had been a tenant of 3rd

defendant at the suit premises, L.R. No. 209/12933 Lower Hill Road, Nairobi. The plaintiff had filed suit on 30th June, 2000 against the defendants, and she obtained interim relief on 18th July, 2000. The defendants had filed an application dated 8th August 2000 seeking discharge of the injunctive orders earlier issued in favour of the plaintiff, but the application was dismissed on 14th February, 2001. The plaintiff then filed an application seeking orders against the defendants and their auctioneers, for contempt of Court; but this application was withdrawn, through advocates' letter dated 7th November, 2001. Earlier on, on 18th May, 2001 the plaintiff's advocates had written to the defendants' advocates seeking to record a consent. A term of the proposed consent was that the plaintiff would clear unpaid rents within a period of three months. The defendants' advocates proposed certain terms on 5th April, 2001 which were not adopted by the plaintiff's advocate; and so consent was not reached.

It is deponed that the plaintiff's suit was not thereafter prosecuted, and it is in this period that the defendants took the courses of action which have precipitated the plaintiff's application herein. The deponent avers:

> ***"…I know that thereafter, the then plaintiff's advocates took no steps to prosecute the plaintiff's pending suit, and the 3rd defendant and I therefore instructed our advocates on record to demand and thereafter file a defence and the 3rd defendant's counterclaim for the rent arrears as well as the redecoration costs and utility bills due from the plaintiff, subsequent to her vacating the suit premises without settling the same."***

It is averred that the defendant's defence and the 3rd defendant's counterclaim was filed on 10th May, 2002 and served upon the then plaintiff's advocates, M/s. Maseki & Co. Advocates on 14th May, 2002; and that an application to have the plaintiff's plaint struck out was filed on 30th September, 2002 and the same was served upon ***Mr. Maseki*** on 3rd October, 2002. This application was heard by ***Ransley, J*** on 27th November, 2002 in the absence of the plaintiff and her advocates, and the plaint was struck out.

The deponent believes to be true the information received from the defendants' advocates, that these advocates had attempted to serve upon M/s. Maseki & Co. Advocates the draft decree for approval, but they found the plaintiff's advocates' offices closed, and so they effected service by registered post.

The deponent avers that by the time the plaintiff vacated the suit premises which she had leased, she was in rent arrears to the tune of KShs.205,000/= even after a credit of Shs.120,000/= had been made in respect of a deposit which she had paid. It is deposed that by the terms of the 3rd defendant's letter of offer to lease the suit premises to the plaintiff dated 10th December, 1998 the plaintiff bore responsibility for redecorating the leased premises prior to vacating the same, and she also ought to have cleared all utility bills incurred by her. It is deponed that the plaintiff is truly indebted to the 3rd defendant as landlord, for the decretal sum awarded in this suit as well as the costs awarded to the defendants. It is further deponed that the claim made by the 3rd defendant in the counterclaim had been a liquidated claim.

When the plaintiff's Chamber Summons application of 16th June, 2004 came up before me on 18th July, 2005 counsel for the applicant and for the respondent, respectively ***Mr. Ngugi*** and ***Mr. Njoroge***, settled for adjournment and were given a mention date for 22nd September, 2005 with a view to recording a settlement of the issues in dispute. Come 22nd September, 2005 both counsel were ready to secure settlement through determination by the Court.

Learned counsel, ***Mr. Ngugi*** prayed for the interlocutory judgement in favour of the 3rd defendant to be vacated. He submitted that the claim made in the 3rd defendant's counterclaim should have led to formal proof — which was omitted. He maintained that:

"The rules did not allow entering of judgment on a counterclaim, in default, without a formal application." He did not , however, identify the specific rule he was relying on. But he submitted that the said rules having been infringed, the judgement which had also led to an assessment of costs, ought to be set aside ex debito justitiae.

Mr. Ngugi cited the High Court's decision by ***Onyango Otieno, J*** (as he then was) in BOC Kenya Ltd.

v. Chemgas Ltd., HCCC No. 935 of 1999 as supporting his argument that it was wrong to enter judgment on the 3rd defendant's counterclaim. Was it against the law? And which law?

In the ***BOC Kenya Ltd*** case the plaintiff had filed no reply to the defendant's defence, and no defence to the defendant's counterclaim "as is required by law" (***Onyango Otieno, J***.). The defendant proceeded to make a request for judgement on the counterclaim, dated 13th October, 1998. On 30th October, 1998 interlocutory judgment was entered against the plaintiff, in respect of the counterclaim. On 7th December, 1998 the plaintiff filed the application which came before the learned Judge, "seeking mainly that the judgement on the counterclaim entered…on 30th November, 1998 be set aside and that the plaintiff be granted leave to file its reply to defence and defence to counterclaim…"

It was submitted in that case that judgement had been entered on the defendant's counterclaim due to no mistake or negligence on the pat of the plaintiff. It was urged that the said interlocutory judgement should be set aside for another reason as well: the subjectmatter is indivisible from that of the plaint. My understanding of this latter point is that the counterclaim was in essence a subterfuge, intended to neutralise the main claim of the plaintiff, and thus to have the main question in contention, with some luck, settled on a technicality and in favour of the defendant. So it was being argued that the subject of the counterclaim, in the interests of justice, ought to be merged into the subject of the suit, and the total issue treated as the subject of the plaintiff's suit and tried to a final determination, on that basis. Such an argument would in my view be an entirely logical one, and a submission so formulated would be a cogent one.

The Court, in that case, found that the request for judgment had been made under Order VIII, rule 13 which provides:

> ***"Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgement for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."***

This provision, the learned Judge held in the ***BOC Kenya Limited*** case, "does not entitle the Court to enter interlocutory ex parte judgement for the defendant in default of defence to counterclaim." It was also not the Court's view in that case, that interlocutory judgement on the counterclaim could have been entered under Order IXA of the Civil Procedure Rules, "because no formal proof was directed…yet the prayers in the counterclaim were…for special damages and interest, both of which need proof by way of formal proof." The learned Judge expressed agreement with the holding of ***Harris, J*** in ***Kahuru Bus Service v. Praful Pate***l [1979] KLR 213:

> **"Neither Order VI nor Order IXA of the Civil Procedure Rules gives the Court jurisdiction to give judgement on a counterclaim, in default of the filing of a defence to the counterclaim."**

But ***Mr. Justice Harris*** had taken note that such an interpretation of the law arose only because there was no express statement of the law in Kenya that judgement could be given on a counterclaim by the defendant. Harris, J did note that in the corresponding English procedure, a defendant who has filed a counterclaim to which there is no defence, is placed in the same position as a plaintiff whose plaint has not been met with a statement of defence, and the defendant thus may apply for judgement on the counterclaim.

Onyango Otieno, J in the ***BOC Kenya Ltd*** case accepted and applied the law as stated by Harris, J in the Kahuru Bus Service case. He stated:

> **"I do agree that there is a provision saying that the defence to counterclaim should be filed within 15 days. I also agree that if that is not done punitive action may be taken against the plaintiff, for rules are supposed to be acted upon….However, the question…is, under what procedure should the Court be moved? Should it be by simply writing a letter applying for judgement as happened here…or should there be a substantive application? I decline to**

answer this …but in so far as the area is still 'grey', it would be wrong for the Court to take such a draconian action like entering interlocutory judgement whereas there is no specific rule stating so."

The learned Judge upheld the plaintiff's claim, though not exclusively on the basis of the proposition that a defendant cannot request interlocutory judgement on a counterclaim not answered. In his words:

"…I do find that the counterclaim and the main suit are inseparable and should be heard together…[T]he draft defence to counterclaim raises a reasonable defence even if I were wrong in my holding that interlocutory judgement cannot be entered in default of a defence to counterclaim…"

Learned counsel, Mr. Ngugi, urged that the persuasive authority in BOC Kenya Ltd be applied; and the effect would then be that the 3rd defendant herein should not have been granted his request for judgement, in respect of the undefended counterclaim. Mr. Ngugi did not deny the propriety in law of a defendant obtaining judgement on the basis of an unanswered counterclaim, except that the defendant's claim must come in the form of an application. My understanding here is that learned counsel was drawing a distinction between (i) a plaint which draws no defence, and (ii) a counterclaim which draws no defence. In the former case, learned counsel must be conceding, a mere request for judgement would suffice; but in the latter case, a formal application for judgement must be made. What would be the justification of such differentiation? I think there would be none.

I think it would be perfectly in order for a defendant whose counterclaim is not met with a defence — provided the counterclaim is genuine and is not just a technicality for defeating the plaintiff's main claim — to make a simple request for judgement on the counterclaim. Just as with the claim in the plaint, so with the claim in the counterclaim: they must have been designed to lead to effective and final resolution of the dispute. Therefore a failure to respond to either, within the time-limit specified, must lead to some consequence that carries a conflict-resolution milestone, and that has an impact on one party or the other. This, I think, is the guiding principle that would resolve any uncertainty in the rules of procedure.

Learned counsel then submitted that even if the Court had jurisdiction to entertain the defendant's request for interlocutory judgement, the proceedings should have included the further step of formal proof. The plaintiff's position is that formal proof was essential in any event, because the claim was not liquidated. But this is a controversial factual question; for it is stated clearly in the replying affidavit that the entire claim was liquidated, and the sums of money demanded were in specific figures, so that there was no need for formal proof.

Mr. Ngugi submitted that the several mistakes which impeded due service of the defendant's papers were occasioned by errors of the plaintiff's advocates, and the consequences of these should not fall on the plaintiff herself. Learned counsel disputed the propriety of the defendants' attempted service upon the plaintiff personally: since defendants' advocates were aware of the fact that there were advocates on record for the plaintiff, they should not have effected service upon the plaintiff personally without the Court's authority. The cogency of this point, I think, is unanswerable. Service upon the plaintiff of the notice of taxation, I think, was improper and had no basis in law. On this account I would agree with counsel for the plaintiff, that the defendants' costs were irregularly taxed.

Learned counsel for the defendants, Mr. Njoroge, submitted that even though the plaintiff had obtained injunctive relief against the defendants, such relief had not applied to rent-payment obligations, which the plaintiff still carried in full.

Mr. Njoroge contested the merits of the plaintiff's failure to defend against the counterclaim, and submitted that the 3rd defendant did, indeed, have a recourse in interlocutory proceedings for judgement against the plaintiff. Learned counsel submitted that it was not good law, to state as Mr. Ngugi had done, that interlocutory judgment cannot be given on a counterclaim if there is no formal application. He submitted that a counterclaim was in the nature of an opposite claim to the original claim of the plaintiff — and the incidents thereof are much like those flowing from the plaintiff's claim. Learned counsel

contended that the 3rd defendant's claim was a liquidated one, and so judgment could be entered, without the need for formal proof. The 3rd defendant's claim was in specific figures, in respect of rent arrears, utility bills, and repair charges.

Learned counsel submitted that the defendant's claim papers were being served upon the plaintiff's former advocates because the plaintiff had not communicated with the defendants and indicated that her advocates on record no longer had authority to act for her.

But learned counsel went on to say: "Once it was realised that the plaintiff's advocate had taken off, from that moment we addressed the client directly." This is consistent with the statement made in the replying affidavit that service had been effected upon the plaintiff's advocates by registered post after their offices were found closed. Counsel did not, however, state whether this matter had been brought before the Court for directions, and I must take it that such a new mode of service was unauthorised, and hence a nullity. Indeed, learned counsel acknowledged this impropriety in effecting direct service upon the plaintiff, in relation to the taxation of costs.

Mr. Njoroge submitted that the interlocutory judgement itself was regular, and represents the legal position; so that if it should be found that any consideration of equity worked in favour of the plaintiff, then she should be required to furnish security, such as by depositing the entire decretal sum in Court, excluding costs.

Learned counsel contended that the plaintiff's proposed defence to counterclaim raised no triable issues, especially as the plaintiff had vacated the suit remises and was no longer a tenant. He relied on the Court of Appeal decision in ***Philip Keipto Chemwolo and Mumias Sugar Co. Ltd. v. Augustine Kubende*** (1982 – 88) 1 KAR 1036 in which the principles for setting aside a default judgement were considered. The Court there adopted principles already set out in the English case, Evans v. Bartlam [1937] A.C. 473, at p.480 (Lord Atkin):

> ***"The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgement was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. [T]he reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard, in exercise of its discretion… The principle is that unless and until the court has pronounced a judgement upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

The main principle in the foregoing passage is that the setting aside of an interlocutory judgement entered because of default in answering to a claim, is governed essentially by the *discretion of the Court.*

Learned counsel for the plaintiff submitted, in his rejoinder, that Order IXA, rule 8 under which interlocutory judgement had been obtained, should be seen as being subject to rule 3, under which if a party fails to appear during trial, then the other party may set down the suit for hearing; and so the defendants' first course of action should have been to set down the counterclaim for hearing, rather than to seek default judgment. It is not clear to me, in the light of that argument, whether learned counsel would deny interlocutory judgement as a recourse that is open to a plaintiff, where the defendant fails to file a defence. I would doubt the validity of counsel's argument.

It is clear that the plaintiff's suit was not managed in the most professional manner. It is thus not strange that the defendants, as from the month of May, 2001 formed the impression that the plaintiff was not committed to prosecuting her suit. They were, therefore, justified in making appropriate requests and applications which resulted in the interlocutory judgement. The interlocutory judgement was, thus, regular in every respect. Should such a judgement be set aside, as prayed in the plaintiff's application?

The controlling factor is the Court's discretion, but this discretion is to be exercised in the light of the

merits of the plaintiff's position as set out in her "affidavit of merits." Now in her affidavit it has become clear that ineffective flow of communication and instruction between the plaintiff and her advocate, was the main reason for lack of progress with the suit; and it is that state of inaction which led to the interlocutory judgement. Just as counsel for the defendants did argue, a problem of such a nature should lead to settlement between party and advocate, rather than between one party and another. Misunderstandings between advocate and client, therefore, is not a proper factor to take into account in setting aside an interlocutory judgement.

I have, however, read the plaintiff's proposed defence to counterclaim, and formed the impression that it squarely joins issue with the 3rd defendant's claims in the counterclaim; and the questions emerging ought to be resolved in the context of trial.

Since the plaintiff had moved out of the suit premises, there is a danger that she could be slow in prosecuting her suit, and this, no doubt, would be prejudicial to the defendants.

I have taken the foregoing considerations together with my earlier finding, that the taxation of costs was not properly conducted and I would, on that account, have set it aside in any case. I will allow the plaintiff to defend on the counterclaim, but this, of course will be part of the total trial process, and so an obligation must be placed on the plaintiff to prosecute her suit in a business-like manner.

I will make specific orders as follows:

1. I hereby, subject to Order No.3 herein, set aside the judgement entered against the plaintiff in default of filing a defence to counterclaim, as well as all consequential orders based on the said judgement.

2. I hereby grant leave to the plaintiff to defend against the counterclaim; her draft defence to counterclaim now on file is to be deemed duly filed, subject to payment of the requisite Court fees, and the same is to be duly served within 5 days of the date hereof.

3. I hereby reinstate the plaintiff's suit which was dismissed on 27th November, 2002 but on the following condition: the plaintiff shall, within 28 days of the date hereof, deposit in Court one-half of the decretal sum in the interlocutory judgement referred to in Order No.1 herein, to be disposed of in accordance with the decree of the Court upon the determination of the suit.

4. The plaintiff shall, within 30 days of the date hereof, set down her suit for hearing, and a date shall be given on the basis of priority.

5. If the plaintiff shall fail to comply with any of the orders herein, the Court's decree in the interlocutory judgement entered on 12th July, 2002 shall be automatically reinstated and may be executed, save that taxation of costs shall in that event be undertaken afresh, with proper service of notice to the plaintiff's advocates on record.

6. The costs of this application shall be in the cause. Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of October, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Ngugi, instructed by M/s. Igeria & Co. Advocates

For the Defendant/Respondent: Mr. Njoroge, instructed by M/s. Ibrahim & Issack, Advocates.