



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 199 of 2001

NATIONAL BANK OF KENYA LTD.PLAINTIFF

VERSUS

CROWLINE FREIGHTERS LTD.1ST DEFENDANT

DAVID KIPKOECH BETT2ND DEFENDANT

RISPAH JEBETOK BETT3RD DEFENDANT

RULING

The Applicant seeks an order that the judgement entered herein on the 17.1.2002 be set aside.

The judgement was entered in pursuance of an application for summary judgement under Order 35 rule 1 of the Civil Procedure Rules and this application is brought pursuant to rule 10 of that order.

The application for summary judgement proceeded ex parte as the Applicant's previous advocates did not attend for the reasons set out in the supporting affidavit of Allan Mbugua sworn on the 17.5.2002.

The reasons given are sufficient to explain why he did not attend at the hearing of the application for summary judgement. However, the Applicant must also convince the court that there is an arguable response to the application for summary judgement as without which to set it aside would be a waste of the court's time.

The application is supported by the affidavit of David Kipkoech Bett the 2nd Respondent in which he sets out the reasons why he should be granted leave to defend the claim as follows:-

- "(a) The Plaint is fatally defective as the Verifying Affidavit has contravened the mandatory provisions of Order 7 Rule (1) 2 of the Civil Procedure Rules to warrant the striking out of the Plaint by the Court on its own motion.*
- (b) The securities were sold illegally and without notice to the Defendants.*
- (c) The Second and Third Defendant's liability has never crystallized as no demand has ever been made pursuant to the guarantees by giving three months notice thereof.*
- (d) The Second and Third Defendants liability, under the terms of the guarantees were not*

to exceed the sum of Kshs.300,000/=.

(e) The guarantees should be discharged due to the misconduct of the Plaintiff for selling the securities illegally and varying the contract between itself and the First Defendant.

(f) We have serious issues for trial.”

Mr. Justice Ringera who heard the application for summary judgement was not informed of these matters. The application for summary judgement was served on the Applicant's advocates on the 30.11.2001 for hearing on the 17.1.2002. However, no grounds of opposition or any replying affidavit was filed. All that the learned Judge had was the Defence filed on the 27.3.2001 and found that the defence filed is a hollow sham calculated to delay the day of reckoning. It raises no bona fide triable issues.

In his affidavit referred to above Mr. Mbugua states that he was served with the application on the 30th December, 2001 and on the same day immediately wrote to the 2nd Defendant on 30th December, 2001 to come and discuss the application and to prepare the Defendant's replying affidavit. The 2nd Defendant appeared on the 16.1.2002 at 4.30 p.m. when he prepared Grounds of Opposition and a replying affidavit, copies of which are annexed.

The affidavit of service appears to have been sworn on the 7/12/2002. This to some extent casts doubt on Mr. Mbugua's statement that he received the application on the 30.12.2001.

Be that as it may has the Applicant shown a case for setting aside the exparte judgement?

If the judgement is set aside then the application for summary judgement should be heard on its merits.

It is unfortunate that this application has taken nearly four years to come for hearing. However, that is not a matter I can impute fault to the Applicant.

The Respondent says this application to set aside being brought some four months or so after the summary judgement was entered is brought too late.

I do not think the delay is so inordinate that I should dismiss this application on that ground.

I think it would, however, be in the interests of justice to allow the Applicant to oppose the application for summary judgement on its merits and, therefore, I allow this application with costs to the Respondent.

The application for summary judgement is to be heard as soon as possible and I will fix a date now for doing so.

Dated and delivered at Nairobi this 7th day of November, 2005.

P. J. RANSLEY

JUDGE