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

**Civil Case 1677 of 2000**

**FIDELITY COMMERCIAL BANK LTD..... APPLICANT**

**-VERSUS-**

**AGRITOOLSLTD..... I$^{st}$ DEFENDANT**

**SALIM BHANJI..... 2$^{ND}$ DEFENDANT**

**S. BHANJI (MS)..... 3$^{rd}$ DEFENDANT**

**RULING**

The application before the court is by a chamber summonsdated and filed on 9$^{th}$ February 2004. It is brought under O.IXA rule10, 1XB rule 8, XXI rule 22 of the Civil Procedure Rules, section 3A ofthe Civil Procedure Act and all other enabling provisions of the law.It prays for two main orders - that there be a stay of execution ofthis court's judgment delivered on 26$^{th}$ March, 2003,and that thiscourt's judgment entered on 26$^{th}$ March, 2003 be set aside and the3$^{rd}$ defendant be granted leave to defend the suit.

The application is based on the grounds that the applicant is atotal stranger to this suit as she was never served with summons and

only learnt of the judgment when she received a letter to that effectfrom the plaintiff on 10$^{th}$ November, 2003; that the applicant wasonce an honourary director of the first defendant up to 1$^{st}$ January,1996 when she officially resigned; that she did not and could nothave executed the guarantee as she resigned on 26$^{th}$ January, 1996while the guarantee is shown to have been signed on 3$^{rd}$ June, 1997;that the applicant's name is not on the proposal form of theguarantee and the signature on the guarantee is not the applicant's.It is further stated that there is a mistake apparent on the face of therecord to warrant the setting aside of the judgment to prevent apossible miscarriage of justice. The final ground is that the plaintiffhas obtained a decree and certificate of costs against the applicantand may execute the decree any moment in which case the applicantshall stand to suffer loss and damage. The application is supportedby the annexed affidavit of SHELLA BHANJI, the third defendantherself.

To this application, MR. SULTAN KHIMJI, the plaintiff'smanaging director, has filed a replying affidavit. In that affidavit heavers that the applicant, Mrs. Sheila Bhanji is the sister in law to Mr.Salim Bhanji, the second defendant, and the suit was brought againstthe third defendant in her capacity as a guarantor. Although Mrs.Bhanji denies that the signature on the guarantee form was hers, itwas witnessed by a third party, and a defense was filed for all threedefendants. She failed to attend at the hearing to

present her case,but the hearing proceeded inter parties. He also avers that the thirddefendant's application is an afterthought and an attempt to canvassthe matters in the suit afresh after judgment has been given. Thereis no supporting affidavit from either the second defendant or any ofthe previous or current advocates who have purported to act on herinstructions. Mr. Khimji also avers that the applicant filed thisapplication after contacting the plaintiff and commencing out of courtnegotiations for payment, and he believes that she has not beenquite sincere. He rests his affidavit on a statement on informationand belief that the third defendant's only available remedy is for anappeal should she be aggrieved by the judgment of the court.

While prosecuting this application, Mr.Memusi who held brieffor Mr. Kiama for the third defendant/applicant adopted the thirddefendant's grounds of application. He said that the signature on the guarantee form is not that of the third defendant; that she was readyto cross examine the person who witnessed it, and that in executionof the guarantee Mrs. Bhanji is not the same person as Sheila Bhanji.

For the respondent, Mr. Kanjama argued that the application isincompetent, misconceived and does not lie. It is brought underO.IXA rule 10,) O.IXB rule 8, and O.XXI rule 22 of the Civil Procedurerules, none of which is applicable since the suit was heard interpartes and finally determined under O.XVI rule 4. Counsel submittedthat the court has no power to set aside a judgment entered interpartes such as this one. Indeed, the defendant's advocates wererepresented when judgment was delivered, and that the court istherefore functus officio. He thereupon referred the court to Mullaon the Code of Civil procedure on ex parte decrees. In the instantcase, he contended that the advocate for the defendants crossexamined the plaintiff's witness; that the case proceeded inter partesand the court considered the defence on record before reaching itsverdict.

Mr. Kanjama further argued, out of abundance of caution, thateven if the judgment had been entered ex parte, no reasons have been shown as to why that judgment should be set aside. Therewere always advocates on record for the third defendant, and noneof them has sworn an affidavit as to the nature of instructionsreceived. He then referred the court to SHAH v. MBOGO_[1967] E.A.116. The summons had been served on the second defendant, hesaid, who accepted service on behalf of the third defendant.Counsel urged the court to hold that it was functus officio and has nodiscretion to set aside an inter partes judgment.

In his reply, Mr. Memusi said that the applicant had shown thatshe had not been served with summons to enter appearance andthat is why the application was made under O.IXA rule 10 and O.IXBrule 8 because there was default of appearance for lack of service ofsummons. The second defendant is not a member of the thirddefendant's family, nor an authorized agent of the third defendant.He urged the court to allow the application as prayed.

After hearing counsel for both parties, I think that the mainissue is whether this application satisfies the legally laid down criteriafor the setting aside judgment. While considering that issue, it willalso be necessary to determine whether the judgment which is the subject matter of this application was regular or irregular. If it was irregular, the applicant would be entitled to have it set aside ex debito justitiae. However, even if it was not irregular, the court has the discretion to set it aside, and that discretion should be exercised judicially.

I find it useful to revisit the evolution of this case in order to place this application in a context. The suit from which the application originates was filed in court on 19th September, 2000. On 6th November, 2000, M/s Sheth & Wathigo, advocates, entered

appearance for the defendants. The memorandum of appearance was in the following words "PLEASE ENTER APPEARANCE for the 1st, 2ndand 3rd defendants herein AGRITOOLS LTD.,SALIM BHANJI AND S. BHANJI..." On the same date, the said advocates filed what is expressed to be "defence for 1st, 2nd and 3rd defendants."

In paragraph 8 of that defence, it is stated-

"In further answer to paragraph 6 of theplaint the 3rd defendant states that she neverguaranteed any loan to the 1st defendant asalleged. Her signature on the alleged

guarantee if any must have been obtainedfraudulently." The particulars of fraud are as follows-

"(a) The third defendant is a total strangerto the transaction herein.

(b) the third defendant has never enteredthe offices of the plaintiff where thealleged guarantee was executed/'

Paragraph 12 then states-

"The 3rd defendant denies being indebted tothe plaintiff in the sum claimed at paragraph 9of the plaint for reasons set out at paragraph8 herein above

On 28th January, 2003, a Notice of Change of Advocates filed in court read in part-

"TAKE NOTICE that the defendants hereinhave appointed P.M. KIAMA ADVOCATE to actfor him in place of SHETH & WATHIGO,ADVOCATES..."

The notice was signed by P.M. Kiama, advocates for theplaintiffs. It follows from this notice that from the very inception of this suit, there were advocates on record for the three defendants,the third defendant included.

After judgment was given in this case on 26th March, 2003 the3rd defendant filed an application on 17th November, 2003 praying fororders-

1. That this matter be heard ex parte in the first place

2. that there be a stay of execution of this court's judgmentdelivered on 26th March, 2003

3. That there be a review of this court's judgment delivered on26th March, 2003

4. That the costs of this application be provided for.

This application was heard on 4th February, 2004 and dismissed onthe same day. On 9th February, 2004, i.e. five days later, thisapplication was filed seeking orders-

1. That this matter be heard ex parte in the first instance

2. That there be a stay of execution of this court's judgmentdelivered on 26th March, 2003

3. That this court's judgment entered on 26th March, 2003, beset aside and the third defendant be granted leave to defendthe suit.

4. That the costs of this application be provided for.

Save and except that this application asks for the judgment tobe set aside whereas the application of 17th November sought for areview of the same judgment, the two applications are identical inprayers, the grounds upon which the applications are based, and thecontents of the supporting affidavits of the third defendant.

O.IXA rule 10 pursuant to which the application is partly made

reads-

"Where judgment has been made under thisorder the court may set aside or vary suchjudgment and any consequential decree onorder upon such terms as are just."

It is to be observed from the above orders that order IXA dealswith the consequences of non-appearance and default of defence,and rule 10 deals with the setting aside of a judgment entered inthose circumstances. However, it is to be further noted that thejudgment in this case was not entered upon the non appearance ordefault of defence.

As indicated earlier on, appearance was duly entered on 6thNovember, 2000 by M/s Sheth & Wathigo advocates for all thedefendants. The appearance was closely followed by the statementof defence, which was filed for and on behalf of all the threedefendants on the same date. This application cannot, therefore, begrounded upon order IXA rule 10. Nor can it be grounded on orderIXB rule 8, as this order deals with non-attendance, and thedefendants were ably represented by Mr. Kiama, who attended ontheir behalf and even cross examined the plaintiffs witness on thehearing date. Non attendance was not in issue.

The sum total of these considerations is that this applicationdoes not bring itself within the parameters of orders IXA and or IXB.It further does not fall under O.XXI rule 22 in as much as no reasonsare advanced for the stay. This court is aware that even if thejudgment had been entered ex parte, the court would haveunfettered discretion to set it aside, provided the court's discretion isexercised judicially. I hasten to add that no sufficient grounds have been demonstrated as to why the court' s discretion should be exercised in favour of the applicant. Referring to this discretion in SHAH v. MBOGO [1967] E.A. 116 Justice Harris said at p.123-

"I have carefully considered...the principlesgoverning the exercise of the court'sdiscretion to set aside a judgment obtained exparte. This discretion is intended so to beexercised to avoid injustice or hardship resulting from accident, inadvertence, orexcusable mistake or error, but is notdesigned to assist a person who hasdeliberately sought whether by evasion orotherwise, to obstruct or delay the course ofjustice../'The upshot of all these considerations is that the judgment sought to be set aside was not made ex parte. It was a regular judgment and no sufficient reasons have been advanced to set it aside. This application therefore fails, and it is accordingly dismissed with costs to the plaintiff/respondent.

Dated and delivered this 1st day of April, 2004

**L. NJAGI**

**JUDGE**