REPUBLIC OF KENYA

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

Civil Case 849 of 1998

ARI BANK CORPORATION LTD (IN LIQUIDATION).....PLAINTIFF

-VERSUS-

LAKE VICTORIA FISH LTD (IN RECEIVERSHIP).....Ist DEFENDANT

GEROGE W.M. OMONDI.....2nd DEFENDANT

RULING

The application for determination is dated 1st March, 2004 andwas filed in court on the same day. It was brought by way of chambersummons under O.IXA Rules 8, 10 and 11 O.VI A Rule A (6) of theCivil Procedure Rules, and S.3A of the Civil Procedure Act. It seeksan order that the default judgment entered herein on 17th October,2002 against the first defendant be set aside, and the suit doproceed for hearing with all the defendants as framed in thepleadings herein.The application is based on the grounds that the defaultjudgment entered against the first defendant was entered in errorand is therefore irregular and cannot be maintained in law and factand that the plaintiffs knew and/or ought to have known about thisirregularity. It is a further ground that the defence filed by theReceiver Manager of the first defendant dated 16th February, 1999 isstill on record and being on record and having not been struck out,no valid judgment in default could stand by virtue of O.VIA Rule 1 (6)of the Civil procedure Rules even if the same is inept or deficient.Another ground is that the plaintiff has joined issue with both 1st and 2nd defendants on the pleadings and cannot now purport only toproceed with hearing as against the 2nd defendant in isolation.Finally, the applicant states that the orders of the court dated 26thFebruary, 2004 were oppressive and prejudicial to the 2nd defendant,and that this defendant is willing and able to deposit the costs asordered by the court pending the determination of this application.The application is further supported by the annexed affidavit ofGEORGE W.M. OMONDI, the second defendant himself.

In opposition to the application, one TITUS MURIITHI ARIITHI,liquidation agent with the plaintiff duly appointed by the liquidator,swore a replying affidavit on 2nd March, 2004 and the same was filedin court on 3rd March, 2004. In that affidavit, he avers on advicefrom his advocates that the second defendant's application is madewithout the requisite authority as it is made by the second defendantwho is not acting for the first defendant, and that there is noapplication by the first defendant to set aside the judgment againstit, and that therefore the reliefs sought are superfluous and cannotbe granted. He also states on oath that the first defendant has neverdenied its indebtedness to the plaintiff, and for that purpose he annexed a copy of the 1st defendant's letter dated 4th October, 1998as exhibit "TMA 1". He further states on information from the firstdefendant's Receivers that the second defendant had always and fora long time been aware of the entry of the default judgment againstthe first defendant and has even accused the Receiver of neglect tofile a defence on behalf of the first defendant.

Mr. Ariithi also avers that if the first defendant had intended todefend the suit, it would have appointed an advocate to do so, and further states that the costs ordered by the court on 26th February,have not been paid. He finally says that it was unfair for the plaintiffto make this application just before the trial begins and that thismust have been done in an apparent effort to delay the hearing ofthe case. He concludes his affidavit by stating on advice from his advocates that the second defendant's application is frivolous and vexatious and an abuse of court process and thereupon urges thecourt to decline the 2nd defendant's application and instead allow thetrial to proceed.

In his oral submissions for the applicant, Mr. Kopere said thatthe first defendant company went into receivership in January, 1997,and since then the Receiver/Manager has been managing it to theexclusion of the directors, including the filing and defending of suits.In this case, the first defendant had been sued through the Receiverin the Receivers name. The Receiver filed a defence denyingpersonal liability. Subsequently, amendments were made removingthe name of the Receiver and leaving the company alone. After hisname was removed, fresh summons were served on him again andalso the second defendant. The defence filed by the Receiver, though inept, remained on record and was not expunged. It wastherefore irregular, Mr. Kopere submitted, to obtain default judgmentagainst the first defendant as there was a defence on record, thoughinept. What the plaintiff should have done would have been to strikeout the defence and obtain judgment. Secondly, Mr. Koperesubmitted, if the Receiver did not wish to defend the company, hecould have referred the matter to the directors to defend thecompany and the matter would have proceeded. Since the defencewas on record, the judgment was irregular. The directors are nowwilling to defend the company, and therefore the judgment againstthe company should be set aside as it was irregular.

Mr. Kopere finally referred to O.VIA and said that the plaintiffshad not obeyed the Rules but that the defects were curable, and thattherefore the trial should not proceed before they are cured.

Mr. Mwangi for the plaintiff opposed the application. Heargued that even though the application is brought by the seconddefendant, prayer 3 especially is in favour of the first defendant. Thefirst defendant is a company and the second defendant is a director therein. But since the judgment is against the company, the second

defendant has no locus to formally apply without stating that hisapplication is made by the first defendant. Unless the application ismade by the first defendant, any orders granted would be madewithout jurisdiction.

Counsel also submitted that there was no irregularity in thejudgment. When the suit was first instituted, the plaintiffs hadserved the receiver and not the company. Thereafter, the plaintiffsfiled an amended plaint, from which the receiver's name was struckoff and the plaintiffs granted leave to file an amended plaint. Thisplaint was filed on 17th July, 2001 and the plaintiffs therein clearlystated that they were suing the company. They took out freshsummons to serve the company in receivership. The receiver wasserved, and so was the second defendant. The receiver acceptedservice and endorsed the summons to the effect that he was not anagent of the company. The plaintiffs thereupon applied for defaultjudgment and it was duly entered.

Mr. Mwangi further submitted that the second defendant hadno locus to represent the first defendant and seek to have thatjudgment set aside. He referred to Mr. Ariithi's replying affidavit to the effect that the second defendant was all along aware of thedefault judgment against the first defendant and the former kept onaccusing the Receiver of failing to defend the company. He alsoreferred to a letter dated 4th October, 1998, addressed to the plaintiffby the second defendant on behalf of the first defendant, argued thatthere is no denial of the debt, and submitted that the only reason thecompany was not defending itself was that it had no defence.

Finally, counsel submitted that the second defendant is abusingcourt process by filing this application after the suit had been listedfor hearing on two occasions, and by so doing he was also delayingthe hearing of the suit, as he was making an application on behalf ofa party who is not making it himself. The second defendant allegesthat the plaint is defective and yet the application does not refer to the plaint.

Counsel thereupon urged the court to decline theapplication.

Mr. Rachuonyo, for the receiver stated that the only reasonthey were in court was that when the matter came for hearing, thecourt entertained doubt as to the legality of the stand taken by theReceiver in distancing himself form the court proceedings involving the first defendant. When a company is under receivership, Mr.Rachuonyo submitted, the directors don't lose the power to bring anddefend suits if and where the receiver is reluctant to do so. Hereferred the court to NEWHART DEVELOPMENTS LTD. v. CO-OPERATIVE COMMERCIAL BANK LTD. [1978]2 All E.R. 896 andsubmitted that matter in which the company has an interest can bepursued by the directors if the receiver is reluctant, and in thatsituation even the concurrence of the receiver is not necessary.

There is no defence on record for the company because thereceiver is not minded to file one, and the company has known thisall along. This stage was not reached accidentally. Mr. Rachuonyothen asked, on behalf of the Receivers, that the latter be excludedfrom the proceedings because they don't affect the debentureholders interests.

In his reply, Mr. Kopere said that the second defendant was adirector and a guarantor, and that therefore he has a locus as aguarantor and can apply for the judgment to be set aside. Whenamendment of the names of the parties was sought, the plaintiffsonly sought the name of the Receiver to be struck out, but the defence remained on record. He also submitted that the Receivercould have told the directors to defend the company, otherwise thedirectors and the company should not be made to suffer. Finally, Mr.Kopere argued that the 1st and 2nd defendants had joined issues withthe plaintiff and the issues had been framed, and that therefore thedefendants must be given an opportunity to defend. He thereforeurged the court to set aside the orders and allow the matter toproceed, otherwise it would be unfair. He also asked for orders 3and 4 with costs in the cause.

Having heard the rival submissions of all the counsel, it seemsthat the issues which arise for resolution are whether there is adefault judgment, and if there is, whether it is regular or irregular,and whether in either event, the second defendant has the locus toseek an order for such judgment to be set aside. The facts of thecase are not in dispute. When the plaint herein was first filed incourt on 16th December, 1998, the plaintiff was ARI BANKCORPORATION LTD. (IN LIQUIDATION) through the Official Receiverand Liquidator Deposit Protection Fund, while the first defendant wasLAKE VICTORIA FISH LTD.(In receivership) through the appointed receiver GRAHAM SILCOCK ESQ. and the second defendant wasGEORGE W.M. OMONDI.

The second paragraph of the plaint described the firstdefendant as a limited liability company... currently underreceivership and further stated that these proceedings were broughtagainst it through its appointed receiver, one GRAHAM SILCOCK ESQ.paragraph 4 stated that the second defendant was sued as thepersonal guarantor to the first defendant.

On 16th February, Mr.Silcock, through his advocates, entered an appearance dated the same day.

It read-

"ENTER APPEARANCE for GRAHAM SILCOCKsued as receiver, Lake Victoria Fish Limited (inreceivership) the first defendant herein,whose address for the purposes of this suitshall be..."On the same day, a statement of defence was filed for GRAHAM SILCOCK by his advocates. It read-

"1. This statement of defence is filed on behalfof Graham Silcock in so far as he is namedas a party to the suit. The statement is not filed on behalf of LAKE VICTORIA FISHLIMITED (in receivership).

2. The said Graham Silcock refers to paragraph2 of the plaint and denies the description ofthe defendant as set out therein. Inparticular, it is denied that Graham Silcock isan agent or officer of Lake Victoria FishLimited (in receivership) or that theseproceedings can be properly brought againstLake Victoria Fish Limited through him.

3.

4. The said Graham Silcock refers to paragraph3,4,5 and 6 of the statement of claim anddoes not plead there to as he is unaware ofthe matters and has no liability or obligationto respond.

5. The said Graham Silcock refers to the suit generallyand states that in so far as it is purported that he isthe agent of Lake Victoria Fish Limited, the suit ismisconceived and untenable and will apply for hisname to be struck off from the proceedings.

REASONS WHEREOF the said Graham Silcock prays that theplaintiff's suit as against him be dismissed with costs."The statement is signed by Rachuonyo and Rachuonyo, advocates forGRAHAM SILCOCK, receiver LAKE VICTORIA FISH LIMITED (inreceivership).

I have taken the liberty to set out Mr. Graham Silcock'sstatement of defence almost in full in order to leave no doubt as toits tenor and meaning. Paragraph 1 thereof leaves no doubt that thestatement is not filed on behalf of LAKE VICTORIA FISH LIMITED (inreceivership), but on behalf of Mr. Silcock personally. It is sopersonalised that in paragraph 4 Mr. Silcock declines to plead toparagraphs 3,4,5 and 6 of the statement of claim as he is unaware ofthe matters and " has no liability or obligation to respond." Thissentiment is repeated in paragraph 5 in which he states that in so faras it is purported that he is the agent of LAKE VICTORIA FISHLIMITED, the suit is misconceived and untenable and that he praysthat the plaintiff's suit against him be dismissed. Throughout thisstatement, Mr. Silcock seeks to distance himself, personally, fromLake Victoria Fish Limited. From that perspective, the statement is an attempt by Mr. Silcock to exonerate himself from anything andeverything to do with Lake Victoria Fish Limited in the proceedings,and to that extent, his statement is not and cannot be construed as adefence by or for Lake Victoria Fish Limited. Instead, all he sought todo was to exonerate himself from the affairs of the company, andthat cannot be construed as the company's defence which can bedescribed as inept on behalf of the company. I find that thecompany did not file a defence, but that the defence on record is thatof Mr. Silcock personally. This is distinguishable from SAID ABDULLAAZUBEDI v. TRUST BANK OMITTED. HCCC No. 609 of 1996 (Nakuru)in which the court ruled that the ex-parte judgment was not availableto the plaintiff as there was a defence and counterclaim. In theinstant suit, there is no such defence and certainly no counterclaimby Lake Victoria Fish Limited. Furthermore, the Nakuru case waspart heard whereas the hearing of the case before this court has notyet commenced. The court order in the Nakuru case cannotinfluence this one. The two are miles apart.

On 18th May, 2000, the plaintiffs filed an amended plaint dated17th May, 2000. Mr. Silcock thereafter made good his word and filed, on May 23, 2001, an application dated May 21, 2001 seeking an order that the said amended plaint be struck out as against him. The application came up for hearing before the Hon. Ringera j, as he then was, on 3rd July, 2001. By consent of the parties, the court made the following order-

" The name GRAHAM SILCOCK be and ishereby struck out from the amended plaintfiled hereon on 18.5.2000. The plaintiff be atliberty to file and serve a further amendedplaint within 14 days of today. Defendant tobe at liberty to file and serve an amendeddefence within 15 days of being served withthe amended plaint."A further amended plaint was filed on 17th July, 2001 suing Lake Victoria Fish Limited alone and leaving out Mr. Graham Silcock, and fresh summons were issued and duly served on the Receiver & Manager. The first defendant did not file a defence to the further amended plaint, whereupon the plaintiffs requested for default judgment. This was entered on 17th October, 2002. It is this judgment that the second defendant now applies to be set aside so that the hearing of this suit can proceed for hearing with all defendants as framed in the proceedings. Mr. Kopere submitted thatthe default judgment was irregular as there was a defence on record,no matter how inept it was. On the other hand, Mr. Mwangisubmitted that the judgment was regular.

Whether the default judgment was regular or not depends onwhether there was on record a defence by the first defendant. Asobserved earlier herein, the defence on record was that of Mr. Silcockwho made it very clear in paragraph 1 thereof that it was not filed onbehalf of LAKE VICTORIA FISH LIMITED (in receivership). In light ofthat, there was no defence filed for and behalf of the company,either then or after service of the further amended plaint. For thatreason, the default judgment was regular. Even then,

however, thecourt has jurisdiction to set aside such a default judgement if thedefendant can demonstrate some reasonable cause as to why therewas default, and further demonstrate that there are some triableissues. This second limb can be satisfied by the offering, by thedefendant, of a draft defence. That has not been done in the instantmatter. Consequently, the needful has not been done to enable the court to evaluate whether or not there would be merit in settingaside a regular judgment.

The final issue is whether the applicant has the locus standi toseek the setting aside of the default judgment herein. With respect,the answer must be in the negative. The first defendant is a party tothese proceedings in its own right. Judgment was entered against it.Whereas the second defendant may be affected by the defaultjudgment, it is the first defendant who is the right person to file anyapplication for setting aside. The first defendant ought to make itsown applications as a party to the suit, but not to suffer suchapplications to be made on its behalf by other parties to the suit infurther furtherance of their personal interests.

An argument was floated that the receiver may not beinterested in defending the company. That may be so. But it is notin dispute that the first defendant is only under receivership. It is notin liquidation. Once an interim liquidator is appointed, the powers ofthe directors cease by statutory provisions. The directors becomefunctus officio. In the instant case, the first defendant is not inliquidation and therefore its directors are not functus officio. In NEWHART DEVELOPMENTS v. CO-OPERATIVE COMMERCIAL BANK,[1978] 2 ALL E.R. 896, it was held that a provision in a debentureempowering the receiver to bring an action in the name of thecompany whose assets were charged was merely an enablingprovision, investing the receiver with the capacity to bring such anaction, and did not divest the company directors of their power toinstitute proceedings on behalf of the company. The converse is alsotrue. If the company directors retain their power to commenceproceedings on behalf of the company when it is under receivership,they have a greater obligation to take the necessary steps to defendthe company in similar circumstances. The Receiver's perceivedapathy can be countered if the directors take some swift and robustaction to safeguard the company's interests. If the directors of thefirst defendant are willing to defend their company, they shouldcause the company itself to file appropriate applications instead ofleaving such applications to be made by other parties who might noteven have authority to do so. The business of companies should bemanaged by their directors and shareholders. It should not be left tothe courts.

For the above reasons, the application before the court mustfail. It is accordingly dismissed with costs to the plaintiff/respondent.Parties at liberty to apply.

Dated and delivered at Nairobi this 2nd day of June 2004

L. NJAGI

JUDGE