REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
HIGH COURT CIVIL CASE NO. 95 OF 2002

NATIONAL CEREALS & PRODUCE BOARD…….……PLAINTIFF

VERSUS

WARENG NEKOI MULTIPURPOSE CO-OP. SOCIETY……..DEFENDANT

RULING

Order IXA rule 10 and 11 and of the civil Procedure stipulates that:-

> *10. "Where judgment has been entered under this Order the court may set aside or vary such judgment and an y consequential decree or order upon such terms as are just."*
>
> *11. "Applications under this Order shall be made by summons."*

Wareng Nekoi Multipurpose Co-operative Society, which I shall hereinafter refer to as "the applicant " has moved this court by way of a Chamber Summons under the above mentioned provisions of the Civil Procedure Rules as well as under Order V whose specific rule has not been cited and I shall therefore not dwell on that particular Order. It also relies on Sections 3 and 3A of the Civil Procedure Act.

National Cereals and Produce Board, which is the plaintiff herein and which, I shall refer to as "the respondent" for the purposes of this application, filed this suit on 30/5/2002. It thereafter proceeded to obtain an exparte judgment against this applicant on 4.7.2002, on the basis of the fact that though served with the Plaint and Summons to Enter Appearance, the applicant did not enter an appearance nor did it file its defence, within the stipulated time.

The respondent proceeded with the execution process leading to the proclamation of the applicant's assets after which a Notification of Sale was issued. That is the action, which has now prompted this application, which is now before me, and in which the applicant who had obtained an order for maintenance of status quo prior hereto, now seeks the following orders inter alia.

- That the court be pleased to set aside the ex -parte judgment herein together with all the consequential orders arising there from and that the matter be fixed for hearing on merits.

- That the defendant be granted leave to file defence out of time and that the annexed copy of the defence be deemed duly filed subject to payment of further fees if any.

The proposed defence is attached as an exhibit to the supporting affidavit.

Though it had also prayed for release of its goods, which had been attached during execution process, this particular prayer was not urged before me and it can thus be safely assumed it deemed it fit to abandon it for the time being.

Be that as it may, the application is based on the grounds that these applicants were never served with the Summons to Enter Appearance, that they were not served with any Notice of Entry of Judgment, that the attachment of their goods was irregular and unprocedural, and finally, that they deny the respondent's claim.

Briefly, the respondent who is the proprietor of a depot in Eldoret, claims to have leased half of store No. 17 within the said depot to the applicant by virtue of an agreement dated 18.1.2000, at a monthly rental of Kshs.150,000/00. The respondent claims from the applicant the sum of Kshs.1,350,000/00, costs and interest thereon which sum is the unpaid rent for the months of June 2000 to June 2001, which has, despite demand remained unpaid.

In it's proposed defence, which is merely titled 'defence', which as aforementioned, was attached to the application, the applicant denies the existence of the aforementioned lease agreement and avers that if at all it exists, the same is illegal and was founded on fraud and misrepresentation.

It also avers that its relationship with the respondent was founded by a third person on whose behalf and benefit, the applicant's business was carried out, that the said person did in fact pay the initial rent deposit, and that he ought to pay all outstanding balances of rent if any. It denies receipt of demand notices and gives notice of their intention to join the said person as a party to this suit.

I have outlined the above facts as I am well aware that in an application of this nature, the court is obliged to look at the proposed defence, and an applicant who raises a triable issue in his defence, be it even one, he ought to be allowed to defend the suit. I am well alive to the fact that the said issue need not establish a prima facie defence, but so long as it is a triable issue, leave should be granted and if need be, with conditions. Indeed the position in law is " *where a draft defence is tendered with the application to set aside a default judgment, the court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does the defendant should be g iven leave to enter and defend." (Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd C.A. No. 220 of 1995 (unr.)) as cited with approval in Tree Shade Motors Limited v D.T Dobie and Company (K) Limited and another C.A. No. (Nai) 38 of 1998. The principle would apply "even where the ex -parte judgment was obtained regularly " (Mwihaki Mwandi v Ken Mawet Kasung H.C.Misc. (Milimani) No. 378 of 2000).*

Order IXA rule 10 empowers this court to set aside or vary an exparte judgment upon such terms as are just and there is no requirement of showing sufficient cause. Secondly, in such an application, the court has unfettered discretion to set aside an ex-parte judgment, but it must be borne in mind that such discretion must be exercised judiciously, for it has a duty to do justice between the parties, and the discretion ought not to be exercised to assist anyone to delay the course of justice.

I have then, as I am required to do, looked at all the pleadings, which have been filed in support or against the application before me, and taking into account the grounds upon which the application is based, and the submissions of both very able counsel, I am convinced that the summons to enter appearance, and the plaint were served upon one Isaac Ruto who was then stationed at the applicant's business premises, and who held himself out then, as the applicant's manager. Why do I find so? Though the applicant has denied knowledge of the said Rutto, whom it claims is unknown to it and who, it also claims, is not an official member of it at all, and who could not in the circumstances, purport to receive any documents on its behalf, I find that the same Rutto features prominently, again as a manager of the applicant in the proclamation forms issued by Peter Bird Investments, which forms were attached to the respondent's replying affidavit, which issue was not controverted at all by the applicant. It can thus be safely assumed that the said Ruto, who was the manager upon whom the Summons to Enter Appearance and the Plaint were served upon on 10/6/2002, is the same person, who was still managing the applicant's business when proclamation was carried out six weeks later on 3/8/2002 at which point, though he witnessed the process, he refused to sign the proclamation forms.

In an application of the nature, it is for the applicant to satisfy the requirements of order IXA rule 10, and in the circumstances, one would have expected the applicant to prove lack of service, a task, which could have been achieved by calling the process server for cross- examination, but this was not done.

Such an omission on the applicant's part has proved fatal to the applicant for up to this point, I can only but find that service was effected and that the applicant was well aware of the fact that a suit had been filed against it. This is further supported by the fact that as deponed in the replying affidavit, which facts have not been controverted that, upon receipt of the summons and notice of entity of judgment and proclamation, the officials of the applicant called upon the respondent's counsel repayment proposals, which they have yet to fulfill.

I do therefore conclude that Ruto, having held out himself as a manager of the applicant, was a person upon whom the said documents could have been served as provided for in Order V rule 2 of the Civil Procedure Rules, and having received the Summons to Enter Appearance and the Plaint, the service was proper and the applicant was placed on notice as far back as 10/6/2002.

On the same token, having established that the applicant's officers called upon the respondent's counsel to make repayment proposals, their defence remains a mere sham which cannot withstand the respondent's claim. In my opinion, I cannot but find the whole application is meant to delay the whole process.

But I could be wrong in the above finding. The issue that would then arise, is whether in the circumstances, I would have allowed the applicant to defend the suit?

A look at the proposed defence indicates that the applicant alleges illegalities, fraud and misrepresentation, the culprit being the named 3rd person. However, contrary to the mandatory requirement that the particulars of the alleged fraud must be pleaded as per Order VI rule 8 (1) the applicants kept mum, again to their detriment. The said rule of Order VI, stipulates that:

> *"Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing -*
>
> > *(a) particulars of any m isrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and*
> >
> > *(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraud ulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."*

Mrs. Kittony was however quick to add that if given leave, for which an application would be made at a later date, the applicant would amend the defence to plead the particulars of the alleged fraud. I do not in my humble opinion believe that such a situation can be allowed to prevail in our courts, for the court can only make its findings on whether the defence raises a triable issue, based on the proposed defence on the records, and not on unknown issues or issues that would be pleaded at a later date. It is for the applicant who desires to be considered favorably at this instance, to lay all it's cards on the table, and not to hope that it can bring in new issues at a later date.

In any event, the applicant does not deny having taken possession of the premises. It remained therein during the material time. Indeed it concedes that the 3rd person who apparently negotiated the lease for it, actually paid a deposit towards the said rent, on it's behalf while it made further payments K.shs. 600,000/-. In my humble opinion, having admitted so, it is esstopped from claiming that the whole lease agreement or contract as it would call it, was daunted by illegalities and fraud.

Based on what I have before me, the defence does not raise any issue worth allowing the applicant to defend the suit.

I do therefore find that the application lacks in merit and the same is dismissed with costs.

Dated and delivered at Eldoret this 14thday of July 2004

JEANNE GACHECHE

JUDGE

Delivered in the presence of: