



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI  
CIVIL CASE NO. 572 OF 2003**

**PHARMACEUTICAL PRODUCTS LTD.....PLAINTIFF**

**VERSUS**

**DEVELOPMENT BANK OF KENYA .....1ST DEFENDANT**

**P. V. R. RAO .....2ND DEFENDANT**

**K. V. SASTRY .....3RD DEFENDANT**

**R U L I N G**

This is an application by the Plaintiff (Chamber Summons dated 2nd July 2004) seeking an order to set aside default judgment entered in favour of the 1st Defendant on 1st April 2004. The judgment is for the sum of Kshs.32,541,548/79 claimed in the 1st Defendant's counterclaim dated 23rd October 2003. The Plaintiff defaulted in filing a defence to that counterclaim. The application is made under rule 10 of Order IXA of the Civil Procedure Rules (the Rules) which gives the court an unfettered discretion to make an order as sought upon such terms as are just. In exercise of that discretion the court's main concern will be to do justice to the parties. Injustice to a party arising out of accidental slip, inadvertence or excusable mistake or error must be avoided. But the discretion is not meant to aid a litigant who has deliberately sought to obstruct or delay the course of justice. The court must look at all the circumstances of the case, including whether the draft or intended defence raises any triable issues, and whether an award of costs would be reasonable compensation to the Plaintiff for the delay or trouble occasioned. Finally the court must remember that to shut a litigant out of court should be the court's last inclination.

The Plaintiff's application is made upon the grounds that failure to file a defence to the counterclaim was purely inadvertent and occasioned by an excusable mistake; that the delay occasioned thereby is not inordinate; that the Plaintiff has a good defence to the counterclaim and his intended defence raises triable issues; and that the 1st Defendant will not be prejudiced by the order sought. There are three affidavits sworn in furtherance of those grounds. The 1st Defendant opposes the application upon the eight grounds appearing in the grounds of opposition dated 13th July 2004. There is no replying affidavit filed.

I have read the affidavits sworn in support of the application. I have also give due consideration to the submissions of the learned counsels appearing. I am satisfied from the said affidavits that the failure to file reply to defence and defence to the counterclaim was occasioned by an excusable mistake that occurred in the offices of the Plaintiff's advocates. That mistake was that upon service of the 1st Defendant's defence and counterclaim upon the Plaintiff's advocates the receiving secretary took the same to the desk of the court clerk in order that he may get the relevant file and place it before the advocate handling the matter. But the clerk was out for lunch, and so the secretary left the document on his desk. The clerk, when he came back, thought the document belonged to another file of the same client, and so he filed it away. The mistake was discovered by the advocate dealing with the matter on the very day that the default judgment was entered. I am concerned why it then took over three months for this present application to be brought. There is no explanation for this delay in any of the three supporting affidavits. But then there has not been any fault at all on the part of the Plaintiff itself. The mistakes and defaults that have occurred can all be laid at the door of its advocates. In these circumstances should the Plaintiff be punished, and to the tune of the very tidy sum of over Kshs.32,000,000/00 plus costs and interest? I think not. That would not be just. I have looked at the draft defence to the counterclaim annexed to the application. It is pleaded that the counterclaim comprises non-contractual and unlawful penalties, charges and inflated and unconscionable interests unilaterally imposed by the 1st Defendant. I

am satisfied that those are triable issues.

I will in the circumstances allow the application. The default judgment entered on 1st April 2004 is hereby set aside. The Plaintiff shall have leave to defend the counterclaim. It may file its reply to defence and defence to counterclaim within seven (7) days of delivery of this ruling. The 1st Defendant shall have the costs of this application and such thrown-away costs as may have been incurred. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2004.**

**H. P. G. WAWERU**

**JUDGE**