



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 838 OF 2000

PATRIOTIC GUARDS LIMITEDPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

The defendant by an application brought under order 9 B Rule 8 of the Civil Procedure Rules seeks an order to set aside the judgment entered herein on 24th August 2004.

The defence counsel during submissions informed the court that the defendant does not seek for hearing of the case de novo, he stated that the defendant seeks the setting aside of the judgment and thereafter the defendant be granted leave to cross-examine the plaintiff.

This case was fixed by consent for hearing on 5th July 2004. On that day when the case was called out both the defendant and its counsel were not present and the case proceeded for hearing with only the Plaintiff's evidence. At the end of the hearing judgment was reserved and was delivered on 24th August 2004.

Defence counsel submitted that he and two other court clerks, employees of Walker & Kontos advocates, failed to pick out the case from the cause list and consequently and mistakenly informed the defendant's witness Mr. Pius Okello that the case was not listed for hearing. Defence counsel said that failure to pick out the case from the cause list was an innocent, regrettable mistake on his part and was not intended to delay the conclusion of this case.

Defence further submitted that the defence and counter-claim was still 'alive' in that it was not dismissed when judgment was entered in favour of the Plaintiff. Counsel further argued that the defendant bank was never involved in the Sale Agreement nor did it disperse the money but rather it was the Plaintiff who gave the money to the alleged owner of the property. It was also argued by the defence counsel that the sums awarded to the Plaintiff namely Kshs 700,000 and Kshs 360, 000 were not specially pleaded.

Plaintiff's counsel argued that the defendant's counsel's failure to attend court was a blunder but not a mistake. He further said that the court should avoid to act at whim or sympathy of the defendant for to do so would be to open a flood gate which could not be controlled. Counsel submitted that the fraud perpetrated by the alleged owner of the property could not be blamed on the Plaintiff and finally said that there was no objection in reopening the case.

The Defendant relied on many authorities which the court will not reproduce here suffice that the court will quote the holding of *SHAH – V – MBOGO & ANOTHER (1967) E.A. PAGE 116*.

“...applying the principle that the court’s discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error.....”

The facts of this case, I believe can be distinguished from the facts of the authority relied on by the Plaintiff namely *BABER ALIBHAI MAWJI – AND – SULTAN HASHAM LALJI AND OTHERS CIVIL APPL. NO. – NAIROBI 236 of 1992*. In that case counsel had delayed filing an appeal for more than one year on the basis that he had been ignorant of rules and the court dismissed his reference to a full bench. In this case it ought to be noted that the counsel filed the present application the day after he learnt of the delivery of the judgment and I am of the view that, that clearly shows that the defendant is not intent on delaying this suit.

The court has a wide discretion in an application such as this one for the setting aside exparte judgment and I am of the view that the defendant is deserving of that discretion being exercised in its favour.

In the case *HCCC No. 498 of 2002 (Milimani)* there is an apt quotation by Justice Ibrahim which I believe captures what ought to be considered when such applications as this one are brought.

“A court inter alia, is a place of refuge for the protection of rights and acquisition of vindication and remedies. Each has a seat of justice and he/she ought not to be removed from it without a hearing unless there are exceptional and justifiable grounds.”

For the reasons enumerated herein above the court will grant the defendant the prayers sought.

The prayers granted by me are as follows:-

- (1) That the judgment delivered on 24th August 2004, herein, is hereby set aside.**
- (2) The defendant is granted leave to cross-examine the Plaintiff and the Plaintiff is granted leave to re-open its case and consequently may adduce further evidence.**
- (3) The Defendant will pay the Plaintiff’s thrown away costs occasioned by the setting aside of the exparte judgment and the costs of the application dated 25th August 2004 which costs if not agreed within 14 days are to be taxed by the taxing master of this court.**

Dated and delivered at Nairobi this 5th day of October 2004.

MARY KASANGO

AG JUDGE