REPUBLIC OF KENYA

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

CIVIL CASE 378 OF 2004

ORION EAST AFRICA LTD…….....PLAINTIFF

- V E R S U S-

KOMOTHAI FARMERS CO-OPERATIVE SOCIETY LIMITED…..DEFENDANT

R U L I N G

The application before the court is brought by way of a chamber summons dated 16th September, 2004 and filed in court on the same day. It is expressed to be brought under O.IXA Rules 10 and 11, OXXI Rules 22,25 and 91 of the Civil Procedure Rules, S.3A of the Civil Procedure Act and all other enabling provisions of the law. The application seeks the following orders from the court-

1. THAT this Honourable Court be pleased to set aside the ex-parte judgment entered against the defendant herein plus all other consequential orders.

2. THAT the defendant herein be granted leave and liberty to file its defence as per the annexed defence herein.

3. THAT there be a stay of execution pending hearing and determination of this application.

4. THAT the costs of this application be in the cause.

The application is based on the grounds-

(a) THAT summons to enter appearance were served upon one David Mbuuri who in turn handed over summons to the chairman, one Francis Waithaka Kiriu but due to illness and a later attack by thugs the said chairman did not forward the summons to the defendant's advocates for action to be taken.

(b) THAT the defendant's failure to file defence on time was not intentional and was due to circumstances beyond their control.

(c) THAT the defendants have a good defence in that the purported rate of interest (3% per month) claimed by the plaintiff was not contractual.

(d) THAT judgment and decree have already been entered and execution may commence at any time.

The application is also supported by the annexed affidavits of FRANCIS WAITHAKA KIRIU, the chairman of the defendant, and DAVID MBUURI, the Secretary of the defendant.

The application is opposed. In his replying affidavit, Mr. Peter Maina Ruo, the managing director of the plaintiff company, avers, inter alia, that the reasons advanced by the defendant's officials for failing to enter appearance and file a defence are not credible. No reason is given to explain why the defendant's secretary manager could not deliver the summons to the defendant's advocates. The debit note/invoice which was served on the defendant on 27th March, 2002 clearly stated that interest would be served on overdue accounts at the rate of 3% per month, and this debit invoice was acknowledged by the defendant's secretary/manager who stamped and countersigned against the invoice. Mr. Ruo further depones that the defendant has in the past made promises to liquidate the amount owed to the plaintiff but did not keep the promises, and that as a result, the defendant still owed the plaintiff Sh.4,396,904.94 as at 31st May, 2004. He finally avers that the defendant's draft defence is in truth an admission which cannot form any basis for the orders sought, and that the plaintiff has already commenced attachment of the defendant's assets and should be allowed to proceed. He therefore urges the court to dismiss the defendant's application with costs.

During the oral canvassing of this application, Mr. Kimani appeared for the defendant/applicant while Mr. Ngatia appeared for the plaintiff/respondent. Mr. Kimani explained that the summons were properly served on the defendants but that the chairman was not able to forward them to the defendant's lawyers as he fell sick and thereafter was attacked by robbers in the course of which he lost his personal documents including the summons. After that he forgot altogether that he ever had such documents until 9th August, 2004. Counsel also argued that the defendant is a co-operative society made of small scale peasant farmers whose income is derived from sale of coffee. Between 2000 and 2003, the defendant was experiencing difficulties and unable to meet the plaintiff's claim. Furthermore, the plaintiff demanded interest at 3% per month. The defendant has attached a draft defence which disputes that rate of interest, as it accounts for ¾ of the decretal amount. Counsel also said that the defendant has made a proposal to pay and is willing to pay Ksh.250,000/= per month with effect from the end of September, 2004, until payment in full. He then submitted that this was a proper case where the ex parte judgment should be set aside and the defendant allowed to defend. He finally referred to **TREE SHADE MOTORS LTD. v. D.T. DOBIE & COMPANY (K) LTD. & ANOR,** Civil Appeal NO. 38 of 1998 (unreported) in which it was held that where there is a draft defence, the court should look at it. He therefore urged the court to grant the application.

In his response, Mr. Ngatia submitted that service of summons was not in issue, as the summons was regularly served on 17th July, 204. It was therefore quite proper for the plaintiff to apply for judgment in default of appearance or the filing of the defence. Counsel then referred to page 3 of the above authority. Referring to the defence to the draft defence to the plaintiff's case, Mr. Ngatia said that the alleged dispute was on interest, yet, annexure No.1 to Mr. Peter M. Ruo's replying affidavit clearly indicates that interest at 3% per month would be charged on overdue accounts, and that annexure is duly signed by the defendants secretary/manager on whom the summons was served. Counsel thereupon submitted that the dispute was superfluous, and that the Law of Contract Act also comes into play. Mr. Ngatia further submitted that the defendant's contention that it has had financial difficulties is enough reason why judgment should not be set aside otherwise the plaintiff will never be paid. "**The law does not operate on sympathies,"** he said. He also referred to the correspondence between the parties and to the case of **CENEAST AIRLINES LTD. v. KENYA SHELL LTD.** [2000]2 E.A. 362 and submitted that a triable issue should be self evident and that it is the only ground on the basis of which an ex-parte judgment can be set aside. He then asked the court to dismiss the application with costs.

In a short reply, Mr. Kimani submitted that the Delivery Note/Invoice did not constitute a contract, and that there ought to have been a clear guidance of the terms of sale. The defendant's letter addressed to their lawyers on 31st January, 2003 admits the claim but disputes the interest, counsel said. Mr. Kimani finally said that by 23rd March, 2004, the balance of the money owed had been reduced to Ksh.1,390,328.00 and that the defendant had shown willingness and commitment to settle this claim.

After hearing both counsel, I am left in no doubt that the ex-parte judgment sought to be set aside is a regular judgment. On his own admission, the defendant's secretary/manager was duly and properly served with summons to enter appearance on 17th July, 2004. Such appearance was not entered. The

only reason advanced by the defendant's officials in their affidavits as to why the appearance was not entered was that after service of summons on him, the secretary of the defendant company handed over the said summons to the company chairman to forward the same to the defendant's advocates. Unfortunately the chairman was taken ill and the doctor gave him fourteen days off duty with effect from 20th July, 2004. On 8th August, 2004, the chairman was further set upon by robbers who made away with his briefcase which contained his personal documents including the summons and a copy of the plaint issued in this matter. Consequent upon the robbery, in which he was shot and seriously injured on the head, he all but forgot to inform the defendant's advocates about this matter. He finally informed them on 9th September, 2004, and on 10th September, 2004, the advocates advised the company that judgment and decree had already been entered.

In paragraph 10 of his affidavit, Mr. David Mbuuri, the company secretary, depones as follows-

"THAT failure to file the defence was not out of ignorance but was due to the aforesaid circumstances."

If failure to enter appearance and/or file the defence was not out of ignorance, then the defendant company, through its officials, must be taken to have appreciated fully well the import of any slip to enter appearance within the appointed time. Where such consequences are fully appreciated, as in this case, no effort should be spared to ensure that counsel is instructed with haste and on time. Given the chairman's circumstances in the instant case, the company had several options. Firstly, since the chairman was able to travel all the way from Ruiru to consult a doctor in Nairobi only the day after he received the summons from the secretary, he could have seized that opportunity to handover the documents to the company's advocates, who are also based in Nairobi. In the alternative, he could have rung the said advocates and they would in turn have advised him on what to do in the circumstances. Thirdly, he could have directed other company officials, like the secretary himself, to proceed and instruct the advocates. Unfortunately, he opted to keep everything to himself well knowing the consequences of failure to enter appearance. After the expiry of the 14 days sick off on or about 4th August, 2004, the chairman had a couple of days before his fateful encounter with the robbers. Yet he did nothing to arrest the sting of the well appreciated consequences of the failure to enter appearance. All this casts a dark cloud on the credibility of the reasons advanced for the defendant's failure to enter appearance. On a very serious note, the company is at law a different person altogether from its officers and shareholders alike, and the disability of any company official, including its chairman, ought not to be allowed to grind a company's operations to a halt. The company in this suit will have to settle for the fruits of its officer's indolence.

Having found that the defendant was regularly served, it follows that the judgment on record is regular. O.IXA r. 10 upon which this application is predicated is in the following words-

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

Case law is replete with authorities to the effect that the discretion of the court under this rule is very wide, and that the court will not usually exercise that discretion to set aside the judgment unless it is satisfied that there is a reasonable defence to the action. In PATEL v. E.A CARGO HANDLING SERVICE [1974] E.A. 75, Duffus P said-

"The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not set aside the judgment unless it is satisfied that that there is a defence on the merits. In this respect a defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J. put it 'a triable issue' that is an issue which raises a prima facie defence and which should go for trial and adjudication."

Arising out of the foregoing, it now becomes imperative to screen the draft defence which can go for trial and adjudication. In this regard, the operative paragraphs in the defendant's statement of defence are paragraphs 2 and 3 which state as follows-

"2. The defendant admits that it owes the plaintiff a sum of Ksh.1,390,328/= but avers that there was no contract on the rate of interest to be charged in case of any default on payment and the claimed rate of interest (3% per month) is baseless, unreasonable, exorbitant and unconscionable and makes the suit untenable in law.

3. The defendant further avers that it is unable to pay the admitted sum of Ksh.1,390,328/= at once and prays pursuant to the provisions of O.XX rule 11 of the Civil procedure Rules that it be allowed to pay the amount by monthly instalments of Ksh.250,000/= per month as from 30th September 2004 until payment in full together with interest at court rate (12% per annum)."

From the above pleadings, it is clear that the defendant admits being indebted to the plaintiff but disputes the amount payable. The amount claimed in the plaint and the decretal sum would appear to have been inflated by the rate of interest levied on overdue accounts at 3% per month. "PMR 1", annexed to the plaintiff's replying affidavit, is a Delivery Note/Invoice addressed to Komothai Coffee Growers, the defendants herein, by the plaintiff. It is dated27th March, 2002, and shows that the total sum owed as at that date was Ksh.1,340,958.00. A statement attached to the said affidavit and marked "PMR 2" shows that the amount due as at 31st May, 2004, was Ksh.4,396,904.94, which is the sum claimed in the plaint. This figure is arrived at after giving the defendants due credit for a total sum of Ksh.950,000.00 paid between 12th September, 2003 and 24th March, 2004 by three different cheques for Ksh.350,000/=, Ksh.400,000/= and Ksh.200,000/=. The other figures are debit rates advising on the amount of interest due at 3% per month. The delivery note/invoice dated and delivered to the defendant on 27th March, 2002, includes the following endorsement at the bottom left hand corner-

"claims and warranties cease after 7 days. Accounts are due on demand. 3% interest per month will be charged on overdue accounts."

The invoice is duly stamped and countersigned by and for the defendant. The defendant did not raise any objection to the inclusion of these conditions onto the delivery note/invoice. Instead, one of its officers signed the documents, thereby adopting those conditions as part and parcel of the original package between the parties. That was a good 2½ years ago. Even though the default charges at 3% appear eight times in the statement of account, and seem, prima facie, relatively high, the defendant accepted them by signing the delivery note/invoice on 27th March, 2002, and is bound thereby. Secondly, their effect also pales away when we take into consideration the fact that the applicant has come to a court of equity, seeking an equitable relief, and yet, it has not paid even that amount which it admits to be due. In these circumstances, it would be unfair to the plaintiff if the defendant were allowed to get away with a condition which it has voluntarily accepted. Being of that persuasion, I don't think that the defendant has raised a prima facie defence which should go for trial and adjudication.

In total, I find no merit in the defendant's application to set aside the ex-parte judgment. The application is accordingly dismissed with costs to the plaintiff/respondent.

With regard to the contents of paragraph 3 of the defendant's statement of defence, the defendant is at liberty to apply.

Dated and delivered at Nairobi this 30th day of November 2004

L. NJAGI

JUDGE