



REPUBLIC OF KENYA

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

Civil Suit 492 of 2004

DUBAI BANK (K) LIMITEDPLAINTIFF

VERSUS

FREDRICK KIMANI NJOROGE..DEFENDANT

R U L I N G

The defendant by his application dated 18th November 2004 brought under Order 9A Rule 10 of the Civil Procedure Rules seeks to set aside an ex-parte judgment entered herein on 16th November 2004.

The defendant on being served with the plaint and summons instructed counsel to file an appearance. On 26th October 2004 the firm of Kihari & Kiai failed an appearance.

The defendant deponed in his supporting affidavit that thereafter he entered into negotiations with the plaintiff's chairman and the plaintiff's counsel. Those discussions took place until 8th November when he was requested to sign an admission of the debt, which he declined. Thereafter on 9th November 2004 for one week the defendant was unwell and was given by his doctor one week off.

He indeed annexed a letter from his doctor confirming the same.

The defendant deponed that he instructed the firm of Gakuru & Co Advocates to file a defence and set off on 16th November 2004.

It ought to be noted that ex-parte judgment in default of a defence was entered on 16th November 2004.

Mr. Gakuru argued that failure to file a defence within the prescribed period was not willful because it was due to discussion between the plaintiff's chairman and the defendant, and also due to the defendant's illness. He also said that the plaintiffs and the defendant's set off were large and the defendant should therefore be allowed to defend the suit by allowing a full hearing to be conducted where the defendant would produce other material evidence in his favour.

The plaintiff opposed the application. Mr. Mutisya argued that the application before court was incompetent and bad in law for contravening Order 3 Rule 9A of the Civil Procedure Rules. Counsel submitted that it was necessary for the firm of Gakuru & Co Advocates to have obtained the leave of the court to act for the defendant since another firm had represented the defendant and subsequently judgment had been entered.

The plaintiff further argued that the defendant had severally and as recent as 26th October 2004 admitted the plaintiff's debt. That the defendant's alleged set off in the proposed draft defence was defeated by the fact that his terms of employment had been reduced in writing. The plaintiff also annexed to the replying affidavit the letters of offer of the facility, which the defendant had signed.

The defendant had not controverted those documents annexed to the replying, it was open to the defendant to seek the leave of this court to swear any further affidavit but he chose not to and accordingly the court will accept that evidence as being unchallenged.

I have considered the submissions made before me and the affidavit evidence. I am of the view that the plaintiff's argument on the violation of Order 3 rule 9A was valid.

Order 3 rule 9A provides.

"When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate or record."

From the above it is clear that the firm of Gakuru & Co. Advocates needed to obtain leave of the court before filing the notice of changed filed on 12th November and it then follows that the present application is incompetent.

The court has looked at the defendant's draft defence and I am of the view that the same is a sham and does not raise an arguable defence. The defendant disputes the rate of interest and yet fails to state the proposed correct rate. The defendant further avers to an oral agreement relating to his salary and yet his terms of employment were reduced in writing.

I am of the view the defendant's application is not merited and the same will be dismissed.

The order of this court is that the defendant's application dated 18th November 2004 is dismissed with costs to the plaintiff.

Dated and delivered this 17th December 2004.

MARY KASANGO

JUDGE