



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 1723 OF 2000

DIAMOND TRUST BANK KENYA LIMITED :::::::::::::::::::::PLANTIFF

VERSUS

TRANSPRAPID EXPRESS CARGO LIMITED :::::::::::::::::::::1ST DEFENDANT

MABEL WAKASA ASUMBA :::::::::::::::::::::2ND DEFENDANT

HESBON A. ASUMBA :::::::::::::::::::::3rd DEFENDANT

RULING

This Notice of Motion dated 21st July, 2004 was brought under Sections 3, 3A and 20 of the Civil Procedure Act, Order IV Rule 3, Order V Rules 7, 9 and 15, Order VI Rule 13 (1) (c) and (d) and Order XLVIII Rules 2 and 5 of the Civil Procedure Rules. The application seeks several orders. At the hearing however, Counsel for the Applicant urged one prayer i.e. that the Judgment entered against the Applicant/2nd Defendant and all subsequent orders be set aside. The Applicant has not properly invoked the jurisdiction of this Court. However, in the interests of justice I will proceed to consider the application on the basis of the well-known principles governing setting aside default judgments.

The grounds for the application are in the Notice of Motion. It is also supported by an affidavit sworn by the Applicant. The application is opposed and there are grounds of opposition.

The main ground for the application is that the judgment entered on 17.3.2004 against the Applicant is illegal and offends the clear provisions of the Civil Procedure Act and the Rules made there under.

The Applicant in the Supporting Affidavit deposes that when her application to set aside Summary Judgment was allowed on 30th May 2002, she was not ordered or directed to file any appearance or any defence. She further deposes that the Plaintiff did not serve her with Summons to Enter Appearance with the result that she did not Enter Appearance. The Deputy Registrar could not therefore lawfully enter judgment in the absence of service of Summons to Enter Appearance. The application is opposed on the grounds that it is without merit, it has been brought with inordinate delay and under incorrect provisions of the law. It is further an abuse of the process of the Court as the ex-parte judgment obtained is a regular one and thus enforceable.

The application came before me for hearing on 19th November 2004. Mr. Amolo argued the application for the Applicant and Mr. Luseno opposed the same for the Plaintiff. Counsel for the Applicant submitted that the Deputy Registrar could only enter judgment if there was evidence of service of Summons to Enter Appearance. In this case the Applicant was never served with Summons to Enter Appearance. The judgment entered against her is therefore irregular and should be set aside.

Counsel for the Plaintiff on his part submitted that the Applicant had improperly invoked the

jurisdiction of this Court and her Application should be struck out. On the merits of the application he submitted that the issue of service of Summons to Enter appearance was now irrelevant as Mwera J. in setting aside the Summary Judgment entered against the applicant granted her leave to defend the suit but the Applicant has since never filed defence to the Plaintiff's claim. In Counsel's view the Applicant is guilty of inordinate delay in bringing this application almost 2 years since the ruling of Mwera J. of 30th May 2002.

Counsel further argued that in any event the Applicant has not demonstrated that she has a good defence to the Plaintiff's claim. She is therefore not entitled to the exercise of the Court's discretion in her favour.

The above are the rival submissions made for and against this application. I have carefully considered the submission. I have also perused the record of this case. I am not happy with this record at all. On 5th April, 2002 the applicant through the same firm of Advocates sought to set aside Summary Judgment entered against her. She succeeded and was granted unconditional leave to defend. The ruling of Mwera J. is very clear that the Applicant wished to file a defence and to have the suit heard on its merits. He granted her the prayers sought on 30th May 2002. She should then have filed the defence which Mwera J. had looked at and observed "*for whatever it is worth in the circumstances the orders sought are granted*".

The Applicant is now saying in this application that she has been advised by her Counsel that the Plaintiff was to serve her with summons to Enter Appearance afresh to enable her enter appearance and file defence. This was clearly a blunder on the part of Counsel. All that the Applicant needed to do was to file the defence that Mwera J. had looked at. Having said this, I have also found that the Plaintiff was not also free from blunder. On 12th March 2004, Counsel for the Plaintiff requested for judgment against the Applicant on the basis that she had failed to enter appearance within the prescribed time. The Deputy Registrar acceded to the request for judgment and entered the same on 17th March 2004.

Counsel for the Plaintiff has argued that the issue of appearance was irrelevant. Yet it is on the basis of default of appearance that judgment was entered in favour of the Plaintiff against the Applicant. As default of appearance could not have been the basis of the default judgment, I hold that the Deputy Registrar should not have entered judgment on the request made by the Plaintiff.

The Applicant is clearly guilty of laches. But what could she have done if her legal expert had advised her to sit on her laurels and await service of Summons to Enter Appearance. I am not inclined to visit Counsel's mistake upon the Applicant. The record of the Court also shows that Mwera J. on the Plaintiff's application entered summary judgment in favour of the Plaintiff. There was no order striking out the defence filed by M/S Karen Mosoti and Company Advocates. When the Applicant successfully applied to set aside the Summary Judgment, the said defence was still part of the record of the Court. A default judgment could not therefore be entered in the manner the Deputy Registrar did. Be that as it may that is now water under the bridge. In sum and to avoid any further confusion I make the following orders.

- 1. The judgment entered against the Applicant/2nd Defendant on 17th March 2004 and all subsequent orders be and are hereby set aside.**
- 2. The Applicant is ordered to pay all costs thrown away and costs of this application.**
- 3. The Applicant is granted further leave to file and serve her defence within seven (7) days from the date hereof failing which the Plaintiff is at liberty to apply for Judgment in default of defence.**

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF DECEMBER, 2004.

F. AZANGALALA

JUDGE

Read in the presence of: