

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 369 OF 2002

NATIONAL BANK (K) LTD. PLAINTIFF

- VERSUS -

SWALEH ATHMAN MWAKUWAZA DEFENDANT

RULING

The Defendant has come to Court by Chamber Summons under Order 9A rules 9, 10 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He seeks the following orders:

1. That Exparte Judgement entered if any, be set aside
2. That leave be granted to the Defendant/Applicant to file the defence out of time.
3. That Defence be deemed duly filed and served upon payment of requisite fees.

The plaintiff had by an application dated 13th November, 2002 successfully applied for the striking out the defence filed by the plaintiff in person for failure to comply with the Provisions of Order VIII rule 1 (2). It is after that defence was struck off that judgement was applied for and entered on 9.1.03 for the sum of Kshs.3,234,110.30. It is the said judgement that the Defendant seeks to set aside. The court before striking out a defence need to consider whether the same was a regular judgement, whether the application was made timorously and what security has been offered and defence.

In this case, the judgement no doubt was a regular one the defence having been struck out. The application was also made in good time and filed only 13 days after entry of judgement. The same was brought under a certificate of urgency and delay in prosecuting the same was occasional by the court vacation.

What sought of security does the applicant offer if any? He offers the same security the plaintiff says they have been unable to realize due to law bids. Therefore they are more or less useless and it was for the said reason that the plaintiff decided to file the current suit.

As for the defence, I note that the defendant does admit owing a sum of Kshs.800,000/= but has not shown any attempts to pay the same have been made nor has he made any offer towards the payment of the said sum. This being a bank loan, the defendant expected it to earn – interest and although I cannot say at this stage whether the principal sum plus interest would amount to Kshs.3,234,110.30 as at the date of filing suit, the issue of interest is not denied. Therefore even without going for, the defendant has not come before the court with clean hands. He wants the court to consider his side, have pity on him for a mistake he pleads ignorance and yet on issues he admits, keeps silence on how he is going to put the same right.

The Defendant in his defence at paragraph 4 denies having defaulted in payment of the said loan but provides no evidence toward the same. In my view the Defendant is simply buying time and the courts will not be used for the said purpose. This in my view is not a case in which the Defendant warrants the exercise of the Court’s discretion in his favour for even what he admits owing, he makes no promises nor attempts to pay.

In the circumstances the prayer to set aside the Ex-parte judgement is hereby disallowed.

Consequently the prayers for leave to file defence out of time and the defence on record deemed as duly filed on payment of the requisite court fees shall also fail. The upshot is that the application is dismissed with costs.

Dated and Delivered at Mombasa this 28th March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE