REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 518 OF 2000

NATIONAL BANK (K) LIMITED ..... PLAINTIFF

VERSUS

MARY S. NDETO ..... 1ST DEFENDANT

JAMES M. MANGOKA ..... 2ND DEFENDANT

T/A JAMA ECONOMIC PRINTERS & GENERAL SUPPLIES

RULING

Plaint in this case was filed on 30th October 2000. It was not served immediately upon the Defendant/Applicant herein and the Plaintiff/Respondent said in another application that that was because the Plaintiff/Respondent could not trace the defendants both of whom were at the time the loan was given out trading as Jama Economic Printers & General Supplies. On 2nd May 2001 the Plaintiff/Respondent filed an application under Order 5 Rule 17 for leave to serve the Defendants/Applicants by substituted service by way of registered post through their last known address and that the Defendant be given fourteen (14) days to enter appearance and file Defence.That application was heard on 25th July 2001 and was granted as prayed. On 27th July 2001 the Respondent/Plaintiff alleges that it did forward through its advocates a copy of summons and plaint to the Applicants by registered post and a Registered Post receipt was issued for the same. On 16th August 2001 after 14 days had expired the Respondent/Plaintiff filed a request for judgment dated 15th August 2001 and on the same day interlocutory judgment was entered on grounds that though served, no appearance had been entered by the Applicants. Vide a letter dated 1st September 2001, the Respondent notified the applicants of the entry of judgment against them indicating in the same letter the entire amount the Applicants were required to pay as at that time.On 11th October 2002, the applicant Mary S. Ndeto states that she was surprised to be shown a warrant of attachment by an auctioneer. She was surprised because, according to her, she had never been aware that she was sued together with James Mangoka on account of a loan from the Respondent/Plaintiff. She approached her advocates and this application was filed on 18th October 2002.

It is seeking mainly three orders and these are first that the exparte judgment entered herein against the First Defendant/Applicant on 16th August 2002 and all other consequential orders be set aside; secondly that the First Defendant be allowed to file her Memorandum of Appearance and Defence out of time and the draft Defence annexed to the application be deemed as duly filed and that the suit herein be transferred to the High Court of Kenya at Milimani Commercial Courts at Nairobi for hearing and determination.It is also seeking costs of the application to be paid by the Plaintiff in any event. The reasons for the same application are that the First Defendant/Applicant was never served with the summons to enter appearance and/or plaint; that the First Defendant has a good Defence to the claim, that

the principles of natural justice demand that the First Defendant be given opportunity to defend herself; that the first Defendant resides in Nairobi where the Plaintiff has its headquarters and that is within the jurisdiction of the High Court of Kenya at Milimani and that it will be more convenient and less expensive for the first Defendant who is a single mother and indeed for all the other parties for the matter to proceed and be disposed of in Nairobi.There is Affidavit sworn by Mary S. Ndeto in support of the same application and there are several annextures to the same affidavit.

The Respondent/Plaintiff opposed the application and filed Replying affidavit and grounds of opposition. In the grounds of opposition the Respondent contends that the contract forming the basis of this suit was executed at the Plaintiff's office in Mombasa and that the cause of action arose wholly within the local jurisdiction of this court. In the Replying Affidavit, the Respondent maintains that the applicant was properly served with summons to enter appearance as the law requires; that the Respondent has no bona fide defence to the suit and that there are no grounds for seeking transfer of this suit to Nairobi. There are several annextures to the same affidavit.

I will first consider the third prayer i.e. prayer seeking an order to transfer this suit to Nairobi, Milimani Commercial Court. That prayer cannot succeed. First it cannot succeed because under Section 15(c) of the Civil Procedure Act the suit was property instituted as it is not in dispute that the cause of action wholly arose in Mombasa. Respondent's Affidavit states at paragraph 5 that the debt was incurred at Plaintiff's Nkrumah Road Branch in Mombasa. ASM4 confirm the same and plaint also states the same at paragraphs 4, 5, and 6. These have not been challenged. That in effect means that the suit was instituted at the correct court and this court has jurisdiction to determine it.Secondly, it cannot succeed because in any case, no proper reasons have been advanced for seeking the transfer. The applicant seeks transfer on the grounds that it will be more convenient and less expensive for her and for all the parties for this matter to be heard in Nairobi. She has not considered the position of the Plaintiff/Respondent whose witnesses and documents may very well be in Mombasa. This in effect means that even if I were to exercise my discretion on the matter, I would have no reasons for the exercise of the same discretion.

I will now consider the first prayer as I feel that the decision on that prayer may very well control the decision on the second prayer. That prayer is seeking setting aside of the ex-parte judgment entered against the Applicant.Two grounds are advanced for seeking the same. First is that the applicant was not served with the summons and plaint and secondly that the Applicant has a good defence on merit. In short the applicant is saying that the judgment entered was not regular on account of non service and that if it was regular then the court should exercise its discretion and set it aside on account that the Defendant/applicant has good defence or bona fide defence.

First on whether the exparte judgment was regular or not regular i.e. whether or not the service was proper. I have carefully perused the Affidavits filed by both the applicant and the Respondent. The Respondent/Plaintiff could not trace the Applicants and so could not serve them personally.It applied to serve them by registered post and that mode of service was sanctioned by court (see Commissioner Tutui's orders delivered on 25th July 2001). Pursuant to the same court's order, the Applicant was duly served through Registered Post using the last known address. The applicant agrees in her supporting Affidavit that the address that was used was earlier on her address and was indeed the address for their joint business. The registered letter (and there is exhibited a copy of receipt of registration) was never returned back to the Respondent. In law the service was proper. I note that she has not stated whether she has checked whether her husband got the documents. Secondly that same address was used in giving them notice of judgment vide a letter dated 1st September 2001.Although she refers to the same letter of 1st September 2001 in her affidavit at paragraph 10 and alleges that she enclosed the same letter as "MSN2" what she actually enclosed as MSN2 was not the letter of 1st September 2001 but a letter dated 11th October 2001. I am not certain why that was done but whatever was the reason, it cannot escape one's mind that she could have only referred to a letter which she got and that was a letter of 1st September 2001 which incorporated a notice of the entry of judgment. I am satisfied that service was proper and the exparte judgment entered on 16.8.2001 was regular.

Having come to that conclusion that the judgment was regular, I now need to see if the draft defence annexed to the application is a bona fide defence or if it is a reasonable defence. This is the correct legal

approach as can be seen in the case of ***Tree Shade Motors Limited vs. D.T. Dobie and Company (K) Limited and Joseph Rading Wasambo Court of Appeal Civil Appeal No.38 of 1998***

where the Court of appeal states as follows:

> *"Where a draft defence is tendered with the application to set aside the default judgment the court is obliged to consider it to see if it raises a reasonable defence to th e Plaintiff's claim. If it does, the defendant should be given leave to enter and defend."*

and as to what is a reasonable defence or defence on the merits or bona fide defence the Court of Appeal stated in the case of **Patel vs. E.A. Cargo Handling Service s Ltd. (1973) E.A.75** and particularly at page 76 as follows:

> *"I also agree with this broad statement of principles to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the meri ts 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 to trial for adjudication."*

In this case before me, there is a draft defence annexed to the application. The first Defendant/applicant admits that she applied for and was given overdraft facility by the Respondent/Plaintiff in the sum of KSh.140,000/- but she says that she had deposited a sum of KShs.150,000/- with Respondent/Plaintiff against which the same overdraft facility was extended to them and she says that if the overdraft was overdrawn then the overdrawn amounts were fully recovered from the said KSh.150,000/- as the Plaintiff has not accounted for the same KSh.150,000/- upto the date of filing the application. She also says the interest of 26% is punitive, unconscionable and excessive and that she reserves the right to seek more particulars. Other parts of the draft defence are mere denials. I have perused the letter of offer dated 10th December 1992. There is an entry in that letter on security and it states as follows:

> *"Security Offered . Lien over your FDR No.25/326 for KSh.150,000. In this connection, kindly call on our advances Dept. to execute the necessar y security forms."*

There is no indication in the court records that the same security forms were executed but one has to assume the same was done for otherwise the facility could not have been given. I have perused the Plaint and I cannot see any pleading as concerns what the Plaintiff has done about that security. It is not stated whether it has been credited to the overdraft facility or not. There are no statements of accounts annexed by the Respondent to help me find out what has happened to the security. The Replying affidavit does not

state anything about this security.I do agree that vide a letter dated 9th January 1996, the Plaintiff did admit being indebted to the Respondent. That admission however does not specify whether she admitted the entire amount after security was taken care of or not. I see a bit of a mystery in the matter of security and that being the case, I cannot say the Defence is not bonafide neither can I say it is not reasonable. I think it needs to be probed by the court and cannot be dismissed as lacking merit. At least it may (not must) succeed even if only partially. Again there is the question of interest that was charged. Applicant says it was uncoutionable, and excessive. The letter of offer says as follows on interest:

"Interest to be at the rate of 21% p.a. on monthly rests for the

time being, calculated on daily balances. The bank however

reserves the right to give notice and thereafter vary the rate of i

nterest charged as may be required."

Again there is nothing in the record to show whether any notice was given by the Bank before raising the interest to 26% being claimed. This defence on interest is also a reasonable defence.

Thus,, I do find that although the exparte judgment entered was regular, the draft defence filed together with the application raises a reasonable defence and calls for the exercise for my discretion in favour of setting aside the judgment entered on 16.8.2001. This would have been an ideal case for setting aside the same judgment on condition but unfortunately I do not know whether and/or when the Plaintiff/Respondent exercised its right of lien over the amount of KSh.150,000. Knowledge of the same would have been of great help in deciding the condition to be imposed and so without that knowledge, I could be acting in the dark if I were to impose any conditions.

The application is allowed in terms of prayer 1. Applicant has seven days from the date hereof to file Defence. Prayer 3 is dismissed. The Applicant is to pay costs of the entire application together with costs thrown away to the respondent within TEN days of the same costs being agreed upon or taxed if not agreed upon within 10 days from date hereof. Orders accordingly.

Dated and delivered at Mombasa this 18th Day of March, 2003

J.W. ONYANGO OTIENO

JUDGE