REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.81 OF 2001

MARK MACAULEY……..PLAINTIFF

=V E R S U S=

1.ROB DE BOER…….1ST DEFENDANT

2.FIONA DE BOER……..2ND DEFENDANT

R U L I N G

The facts of this case are that the Plaintiff rented from the Defendants some premises in Lamu, popularly known as Kisimani House at a daily rate of £250 for the period between 1st December, 1998 to 1st January, 1999. The Plaintiff paid as advance rent of £2734 to the Defendants' account number 123888-02 in Lloyds Bank Waterloo Place London. Later the Plaintiff's cheque for £2666 was credited into the Defendants' same account against his instruction. Thus the Defendants received a total of £5000. When the Plaintiff arrived in Lamu on 1st December, 1998, with his guests they occupied the premises for only a day but had to move out the next day on the ground that the premises were not prepared for occupation as agreed between the parties in their earlier agreement. The Plaintiff had to take up an alternative accommodation elsewhere with an understanding that the Defendants would make good the defects immediately and turn it over to the Plaintiff. But the Defendants failed to do so. Instead they decided to refund the rents already received by them. The Plaintiff read this to mean that the Defendants had indeed terminated the agreement. To this end the Defendants issued a cheque of £2724 to the Plaintiff being part refund on 7.12.98 but the Defendants apparently changed their mind because they counterminded payment the next day on 8.12.1998. The Plaintiff then decided to come to this court in March, 1999.

The Defendants entered defence admitting the said rental agreement between the parties but stated that the agreement had provided that Plaintiff would take the premises not from 1st December, 1998, but from 28th November, 1998 till 1st January, 1999. They admitted receiving £2734 as deposit. The Defendants further admitted that they indeed agreed to refund and made a refund cheque to Plaintiff of a sum of £2734 and they asserted that their decision to refund was a gesture of good faith to enable an amicable settlement. They also admitted that £2666 which was wrongfully credited to their account was refundable to the Plaintiff. But the story did not end there. The Defendant filed with their defence a counter-claim and set off. They claim a loss of business of £3750 and unwarranted expenditure on the premises to appease the Plaintiff of ¦4463. Having taken into account £2660 and 2734 paid by the Plaintiff, they ended up counter-claiming £2813. The Defendants filed their defence and counter-claim and served the Plaintiff's advocates with it on 23rd June, 1999. The Plaintiff according to the rules and pleadings was supposed to file his defence to the counter-claim within a period of 15 days from the date of service. In the meantime there appears to have been several communications between the parties advocates, inclusive of further interlocutory pleadings which included Request for Particulars, Affidavits thereof, etc.

What is of greater interest to us however, is that the Plaintiff failed to file his defence to the counterclaim and set off served upon them within the prescribed 15 days. This made the Defendants advocate make a request for judgment in default dated the 27.6.2000 but which was filed in the court on 1st of August, 2000. A month after, on 1st September, 2000, the Plaintiff filed a Reply to Defence and Defence to the Counter-claim aforementioned. I note also that even as late as 19th September, the Defendants were filing the Defendants' Affidavits of Documents and Better Particulars earlier sought by the Plaintiff despite the fact that they already had obtained an interlocutory judgment on the 2nd August, 2000. The Plaintiff's advocate claimed from the bar that during the time of the above exchange which occurred after the said default judgment had been obtained by the Defendants the latter did not reveal that they had obtained the judgment and that he himself did not know until much later that the judgment had been entered against the Plaintiff. It is interesting to note that when the Defendants' advocate, A.E. Gross applied to the Deputy Registrar on 13.10.2000 for the approval of Defendants' costs in respect of the default judgment in question, the learned advocate purports to issue the same to the Plaintiff's advocate and indicates that the application would infact be served upon the Plaintiff's advocates. It is not clear whether Mr. Gross actually served the copy of the application. In conclusion, in respect to this issue however, the Plaintiff has sworn in his affidavit sworn on 7th February, 2002, that it was not until the 24th January, 2002, that the Defendants' advocate finally informed him that he had in his hand the judgment aforementioned.

It was under the above circumstances that the Plaintiff's advocate's firm filed this application before me on 7th February, 2002. The Plaintiff seeks for orders:-

a) That the said default judgment obtained by the Defendants on 2nd August, 2000 be set aside.

b) That the Reply and Defence to Counterclaim and set off filed by the Plaintiff on 1st September, 2002, be deemed to have been filed and served properly with leave of the court.

c) Costs.

I have carefully read and considered the affidavits in support and in opposition of the application together with the annexed documents. I have also considered all the facts and circumstances affecting the matter before me. The question which I must answer is whether or not the Plaintiff's prayers above, should, in the exercise of this court's wide discretion, be granted. It is now trite law that this court has inherent power and discretion to set aside an ex parte judgment after deciding that the circumstances of the case before it are such that it would be in the interest of justice that such a judgment should be set aside. The court will no doubt take into account reasons why the defaulting party failed to file defence within the prescribed time; whether or not the Applicant's application was filed without delay; whether or not the Applicant has prima facie a good defence; whether or not the Applicant has generally acted diligently and whether or not the granting of the prayer to set aside would be easily compensated in costs and that it would, considering all circumstances of the case, be to the ends of justice to exercise the court's discretion in favour of the Applicant. Every case will be considered in the context of its own circumstances and no two cases may easily be exactly the same. As stated in the case of SHAH vs MBOGO, [1969] E.A. at page 116.:-

> *"I have considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident; inadvertence or excusable error, but it is not designed to assist a person who deliberately sought whether by evasion or otherwise to obstract or delay the c ourse of justice."*

Assuming that this is a suitable case to be considered under Order 9 rule 10. I do in my discretion consider the following facts in favour of the Plaintiff:-

a) That the error or default herein was committed by the Plaintiff advocate and not the Plaintiff himself.

b) That the Plaintiff's error or default was caused by Plaintiff's advocate oversight or inadvertence.

c) That the Defendant's advocate who obtained the judgment in question did not notify the Plaintiff of the entry of the judgment as the law requires but proceeded to obtain the relevant decree and certificate of costs as if in secret.

d) That defendants conduct after obtaining the judgment in proceeding to provide particulars of the claim, swearing several affidavits in relation to the counter-claim was not itself bonafides.

e) That the draft defence to the counter-claim and set off indicates a probable defence to the counter-claim and the set off.

f) That considering the circumstances of this case, granting of the prayer to set aside would be in the interest of justice and that the defendants can be compensated in costs.

g) That considering the circumstances of this case, the Plaintiff filed this application promptly considering that entry of the judgment was shrouded with secrecy deliberately created by the defendant's advocate.

For the above reasons I would exercise this court's discretion in favour of the Plaintiff by setting aside the said judgment. But those are not the only grounds upon which the Plaintiff sought the prayer aforementioned, although the Defendants wished this court to consider this application as if the relevant default judgment was a simple default judgment entered under Order 9 rule 10. The Plaintiff's case was also and in addition, that the Defendants were legally wrong to obtain the judgment without formally applying for such judgment by Chamber Summons which would be properly served upon the Plaintiff who would have a right to defend if he so decided. The Plaintiff further argued that the Deputy Registrar had no power to enter the said judgment because a judge could not enter such judgment and more so the Deputy Registrar cannot claim greater powers. It is upon this additional ground that I now also and in addition wish to examine the Plaintiff's application. The learned counsel for the defendants referred this court to several authorities both Indian and English in support of his argument that the defendants were entitled in law to seek for and the Deputy Registrar had no authority to enter the ex parte judgment in question. He quoted Mulla 4th Edition Vol.11 page 1085-1086. He also referred to Halsbury's 4th Edition, Vol.42 page 276. Mulla states on page 1085:-

"6F. If the plaintiff makes default in putting in a reply to the counterclaim made by the defendant, the co urt may pronounce judgment against the plaintiff in relation to the counterclaim made against him, or make such order in relation to the counterclaim as it thinks fit"

Halsbury's Laws of England, Volume 42, 4th Edition also states:-

"For the purpose of def ault in pleading, a counterclaim is treated as a claim. Therefore, if the Plaintiff or other person against whom a counterclaim is made fails to serve a defence to counterclaim within the prescribed time, the counterclaiming defendant may enter final judgment according to the nature of the counterclaim."

Close examination of the Indian and English positions would suggest, in my opinion, that it is similar and that under both the defendant counterclaiming is entitled to a default final judgment without more or further action. Under that position, a Deputy Registrar empowered to enter judgment in default of appearance and/or defence can enter such a judgement. I have examined our relevant Civil Procedure Rules i.e. Order 9A, but I find no similar provision as those quoted above.

Mr. Chigiti referred me to Order VIII Rule 17(3) of our Civil Procedure Rules. It states:-

"(3) Where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defences."

He relied on it as an authority that our legal position is similar to that in India or England. I however do not accept his argument. In my opinion all that sub rule (3) of Order 17 means, is that the defence to the

counterclaim must be filed within the 15 days prescribed for entering any defences generally and that in default of filing the defence, the defendant would be entitled to apply for ex parte judgment. The rule does not however provide the method of such application, whether it is by the simple form prescribed as the defendants did in this case or whether it is by a Chamber Summons, which is the argument put forward by the applicant herein. Referring to the Indian and English rules abovementioned Harris J., as he then was, in the case of Kahuru Bus Service vs Praful Patel Nairobi High Court Civil Case No.1419 of 1976 reported in Kenya Law Reports at page 213 stated thus in page 214:-

> *"No such provision is contained in either Order VI or Order IXA of our rules; and the position of a defendant to whose counterclaim no def ence has been filed is not equated to that of Plaintiff to whose plaint no defence has been so far as relate to the obtaining of judgment in default."*

He then proceeded to decline granting judgment on the counterclaim sought on the ground that he accordingly had no jurisdiction to do so. Being conscious of the fact that the conclusion he reached is merely persuasive and not binding on me I would prefer to accept his conclusion however. The issues raised in this application were exhaustively examined by the Court of Appeal in the case of Kiprotich vs Gathua and Others, C.A. Civil Appeal No.19 of 1976 reported in Kenya Law Reports on page 87. In that case Law, V-P decided that the correct legal position is the one pronounced by the court in the English case of Rogers vs Woods, [1948] 1 All E.R. 38. This was a case decided under Order 28 Rule 11 of the Rules of the Supreme Court in England which like our Order 12, Rule 6 gave jurisdiction to the court to enter judgment due to failure to file a reply or defence to a counterclaim under Order 8, Rule 17(3) earlier considered. The honourable senior Judge held that the court undoubtedly has no jurisdiction to enter such judgment where the subject matter of the plaint and the counterclaim is found to be indivisible and that the claim as contained in the plaint was still pending having not been struck out or dismissed.

Applying the said principle in this case I find and hold that the Applicant/Plaintiff's claim and Defendants' counterclaim are indivisible. The Plaintiff claimed the refund of the money paid to the Defendant for the rental of the premises known as Kisimani House in Lamu a sum of £5000, which contract prima facie, appears to have been frustrated by the Defendants. The Defendants counterclaim and set off arose from what they believed were good reasons why the money deposited by the Plaintiff aforesaid in the performance of the same contract should not be refunded and why the extra sum in the counterclaim should be paid by the Plaintiff who purportedly caused the extra expense in the process of improving Kisimani House to satisfy the terms of the contract with the Plaintiff. I also hold that the Plaintiff has, without making a final conclusion, a prima facie, good defence to the counterclaim and set-off of the defendants. The Plaintiff claim has neither been struck out nor dismissed. Under the above circumstances I hold that the Plaintiff should be given an opportunity to file his defence to the counterclaim and setoff under consideration. As I had earlier indicated hereinabove, even if the Plaintiff's claim and Defendants' counterclaim and set off were to be held to be divisible, I would still have granted the Plaintiff leave to file his defence in the exercise of this court's discretion to exercise such discretion basing the exercise upon other equitable grounds inclusive of a defence which is not patently frivolous, Plaintiff's diligence and without appearing to exhaust the list of such grounds, the interest of justice. Our procedural rules are intended to help the court to arrive at a just decision. They should therefore be followed. But where due to inadvertence or accident or any other excusable error on unfair or unjust order is made, this court will not on equitable grounds hesitate to act to rectify the situation.

On the above grounds I make the following orders:-

ORDER

1) The interlocutory judgment entered for the Defendants in respect to the counterclaim and set off on the 2nd of August, 2000 is hereby set aside.

2) The Plaintiff's Reply to Defence and Defence to the counterclaim and setoff filed on 1st September, 2000 be and are hereby deemed to have been filed with the leave of this court.

3) The costs of this application are to the Defendants in any event and may be taxed or agreed upon

between the parties before the main suit is heard and finally determined. The reason for this last order on costs is that the Plaintiff committed acts of forgivable negligence and the costs are available to the Defendants in any event. That is why there is no need for them to wait until the end of the main suit.

Dated and delivered at Mombasa on the 11th day of April, 2002.

D. A. ONYANCHA
J U D G E

Ruling delivered in the presence of:-

Mr. Kinyua - for Ole Kina -for Applicant/Plaintiff

Weda - for Gross -for Respondents/Defendants