



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI  
MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 131 OF 2000**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**DAVID JIMMY OWINO WEYA ..... 1ST DEFENDANT**

**FRANCISCA ATIENO WEYA ..... 2ND DEFENDANT**

**Both t/a DALABEN AGENCIES**

**RULING**

By this Chamber Summons application made under O. IXA Rule 10 and O. L Rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the defendants seek to set aside a default judgment entered in this matter against them on 9.6.2000 together with all consequential orders. The application is supported by an affidavit sworn on 11.9.2000 by David Jimmy Owino Weya, the 1st defendant.

The circumstances giving rise to this application are that, the plaintiff, Kenya Commercial Bank Limited filed this suit against the defendants on 28.1.2000. Upon being served with the requisite summons to enter appearance, the defendants appointed M/S Arum and Company Advocates to be their advocates in the matter. M/S Arum & Co. Advocates duly entered appearance in the matter but according to the defendants, inadvertently failed to file defence thereby leading to the default judgment being entered on 9.6.2000.

The defendants say that they have a good defence to the plaintiff's claim and they therefore urge this court not to visit the mistake of their advocate to them. They further pray that they be granted leave to defend the suit which they claim arises from a sale of their property which said sale they say was conducted in breach of the Auctioneers Rules and consequently had no legal effect.

Under O. IXA Rule 10, this court has a wide discretion to set aside a default judgment made under the same order. However for the court to exercise such discretion in a judicious manner in the case of a default judgment entered for failure to file a defence, there has to be an explanation as to why the defence was not filed in time. In paragraphs 11 and 12 of the supporting affidavits, the 1st defendant has explained why the defence was not filed. The failure was occasioned by inadvertence on the part of the defendant's previous advocates.

The explanation aforesaid solves only half of the defendants' problem. In order to succeed in this application, they must go further and show that they have a good defence to the claim. They purport to do so by saying that no notice was properly issued and served upon them as required by law before the sale of their property. In the premises they contend that the sale of their property was null and void. The illegal sale also entitles them to damages against the plaintiff in respect of which they have counter-claimed, they further assert. To prove that they have a good defence, the defendants have annexed to the application a copy of their proposed defence to the affidavit of the 1st defendant.

The plaintiff's response to the defendant's assertions is to be found in the Replying Affidavit of J.

M. Wandolo, an Advances Officer at the plaintiff's City Centre Branch. Although I am not required to make any definitive finding as to the merits of the defendants' case, I think I can properly make the observation that the evidence contained in Mr. Wandolo's affidavit does not show that the defendants' defence is entirely devoid of merit. Having carefully gone through the evidence presented in this application, I am of the opinion that it would be wholly unjust to determine this matter before delving further into the defendants' complaints. For those reasons, the application is allowed and the default judgment set aside. The defendants will bear the plaintiff's costs of the application.

Dated at Nairobi this 16th day of January, 2001.

**T. MBALUTO**

**JUDGE**