

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

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1305 OF 2000

**NINA MARIE LIMITED
.....
... PLAINTIFF**

VERSUS

**GATMA HOLDINGS
LIMITED
..... 1ST
DEFENDANT**

**INSURANCE COMPANY
OF EAST AFRICA LTD.
..... 2ND
DEFENDANT**

RULING

The plaintiff has brought this application under O. VIII Rule 17 (3), O. IXA Rule 10 and O. VII Rule 1 of the Civil Procedure Rules for an order to set aside a default judgment entered against it on the defendant's counterclaim. The application is supported by an affidavit sworn on 23.11.2000 by Hamilton Mwandawiro who is the plaintiff's general manager. Two further affidavits, one sworn by the same Mwandawiro and the other by Harit Amritlal Sheth, the plaintiff's leading advocate, have also been filed in support of the application. The defendants oppose the application on the grounds contained in an affidavit sworn on 28.11.2000 by Mary Nyambura Kamau an advocate of this court having the conduct of the case on behalf of the 1st defendant.

Basically the defendant's position is that no good explanation has been given by the plaintiff for its failure to file a defence to the counterclaim. They also assert that there has been inordinate and unexplained delay in bringing this application and that the intended defence to the counterclaim does not raise any reasonable defence.

Regarding the plaintiff's failure to file defence to the counter-claim, in his affidavit Mr. Sheth has explained that he was leading the advocate on record in this matter for the plaintiff and as such, it was his responsibility to draw the defence to the counterclaim. He further states that he was outside the country during most of the material time and because of that and also through inadvertence he failed to file the defence as required. That statement is confirmed by entries in Mr. Sheth's passport (copies of which are annexed to his affidavit) which show that he did a lot of travelling outside the country during the period between 29.8.2000 and 21.11.2000.

Bearing in mind the fact that the sins of counsel should not be visited upon their clients, I find Mr. Sheth's explanation sufficient for the purposes of exercising the very wide discretion conferred to this court by O. IXA Rule 10 to set aside the default judgment.

As to the claim that the purported defence does not disclose any cause of action or as put by Mr. Kirundi during his submissions, whether any defence at all arises, I think I should confine myself to the holding in the case of Kiprotich V. Gathua and Others (1976) KLR 87 which I consider very relevant to this case. The court held:-

“The jurisdiction to award judgment resulting from a failure to reply to a counterclaim should only be exercised in the clearest of cases and never where the subject -matter of the counterclaim is so closely related to the subject - matter of the plaint as to be indivisible and the plaint has not been struck out or dismissed. Even where the subject -matter is distinct and divisible, a party who has appeared but is in default of pleading should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward.”

The instant suit arises from an alleged breach of tenancies and besides other reliefs the plaintiff seeks damages arising from the alleged breach. In its counter-claim the 1st defendant alleges that the plaintiff failed to pay rent on due dates in terms of the lease between the parties and claims a total of Shs.56,310,508/= which the 1st defendant asserts it is entitled to under the lease. In my view the subject matter of the counter-claim in this suit is so closely related to the subject matter of the plaint as to be indivisible. It is indeed the type of case the Court of Appeal had in mind when it made the comments referred to above in the case of Kiprotich. In those circumstances, the default judgment should not have, in the first place, been entered and consequently the issue of whether or not the purported defence to the counter-claim raises any reasonable defence does not arise. It is not an issue in this matter. For those reasons, I find that the applicant has established a case for setting aside the default judgment.

In the same application the plaintiff also sought an order to strike out the defendant's counter claim. However, that part of the application though opposed by the defendants was not canvassed before me by any of the parties and consequently I am unable to rule on it.

In the event the application to set aside the default judgment entered against the plaintiff in favour of the 1st defendant on the counter-claim is allowed, the default judgment set aside and the plaintiff granted unconditional leave to defend the counter-claim. The costs of this application will be borne by the plaintiff.

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

T. MBALUTO

JUDGE