

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 308 OF 2001

NATIONAL INDUSTRIAL CREDIT BANK LIMITED ... PLAINTIFF

VERSUS

PETER MBIU MUTINGA DEFENDANT

RULING

This application which has been brought by way of a notice of motion under O. IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks an order of this court to set aside a judgment entered against the defendant in default of defence. The application is supported by two affidavits one of which is sworn by the applicant himself while the other is sworn by his advocate.

Two grounds, besides others, are advanced for the application. They are that:-

- (a) Although the applicant concedes that there was delay in filing the defence, the duration of the delay attributable to him was only 7 days; he explains that the rest of the delay was occasioned by unavailability of the court file in the Court Registry with the result that the plaintiff was not able to file his defence as soon as it was ready. But regarding the 7 days delay, the defendant states that he had to go through many business transactions involving numerous documents for the purpose of preparing his defence and consequently his defence was not ready when time for filing it lapsed.
- (b) The second ground is that the applicant has a good defence and should therefore be allowed to defend the suit. One of such defences is said to be that the respondent has joined in the suit three different transactions relating to several different subject matters allegedly giving rise to different causes of action which joinder cannot in law be properly done.
- (c) Thirdly, the applicant's advocates state that the suit is incompetent for non-compliance with O. VII Rule (2) of the Civil Procedure Rules.

Although in his replying affidavit Mr. Wanjama for the respondent states that the explanation given for the delay by the applicant is not satisfactory, the record of this matter partly bears out what the applicant states in paragraphs 5, 6 and 7 of his affidavit. It reveals that between 13.4.2001 when the case file was minuted by a Registry clerk for action by the Deputy Registrar for purposes of entering default judgment and, 18.4.2001, when the Deputy Registrar finally entered that judgment, the file was clearly not in the Registry but with the Deputy Registrar. It is therefore more than clear that the applicant was prevented by the absence of the file in the Registry from filing his defence.

The explanation for the delay thereafter is to an extent a bit tricky and obviously not amenable to easy evaluation. The scenario emerging from what the applicant says and the response thereto by Mr. Wanjama, raises questions which cannot be resolved on the basis of the evidence before me. The defendant complains that for a long time he was unable to trace the court file while Mr. Wanjama's statement in the Replying Affidavit implies that he could have assisted the defendant to locate the court file. Given that situation the only observation I would wish to make in connection with the two conflicting contentions is that a situation whereby a court file is readily available to one party while the other cannot access it for purposes of filing vital documents despite several attempts to that effect is totally unacceptable to me. As far as the instant case is concerned, it is I think sufficient to further

observe, without attempting in any manner to place blame on any one that between 16.4.2001 and the time of lodging this application, the applicant made several unsuccessful attempts to file his defence. As to the draft defence, I note that Mr. Wanjama describes it as a devoid of merit and also that it raises no triable issues.

But the plaintiff states in his affidavit that the plaint he was served with was not verified contrary to the requirements of the Civil Procedure Rules and because of that it is therefore incompetent. That surely is an issue which must be resolved before the matter can go for trial. It may even be a ground for striking out the entire plaint. The other issue relates to the alleged improper joinder of causes of action. At this stage, we do not have particulars of those alleged causes of action. But the cure for the deficiency that arises from this situation is not to say that the defence is useless and should be ignored but to request for particulars in accordance with O. VI Rule 8 of the Civil Procedure Rule i.e. after the defence has been formally filed.

Order IXA Rule 10 of the Civil Procedure Rules pursuant to which this application has been made gives this court a very wide discretion to set aside a judgment entered in default of defence. As far as this case is concerned, I am satisfied for the reasons given above and also in the interests of justice, that such discretion should be exercised in favour of the defendant. Accordingly, I allow the application and set aside the judgment entered in this matter on 18.4.2001. The applicant will however bear the respondent's costs of the application.

Dated at Nairobi this 15th day of October, 2001.

T. MBALUTO

JUDGE