



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

**AT NAIROBI**

**CIVIL CASE NO. 3654 OF 1985**

**DIAMOND TRUST OF KENYA.....PLAINTIFF**

**VERSUS**

**HUTS & SAFARIS & 2 OTHERS.....DEFENDANTS**

**RULING**

I have before me an Amended Chamber Summons brought under Order 1 X A r.10, Order XX1 r 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the applicants (2nd and 3rd defendants) are seeking the following orders:-

- "1.THAT the ex-parte judgment entered against the 2nd and 3rd Defendants in default of filing Defence within stipulated time and all the subsequent order (sic) be set aside and suit be heard inter-parties (sic).
- 2.THAT stay of execution be granted.
- 3.THAT the 2nd and 3rd Defendant be granted leave to file their Defence.
- 4.THAT the attached draft copy of the Defence be deemed duly filed.
- 5.THAT the costs of this application be provided for".

The application is brought on the grounds that the 2nd and 3rd Defendants were never served and the mistake of not filing Defence was caused by their Advocate then on record and on the annexed affidavit of Timothy Joel Kamanu.

The position here is that the applicants (2nd and 3rd defendants) were guarantors of the 1st defendant. There was a defence by 1st defendant and it is the contention of the applicants that the defence of 1st defendant and that of 2nd and 3rd defendants is intertwined and may not be separated. The applicants will be advancing the principle that the plaintiff could not sue the guarantors before realizing security from the principal. Mr. Mugeni for the applicants argued that the dispute arose out of a hire purchase agreement and the vehicle which was the subject matter of the hire agreement was repossessed by the plaintiff/respondent. He contended that if the vehicle is sold the proceeds would either satisfy the decretal amount or reduce it considerably.

In opposing this application Mr. Mohammed for the respondent argued that there was inordinate delay since judgment was delivered against the 1st defendant on 13th February, 1986, and although the court

record shows that that judgment was set aside by consent there were attempts to execute against 1st defendant. As regards mistake as alleged by the applicants, Mr. Mohammed pointed out that there was no affidavit sworn by the advocate in question and hence this appliTchaitsi onc aosueg hhta st oa bleo ndgi shmiisstsoerdy. going back to 1985. From the pleadings this would appear to be a normal dispute in which the subject matter is a vehicle in a hire purchase agreement. The applicants (2nd and 3rd defendants) were directors and guarantors of the 1st defendant. The plaintiff sued all the three defendants. It would appear that while 1st defendant filed a defence the other two did not do so. The records show that judgment against 1st defendant was set aside. It was not clear why judgment was not set aside in respect of 2nd and 3rd defendants. Hence the 2nd and 3rd defendants are now seeking the setting aside of the judgment entered against them.

What is the law as regards setting aside of ex parte judgments? I think we should start with the case of Kimani V. Mc Connel and Another (1966) E.A 547 at p.555 where Harris J had the following to say:-

'Looking at 0.1X as a whole and attempting to comprehend the purpose of rr 10 and 24 it seems to me that a reasonable approach to the application of these rules to any particular case would be for the court, first, to ask itself whether any material factor appears to have entered into the passing of the ex parte judgment which would not or might not have been present had the judgment not been ex parte and then if satisfied that such was or may have been the case to determine whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed".

Then in the now celebrated case of Shah v. Mbogo and Another (1967) E.A 116 at p.123 the same Harris J, said:-

"I have carefully 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 so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

The principles stated by Harris J. in the two cases cited above were approved by the then Court of Appeal for East Africa in Mbogo and Another v. Shah (1968) E.A. 93.

Hence in this application, I am being asked to exercise my discretion which discretion must be exercised judicially, and this discretion is unfettered. Indeed this is what was said in Patel V. E.A. Cargo Handling Services Ltd. (1974) E.A 75 at p.76 by Duffus P:-

"There are no limits or restrictions on the judges discretion except that if he does vary the judgment he does so on such terms as may be just".

So in this application, I must consider what led to the ex parte judgment being entered. It was entered because there was no defence filed by the two applicants who were 2nd and 3rd defendants. They now say that they had asked their lawyer to file a defence for all the three defendants but only the defence of 1st defendant was filed. We have now been told that the judgment which had been entered against the 1st defendant was set aside by consent. And the two applicants state that they were guarantors for the 1st defendant and that the vehicle which was the subject of the hire purchase agreement was repossessed and if it was to be sold then the proceeds from the sale would satisfy the claim. There is another aspect of the matter. The applicants contend that they ought not to have been sued until the plaintiff had failed to recover from the principal debtor (1st defendant). All these matters ought to be taken into account when considering whether or not to set aside the ex parte judgment. The applicants said that they had a good defence to the plaintiff's claim. I have referred to the issue of a motor vehicle which was repossessed by the plaintiff and nothing has been said about it.

In view of the foregoing, I am of the view that the applicants have shown that the circumstances of the

case justify setting aside of the ex parte judgment. Indeed a court of justice should aim at sustaining a suit rather than it is heard and determined on merits (See D.T. Dobie (K) Co. Ltd., V. Muchina & Another - Civil Appeal No. 37 of 1978 (unreported)).

Before I conclude this ruling, I am reminded of what Sheridan J. said in Sebei District Administration V. Gasyali and others (1968) E.A 300 at p.302:-

"The nature of the action should be considered the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court".

In view of the history of this dispute and all that has been said about the principles to be applied in setting aside ex parte judgments, I am satisfied that the applicants herein have succeeded in showing that they deserved to be granted leave to defend this suit. Hence their application is allowed, ex parte judgment against them set aside and the draft defence attached to the application is deemed as duly filed. Since the ex parte judgment has been set aside there can be no question of a stay of execution as there is nothing to be stayed. In interest of justice the respondent is to be paid the costs of this application.

**Dated and delivered at Nairobi this 22nd day of September, 2000.**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**