



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Equity Bank Kenya Limited v Hassan & 3 others (Civil Case E302 of 2022)
[2024] KEHC 6942 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E302 OF 2022
FG MUGAMBI, J
JUNE 7, 2024**

BETWEEN

EQUITY BANK KENYA LIMITED PLAINTIFF

AND

ALI KULI HASSAN 1ST DEFENDANT

SAMUEL MBUGUA 2ND DEFENDANT

MASTER ROCK CONSTRUCTION CO LTD 3RD DEFENDANT

NWEST VALUERS LIMITED 4TH DEFENDANT

RULING

1. Before the court are two applications, one dated 5th December 2022 filed by the 2nd defendant and one dated 6th February 2023 filed by the 1st defendant. Pursuant to the directions of this court, the two applications shall be disposed of instantaneously. Parties filed their respective pleadings and written submissions to both applications.

Application dated 5th December 2022

2. The application was brought under sections 1A, 3A and 63(e) of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 10 Rule 11 of the *Civil Procedure Rules* 2010 and all enabling provisions of the Law. It seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. Spent



- iv. That this Honourable Court be pleased to set aside the default judgement of this Court entered on the 21st November 2022 and all consequential orders attendant thereto.
 - v. That upon the said default judgment and the consequential orders thereto being set aside and vacated, the 2nd defendant be granted leave to file his defence.
 - vi. That the 2nd defendant be given unconditional leave to defend the suit and the suit be heard and be decided on its merits.
 - vii. That the cost of this application be in the cause.
3. The application is supported by the grounds on the face of it and the affidavit sworn by Samuel Mbugua and submissions dated 14th February 2023.
 4. Briefly, the application is sought on grounds that the alleged service on the 2nd defendant was defective and improper as he did not regularly check his emails, that the judgment was entered irregularly as the plaintiff did not provide court with a delivery receipt of the email sent to him to show that the email was delivered, that he has a good defence and finally that the present application has been brought without delay. The 2nd defendant urges the court to find that the judgment against him was irregular and ought to be set aside.
 5. The plaintiff opposed the application by filing Grounds of Opposition dated 13th February 2022 and a replying affidavit sworn on 15th December 2022 by Benjamin Munge, the Credit Administrator of the plaintiff. It opposed the application on the basis that the default judgment was regular since the 2nd respondent was properly serviced via electronic mail, that the 2nd defendant did not have a plausible defence and finally that the application had been brought to court after undue delay.

Application dated 6th February 2023

6. The 1st defendant filed the application dated 6th February 2023 under sections IA 3A and 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 10 rule II of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law. The application sought the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to set aside the default judgement of this Court entered on the 21st November 2022 and all consequential orders attendant thereto
 - iv. That the 1st defendant be granted leave to file his defence and defend the suit and have the same be decided on its merits.
 - v. That the cost of this application be in the cause.
7. The application was premised on the grounds on the face of it, supporting affidavit sworn by Ali Kuli Hassan and submissions dated 3rd March 2023. Briefly the 1st defendant denies service of the plaint and notice of entry of judgment, states that he has a good defence and that the plaintiff would not suffer any prejudice if the judgment was set aside. The 1st defendant urged the court to exercise its unlimited discretion set aside the ex-parte judgment as he would stand to suffer injustice if the default judgment remained in place.
8. The plaintiff filed Grounds of Opposition dated 15th February 2023 and a replying affidavit sworn by Benjamin Munge on 13th February 2013 in opposition to the application. Briefly, the plaintiff's



grounds were that the 1st defendant was validly served via electronic mail and later served on via WhatsApp, that failure to serve notice of entry of judgment does not lend itself to setting aside the judgment, that the draft defence was a sham and disclosed no defence and finally that there was inordinate delay in bringing the application and with no plausible explanation. It was stated that the plaintiff would be highly prejudiced if the orders sought were granted.

Analysis

9. I have carefully considered the pleadings, rival submissions and authorities presented before the Court. The main issue for determination is whether the court should set aside the judgment of the court dated 21st November 2022. Of relevance is Order 10 rule 11 of the [Civil Procedure Rules](#) which provides as follows:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

10. The terms upon which the court may vary or set aside a default judgment are also well crystalized, following numerous judicial pronouncements on the issue. The Court of Appeal in the case of [James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another](#), Civil Appeal No. 6 of 2015 eKLR, held that:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the [Civil Procedure Rules](#), to move the court to set aside the default judgment and to grant him leave to defend the suit.

In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.”

(See also *Mbogo & Another v Shah (supra)*, *Patel v EA Cargo Handling Services Ltd*, [1975] EA 75, *Chemwolo & Another v Kubende*, [1986/ KLR 492 and *CMC Holdings v Nzioki*, [2004/ 1 KLR 173]).

11. The fact that both defendants did not enter appearance and did not file their statements of defense is not controverted. Both defendants are adamant that the service was irregular.
12. Order 5 of the [Civil Procedure Rules](#) sets out the procedure on service of summons. Order 5 rule 22B provides for service through electronic mail service. The plaintiff stated that he had served the 2nd defendant using the last known email address that the 2nd defendant used when applying for the loan, which is the subject matter of the suit. I note that the 2nd defendant does not deny that the email belonged to him but only states that he did not access his email for some time and therefore missed out on the service. An affidavit of service sworn by Ruth Nguni on 14th September 2022 indicates that the 2nd defendant was served on 19th August 2022. There is no other obligation imposed on a plaintiff



- under Order 5 Rule 22B and for that reason I find that the service on the 2nd defendant was regular and well effected.
13. The plaintiff has further attached evidence of a screenshot indicating service of the 1st defendant by WhatsApp, which is a mobile message application. Order 5 Rule 22C allows service of summons by way of mobile enabled messaging applications, to the defendants last known phone number. The 1st defendant has not denied that the number to which service was effected is his. I therefore conclude that there was proper service on the 1st defendant as well. For the avoidance of doubt, it is my finding that the judgment against the 1st and 2nd defendants was therefore regularly entered.
14. The next question that this Court is required to determine is whether there are plausible reasons for exercising its discretion to set aside the default judgment. As earlier stated, there are sufficient judicial pronouncements outlining the guidelines along which such discretion should be exercised. These, in addition to the case of *Shah v Mbogo* [1967] EA 166 and *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 amongst many others, lay out the following key considerations:
- i. The discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error;
 - ii. The discretion is not meant to assist a person who has deliberately sought to obstruct or delay the cause of justice;
 - iii. The court must be satisfied that there is a defence on the merits, which means a defence that raises a triable issue which should go to trial for adjudication with a prospect of success.”
15. I have already found that service was regularly effected on both defendants and therefore the reasons that have been given for not entering appearance and putting in their statements of defence are not plausible. While I must state that the time taken by both defendants to file their applications is not inordinately long, this alone is not sufficient to grant the orders sought by the defendants. Turning to the draft statements of defence filed by the defendants, I note that each of them contains general denials of the averments in the plaint.
16. This court is not required to determine the merits or demerits of a case at this point. A cursory look at the pleadings should however disclose triable issues in response to the plaint. To this extent I do concur with the Learned Judge in the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga*, [2016] eKLR where the court, while dealing with a defence of mere denial observed as follows:
- “ A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence. ...”
17. I have looked at the affidavits filed by the 1st and 2nd defendants, the supporting affidavit sworn by the plaintiff opposing the two applications as well as the plaint and draft statements of defence. I find the statements of denial by the defendants to be simply evasive. They do not answer to any point of substance. The Court must have some information to work with to come to a finding that there are triable issues in the matter for example either that the amount borrowed is disputed or that the terms of the contract were unreasonable. A general traverse without any explanation does not assist the court.

Determination and orders

18. In conclusion therefore, I find and hold that the applications of 5th December 2022 filed by the 2nd defendant and one dated 6th February 2023 filed by the 1st defendant are without merit and the two applications are dismissed with costs to the plaintiff.



DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

