



KCB Bank Kenya Limited v Mobile Talkshoppe Limited & 2 others (Commercial Suit E455 of 2023) [2024] KEHC 8728 (KLR) (Commercial and Tax) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E455 OF 2023**

PM MULWA, J

JULY 18, 2024

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

MOBILE TALKSHOPPE LIMITED 1ST DEFENDANT

ABDI QAFAR ALI ADAN 2ND DEFENDANT

MOHAMEDNUR ADOW ABDI 3RD DEFENDANT

RULING

1. This ruling relates to a Notice of Motion application dated January 26, 2024, brought under the provisions of; Sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Order 42 Rule 6(1), (2) a & b and 6 of the [Civil Procedure Rules](#). The applicants are seeking for orders that;
 - i). Spent
 - ii). Spent
 - iii). The court to set aside in its entirety the interlocutory judgment entered on 18th December 2023 together with all consequential orders.
 - iv). The applicants be granted leave to defend the suit.
 - v). The applicants be granted leave to file defence and accompanying documents within 7 days from the day of the order.
 - vi). Costs of the application be provided for.



2. The application is premised on the grounds on the face of it and an affidavit dated January 26, 2024, sworn by Abdi Qafar Ali Adan the 2nd defendant/applicant. He deposed that, the court has unfettered jurisdiction to grant the orders sought, the delay to file defence was not inordinate or inexcusable and the defence raises triable issues worth consideration by the court.
3. The application was opposed by the plaintiff through a replying affidavit sworn by its Recoveries Manager, Ferdinand Kalafweri on February 26, 2024. He narrated how the 1st defendant had been advanced a facility by the plaintiff and which it failed to service as per agreement.
4. It was averred that the 1st defendant filed a memorandum of appearance on October 9, 2023 but deliberately failed to file its defence within the statutory timeline, the filing of the instant application was an afterthought and the intended defence raises no triable issues as the 1st defendant had admitted their indebtedness.
5. Parties filed written submissions which the court has considered. The same mirrored the averments made in the respective affidavits in support and in opposition.
6. Having been served with the suit herein, the 1st and 2nd defendants filed a memorandum of appearance dated October 9, 2023. The plaintiff filed a request for judgment against the defendants due to the default in filing a defence. Judgment was entered accordingly on December 18, 2023.
7. I must state from the onset that having gone through the application, the affidavit in support and the applicants' submissions, nowhere is it stated what attributed their failure to file a statement of defence. They only contend that the application has been brought timeously.
8. It is contended by the plaintiff that the instant application is a mere attempt to delay the just and expeditious determination of the matter and the intended defence constitute mere denials.
9. Order 10 rule 11 of the *Civil Procedure Rules* empowers the court to set aside judgment in default of appearance or defence on such terms as are just. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court held that:

“There are no limits or restrictions on the judge’s discretion except that if he/she does vary the judgment, he does so on such terms as may be just. It is now trite that the said discretion is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.”
10. Therefore, the main concern of the court is to do justice to the parties without imposing conditions on itself or fetter wide discretion given to it by the rules of procedure. In exercising this discretion, the court is invited to look at the entire circumstances of the case, the conduct of the parties, whether the defendant has a defence to the claim and any prejudice that may be occasioned to the plaintiff.
11. In this case the defendants do not deny indebtedness but have invited the court to consider the draft defence which, they argue, raises triable issues.
12. Being mindful that this is not the trial of the main suit, I have considered the plaint vis-a-vis the draft defence. The applicants aver in the draft defence at paragraph 5 and 6 thereof that, there existed challenges in channeling dealer commissions to the plaintiff’s account because one of the 1st defendant’s accounts held by DIB bank had not been closed due to an outstanding facility.
13. Having considered all the arguments herein, I hold the view that, it is in the interest of justice that, the applicants be allowed to file their defence and pave the way for the matter to be decided on merit.



14. For the reasons I have set out above, I allow the application dated January 26, 2024 on the following terms:
- a. The interlocutory judgment herein be and is hereby set aside.
 - b. The defendants shall file and serve their defence to the claim within seven (7) days, with corresponding leave for the plaintiff to file a reply to the defence, if need be.
 - c. The defendants shall pay the plaintiff costs of this application assessed at Kshs. 30,000/- within seven (7) days.
 - d. In default of any of the conditions set out above, the interlocutory judgment shall stand reinstated and the plaintiff shall be at liberty to proceed with the formal proof.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2024.

P. MULWA

JUDGE

In the presence of:

Ms. Mbithe hb Mr. Garat for Plaintiff/Respondent

Ms. Nduva hb Mr. Ondiek for 1st & 2nd Defendants/Applicants

Court Assistant: Carlos

