



REPUBLIC OF KENYA



**KENYA LAW**  
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**Equity Bank Kenya Ltd v Hassan & 3 others (Civil Case E302 of 2022)  
[2023] KEHC 20269 (KLR) (Commercial and Tax) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20269 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E302 OF 2022  
FG MUGAMBI, J  
JULY 14, 2023**

**BETWEEN**

**EQUITY BANK KENYA LTD ..... PLAINTIFF**

**AND**

**ALI KULI HASSAN ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MBUGUA ..... 2<sup>ND</sup> DEFENDANT**

**MASTER ROCK CONSTRUCTION COMPANY LTD ..... 3<sup>RD</sup> DEFENDANT**

**NWEST VALUERS LTD ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before the court are two applications, one dated December 5, 2022 filed by the 2<sup>nd</sup> defendant and one dated February 6, 2023 filed by the 1<sup>st</sup> 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 December 5, 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 November 21, 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 2<sup>nd</sup> defendant be granted leave to file his defence.
  - vi. That the 2<sup>nd</sup> 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 February 14, 2023.
  4. Briefly, the application is sought on grounds that the alleged service on the 2<sup>nd</sup> 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 2<sup>nd</sup> defendant urges the court to find that the judgment against him was irregular and ought to be set aside set aside.
  5. The plaintiff opposed the application by filing Grounds of Opposition dated February 13, 2022 and a replying affidavit sworn on December 15, 2022 by Benjamin Munge, the Credit Administrator of the plaintiff.
  6. The plaintiff filed Grounds of Opposition to the application by the 2<sup>nd</sup> defendant. It opposed the application on the basis that the default judgment was regular since the 2<sup>nd</sup> respondent was properly serviced via electronic mail, that the 2<sup>nd</sup> defendant did not have a plausible defence and finally that the application had been brought to court after undue delay.

### **Application Dated February 6, 2023**

7. The 1<sup>st</sup> defendant filed the application dated February 6, 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 November 21, 2022 and all consequential orders attendant thereto
  - iv. That the 1<sup>st</sup> 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.
8. The application was premised on the grounds on the face of it, supporting affidavit sworn by Ali Kuli Hassan and submissions dated March 3, 2023. Briefly the 1<sup>st</sup> 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 1<sup>st</sup> defendant urged the court to exercise its unlimited discretion set aside the exparte judgment as he would stand to suffer injustice if the default judgment remained in place.



9. The plaintiff filed Grounds of Opposition dated February 15, 2023 and a replying affidavit sworn by Benjamin Munge on February 13, 2013 in opposition to the application. Briefly, the plaintiffs grounds were that the 1<sup>st</sup> 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

10. 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 November 21, 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.”

11. 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 Kanyita Nderitu & Another Versus 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].”

12. The fact that both defendants did not enter appearance and did not file their statements of defence is not controverted. The 2<sup>nd</sup> defendant states that service was irregular while the 1<sup>st</sup> defendant claims not to have been served with the summons to enter appearance and the plaint. The plaintiff on the other hand states that service was effected electronically.
13. Order 5 of the *Civil Procedure Rules* sets out the elaborate procedure on service of summons. Order 5 Rule 22B provides for service through electronic mail service. The plaintiff stated that he had served the 2<sup>nd</sup> defendant using the last known email address that the 2<sup>nd</sup> defendant used when applying for the loan, which is the subject matter of the suit. I note that the 2<sup>nd</sup> 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 Ngure on September 14, 2022 indicates that the 2<sup>nd</sup> defendant was served on August 19, 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 2<sup>nd</sup> defendant was regular and well effected.

14. The plaintiff has further attached evidence of a screenshot indicating service of the 1<sup>st</sup> 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 1<sup>st</sup> defendant has not denied that the number to which service was effected is his. I therefore conclude that there was proper service on the 1<sup>st</sup> defendant as well. For the avoidance of doubt, it is my finding that the judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was therefore regularly entered.
15. 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 vs 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
  - iii. sought to obstruct or delay the cause of justice,
  - iv. The court must be satisfied that there is a defence on the merits, which means a defence that raises a triable issue d which should go to trial for adjudication with a prospect of success.
16. 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.
17. This court is not required to make a determination on the merits or demerits of the 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 Vs 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...”
18. I have looked at the affidavits filed by the 1<sup>st</sup> and 2<sup>nd</sup> 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. This could either be 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**

19. In conclusion therefore, I find and hold that the applications by the 1<sup>st</sup> and 2<sup>nd</sup> defendants are without merit and the same are dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>th</sup> DAY OF JULY 2023**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

