



REPUBLIC OF KENYA



**I & M Bank Limited v Druways Limited & 3 others (Commercial Suit 616 of 2021)
[2023] KEHC 20011 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT 616 OF 2021**

A MABEYA, J

JULY 17, 2023

BETWEEN

I & M BANK LIMITED PLAINTIFF

AND

DRUWAYS LIMITED 1ST DEFENDANT

ANDREW NGURE GATHIMBA 2ND DEFENDANT

ESTHER MUTHONI MWANGI 3RD DEFENDANT

ISAAC NGURE GATHIMBA 4TH DEFENDANT

RULING

1. Before Court is the 1st defendant's application dated 28/7/2022. It was brought under sections 1A, 1B, 3A of the [Civil Procedure Act](#) and Order 10 Rule 11, Order 11 rule 3 and Order 51 Rule 1 of the [Civil Procedure Rules](#).
2. The application sought to set aside the judgment, subsequent proceedings and orders made on October 21, 2021. The application further sought to have the defence deemed as duly filed and have the suit transferred to Kajiado High Court in order for it to be consolidated with Kajiado High Court Case No E009/2021, Druways Limited versus I&M Bank Limited.
3. In support of the application, the applicant relied on the grounds on the face of it and on the supporting affidavit sworn by Andrew Gathimba Ngure sworn on 28/7/2022. It was averred that the Court granted an interlocutory judgment against the 1st defendant/applicant for Kshs 21,577,122.67, Kshs 15,000,000/- and Kshs 500,000/- against the 2 and 4th defendant and Kshs 15,000,000/- against the 3rd defendant, respectively. It was contended that the failure to enter appearance and file a defence was occasioned by the plaintiff who failed to serve the summons and the plaint.



4. According to the defendants, they learnt of the matter after being served by an application in Kajiado High Court Civil Case E009/2021 which according to them ought to be consolidated with this matter to avoid conflicting decisions. They contended that they had a meritorious defence and the plaintiff would suffer no prejudice if the application was allowed.
5. The application was opposed vide a replying affidavit sworn by Doreen Otieno on 21/9/2022. She stated that the applicant was served through its advocate Mutanda Law Advocate on 25/8/2021. Further the 3rd defendant was served on 8/9/2021 and an affidavit of service was sworn on 23/9/2021 by Joseph Cedric Amulyoto. That the defendants had no triable defence that would warrant setting aside the judgment and the decree holder would suffer great prejudice.
6. The application was canvassed by way of written submissions which I have considered.
7. The defendants submitted that the ex-parte judgment was irregularly obtained and ought to be set aside. That there was no proof of service upon the law firm representing the defendants which at the time was not on record for them.
8. On its part, the respondent submitted that the judgment was regular since the defendants did not enter appearance within the stipulated time. Counsel submitted that the defence did not raise any triable issue since the debt was admitted by the defendants. That the defendants did not explain the delay in filing the application.
9. I have considered the pleadings, the submissions and the authorities relied on. The main issue for determination is whether the court should set aside the judgment entered on October 21, 2021.
10. Order 10 rule 11 of the *Civil Procedure Rules* provides: -

“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 defendants’ case was that the judgment was irregularly entered since they were not served with the summons to enter appearance and the plaint. They contended that they learnt of the said judgment in another application filed in a different matter between the parties.
12. On its part, the plaintiff contended that service was effected upon all the defendants and the processes server filed an affidavit of service to that effect. Its position was that the judgment was regular and setting it aside would be highly prejudicial to it. That the defence did not raise any triable issue as the debt was admitted.
13. In *James Kanyitta Nderitu & Another Versus Marios Philotas Ghikas & Another*, Civil Appeal No 6 of 2015 eKLR, the Court of Appeal held;-

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. 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 *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)."

14. From the foregoing, the Court has to consider the reasons advanced for failure to enter appearance and file a defence, the time that has lapsed since entry of judgment, whether the defence raises triable issues and the prejudice that would be occasioned to the parties, if any.
15. The defendants' contention is that they were not served with the summons to enter appearance and the plaint. They contended that service was effected on the firm of Mutanda Law advocates who had not filed a notice of appointment and could therefore not be served on behalf of the defendant.
16. Order 5 of the *Civil Procedure Rules* sets out an elaborate procedure on service of summons. I have perused the return of service sworn by the process server on 23/9/2021 sworn by Joseph Cedric Amulyoto. He swore that the 2nd defendant instructed him to serve the law firm of Mutanda Law advocates. That averment was not challenged or denied. I therefore find that the service was effected in accordance with the law and therefore the judgment entered was a regular judgment.
17. In *Rayat Trading Co Limited vs Bank of Baroda & Tetezi House Ltd* [2018] eKLR the court held that some of the matters to be considered in exercising the court's discretion is; if the defendant has a real prospect of successfully defending the claim; or if it appears to the court that there is some other good reason why the judgment should be set aside or varied. That is when the defendant should be allowed to defend the claim.
18. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, the Court of Appeal observed that: -

"What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."
19. I have considered the draft defence annexed to the application. The defendants faulted the sale of the properties terming it as negligent and irregular and it involved a collusion between the plaintiff's employees. The defendants have also challenged the plaintiff in the manner in which it computed the interest charged. In view of this the court finds that there are triable issues and it would be in the interest of justice to give the defendants an opportunity to be heard. Any prejudice suffered by the plaintiff in terms of the delay can be compensated by costs.
20. The defendants sought to have the matter consolidated with Kajiado High Court case no E009/2021, *Druways Limited versus I&M Bank Limited*. Order 11 Rule 3(1)(h) mandates the Court to consider consolidation of suits with a view of furthering expeditious disposal.



21. In *Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others* (2014) eKLR, the Supreme Court of Kenya had this to say about consolidation of suits: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

22. I note that the prayer for consolidation was not opposed. The reliefs sought by the parties arise from the same transaction and having regard to the facts presented, I find that this is a proper case for consolidation.

23. In the upshot I find merit in the application and the same is allowed as prayed.

24. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

