



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 1287 OF 1999

BETWEEN

KUGURU FOOD COMPLEX LIMITED PLAINTIFF

AND

MASHREQ BANK PSC.....1ST DEFENDANT

DUBAI BANK KENYA LIMITED (IN LIQUIDATION)2ND DEFENDANT

RULING

Introduction and Background

1. What is before the court is the 2nd Defendant's Notice of Motion dated 29th October 2020. It is made primarily under **Order 10 rule 11** of the **Civil Procedure Rules** ("the **Rules**"). It seeks to set aside the interlocutory judgment entered against it on 20th December 2019 and for leave to file its Defence and that its draft Defence filed be duly admitted on record. The 2nd Defendant ("the Bank") also seeks to set aside the formal proof proceedings of 28th September 2020 and reopen the case for hearing.

2. The application is supported by the affidavit of its Resolutions Officer, John Ombasa, sworn on 29th October 2020. It is opposed by the Plaintiff ("the Company") through the replying affidavit of its Managing Director, Peter Ngibuini Kuguru, sworn on 26th November 2020; Statement of Grounds of Objection dated 17th November 2020 and a Further Statement of Grounds of Objection dated 26th November 2020. The 1st Defendant neither supported nor opposed the application. The application was disposed of by way of written submissions.

The Application

3. The Bank does not deny that it was served with the Summons to Enter Appearance on 31st October 2019 and that it failed to enter appearance and file its defence within the time prescribed. According to Mr Ombasa, failure to file its defence was due to an inadvertent mix-up at the registry. He depones that after entry of judgment, the Bank engaged the Company in correspondence and meetings with the aim of settling the claim. The Bank also states that it has a valid Defence against the claim and would wish to defend it. It asserts that it risks suffering prejudice if the judgment is not set aside and the case reopened for hearing.

4. Counsel for the Bank submitted that the court has discretion to set aside interlocutory judgment. He cited **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, **Shah v Mbogo [1967] EA 166** and **Sebei District Administration v Gasyali & Others [1968] E.A. 300** to advance the view that the main concern of the court to do justice to the parties and to avoid injustice resulting from accident, inadvertence, excusable error or mistake. Counsel also urged that in line with the decision in **Sebei District Administration v Gasyali & Others (Supra)**, the court should also consider the nature of the cause of action, the intended defence and whether the Company can reasonably be compensated by an award of costs occasioned by setting aside the ex-parte order.

5. The Bank reiterates that it has a viable Defence as demonstrated by the draft annexed to the affidavit of John Ombasa. It contends that the decretal amount of KES. 4,664,880.00 together with interest at 22.5% p.a is high and considering that the Bank is in liquidation, the default judgment will greatly prejudice its operations.

6. The Bank submits that the amount claimed by the Company is not justified and that the fraud alleged by the Company was an inside job and its recourse lies against the Company's employees who perpetrated the fraud. The Bank adds that considering the Company was actively engaging the Bank for an out of court settlement after filing suit and before the entry of interlocutory judgment, the failure to file the Defence was not actuated by any malice but was an oversight on the part of the Bank.

The Plaintiff's Response

7. The Company opposes the application on the basis that it is part of a long drawn scheme to delay final disposal of the suit. It rejects the Bank's contention that failure to enter appearance and file defence was due to inadvertence or mix up. It points out that the failure to file the application to set aside judgment promptly is the result of laches. It further contends that the Bank does not have a valid defence and if the application is allowed, it will suffer substantial prejudice.

8. The Company asserts that after serving the summons, it took not less than seven steps to constantly remind the Bank of the existence of this suit and service of summons. These steps included service of the Notice of Withdrawal of the suit against the 3rd Defendant on 3rd October 2019, service of the Notice of Entry of Judgment and a further notice on 22nd January 2020 and 17th February 2020 respectively. The Company also sent to the Bank a further Notice threatening to execute dated 2nd June 2020. On 15th September 2020, a 3rd Party Notice dated 15th September 2020 was served by both Defendants. Finally, on 28th September 2020, the Bank was represented in court by an advocate when hearing proceeded. Counsel contended that in all these instances, the Bank was aware of the judgment.

9. Mr Kuguru deponed that he also visited Mr Mohamud Mohamud, the Managing Director of Kenya Deposit Insurance Corporation(KDIC) which manages the Bank and who is personally known to him. That the meeting was held on 30th January 2020 was also attended by the Company's advocate, Mr Waihiga and other officers of the Bank whereby this case was discussed as evidenced by Company's letter to the Bank dated 17th February 2020. Mr Kuguru depones that during the visit he drew the Bank's attention to the judgment and informed it of the Company's intention to proceed with execution if the matter was not resolved.

10. As regards the suit, the Company submits that this suit is now 21 years old having been filed in 1999. That the suit has been heard in the past and ordered to be heard *de novo* by the Court of Appeal in 2018 hence it would not be in the interest of justice to set aside the judgment. The Company states that one of its witnesses, Mr. Dinesh Bhattesa (PW 3), is based in the United Kingdom, is not only old but has also been very unwell and getting him to testify is not only costly but also difficult given his ill health and that the cause of action arose 20 years ago. Mr Kuguru adds that he too, is an old man and of ill health and has been in and out of hospital. Mr Kuguru laments that it is doubtful and remote that witnesses will be available or able to give evidence for health reasons if the matter were re-opened and the Company will be severely prejudiced.

11. The Company submits that the interlocutory judgment entered against the 2nd Plaintiff is regular. It argues that for the Bank to succeed, it must show reasons why it failed to file the memorandum of appearance and defence within the prescribed time. It must also show that the intended defence raises triable issues. The Company submits that the Bank has not established any good or meritorious reasons for not filing appearance and defence. It also maintains that the inadvertence or inadvertent "mix up" has not been proved. It further contends that the application has been brought after considerable delay.

12. As regards the defence, the Company submits that the Bank's defence does not raise any triable issues as it has not denied the claims by the 1st Defendant or claimed indemnity from the 1st Defendant which has issued the Third Party Notice dated 5th September 2020 to it. It avers that the Bank's defence is general and speculative as the only issue it can defend or raise is a claim against the 1st Defendant. The Company adds that the Bank's draft Defence, if allowed, would be oppressive, unlawful and prejudicial to the Company as the 1st Defendant and the Bank are technically or directly in law the same legal persons. The Company submits that the Bank has no knowledge, evidence and/or cannot produce evidence in support of its defence as such evidence can only come from the 1st Defendant and that the 1st Defendant decided not to participate in the trial at all, by either filing witness statements and exhibits or by either, cross-examining the Company's witnesses or presenting its own oral evidence. The Company submits that the Bank has no witnesses as they have not given any witness names or filed any witness statements.

Analysis and Determination

13. Although there some technical issues that have been raised, I propose to deal with the substance of the matter and it is whether the interlocutory judgment should be set aside under **Order 10 rule 11** of the **Rules** which states as follows:

11. Setting aside judgment [Order 10, rule 11.]

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*.

14. There is also no dispute that the judgment entered on 20th December 2019 is regular as the Bank was duly served with Summons to Enter Appearance but for the reasons I have set out above, failed to enter appearance or file a defence, resulting in the default judgment. The Court of Appeal in **James Kanyita Nderitu v Maries Philotas Ghika & Another NRB CA Civil Appeal No. 6 of 2015 [2016]eKLR** held that in such a case, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such 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 (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**).

15. Turning to the facts of the case, the Bank's case is grounded on the fact that it inadvertently failed to file the defence to due to a mix up at

its Registry. Mr Ombasa did not disclose the nature of the inadvertence and when the mix-up was discovered. The undisputed material before the court shows that the Bank was, at the highest level, aware of the interlocutory judgment but only filed the application 10 months later. This is despite the fact that it was informed that judgment had been entered against it.

16. I find and hold that in the circumstances of this case, the 10 months the Bank took to file the application to set aside the interlocutory judgment is unreasonable and inordinate. The fact that the Bank was negotiating with the Company did not preclude it from filing the application to set aside the defence as the two are not mutually exclusive. I am satisfied that at all material times, the Bank was aware of the existence of the judgment.

17. It is settled law that even where the judgment is regular, the court also has to consider whether the defendant has an arguable defence (see *Tree Shade Motors Limited v DT Dobie and Company Limited NRB CA Civil Appeal No. 38 of 1998 [1998] eKLR*). An arguable defence is not one that must succeed on trial, it is one that must be ventilated at the trial and is not frivolous (see *Stanley Kang'ethe Kinyanjui v Tony Keter and 5 others CA NAI Civil Appl. No. 31 of 2012 [2013] eKLR*). The Plaintiff's case is that the Defendants committed negligence and fraud causing it to lose the money it claimed as general damages. The thrust of the Bank's defence is that the Plaintiff was negligent and or acted fraudulently in the manner it operated its account and that it should shoulder blame for the manner in which it operated the account. It avers that the claim is fictitious and an attempt to defraud the Bank.

18. A claim for fraud is serious and the Plaintiff is obliged to prove its case on a standard higher than on the balance of probabilities (see *Ndolo v Ndolo [2008] 1 KLR (G & F) 742*). While I cannot definitively say that the Bank has no defence to the action, the defence is also not frivolous and the Bank ought to be given a chance to ventilate it bearing in mind the court's discretion in such an application to set aside the judgment on such terms as the court deems just.

19. Finally, this suit was filed in 1999. It has now taken 20 years to reach this stage. The health and ability of the key witnesses to testify are matters I have taken into account in concluding that setting aside the judgment unconditionally would prejudice the Company in a manner that costs would not be sufficient. The Plaintiff has already closed its case. Its witnesses are elderly and not in the best of health to testify again.

20. In framing the order, I intend to make, I have taken into account the fact that I heard the matter on 29th September 2020. On that day, the Defendants were duly represented by counsel and given full opportunity to cross-examine all the witnesses. Further, the Bank was aware that the suit was fixed for hearing on that date after several mentions hence the Bank had the chance to file its application to set aside the judgment before the hearing date thus sparing the Plaintiff of the expense and hardship of availing its witnesses.

21. In the interests of justice, I therefore allow that application to the extent only that I set aside the judgment, to allow the Bank to file its defence and call its witnesses.

Disposition

22. For the reasons I have set out above, I allow the Bank's Notice of Motion dated 27th October 2020 on the following terms;

- a. Interlocutory Judgment dated 20th December 2019 be and is hereby set aside and the 2nd Defendant is granted leave to file and serve its Statement of Defence in terms of the defence annexed to the application within 7 days.
- b. For the avoidance of doubt, the proceedings of 29th September 2020 are not set aside and the 2nd Defendant is granted liberty to call its own witnesses.
- c. The 2nd Defendant shall pay costs of the application to the Plaintiff assessed at Kshs. 50,000.00 which shall be paid within 7 days.

DATED and DELIVERED at NAIROBI this 2ND day of MARCH 2021.

D. S. MAJANJA

JUDGE

Mr Waihiga instructed by Mwaure and Mwaure Waihiga Advocates for the Company.

Mr Amin instructed by Amin and Company Advocates for the 1st Defendant.

Mr Obuya instructed by TripleOKLaw LLP Advocates for the 2nd Defendant.