



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 358 OF 2017

KENNEDY MILTON NTHIGA.....PLAINTIFF/RESPONDENT

VERSUS

HITEN SHANTILAL SHAH.....1ST DEFENDANT

SHANTILAL VERSHI SHAH.....2ND DEFENDANT/APPLICANT

ATULA SHANTILAL SHAH.....3RD DEFENDANT/APPLICANT

RULING (3)

CONSENT

1. On 25th September 2020, Counsel for parties herein; Chris. N. Mutuku for the Plaintiff Maosa & Co Advocates for 1st Defendant and Mwaniki Gachoka Advocates for 2nd & 3rd Defendants entered into and filed Consent that the Court would deliver Ruling on Applications of/filed 6th & 9th September 2019. The Defendants/Applicants would rely on submissions filed on 11th October 2019 and Plaintiff/Respondent would rely on Replying Affidavit of 16th September 2019 & Submissions of 30th October 2019.

NOTICE OF MOTION OF 6TH SEPTEMBER 2019

2. The Applicants (herein **“the 2nd & 3rd Defendants”**) by Certificate of Urgency Application filed together with Notice of Motion and Supporting Affidavit dated 6th September 2019, urged the court to be heard on priority basis for the following reasons;

- a. That the 2nd & 3rd Defendants who are in Civil jail filed this Application seeking orders to stay execution and set aside default judgment.
- b. That this application sought a stay of execution of the decree herein and release of the 2nd & 3rd defendants to enable them defend the suit on its merits.
- c. That the 2nd and 3rd defendants have a strong defense that raises triable issues.
- d. That unless the Application is heard and determined on priority basis, the same would be rendered nugatory as committal would subsist to completion.

3. In the Notice of Motion, the Applicants sought orders; -

- a) The Court to stay execution of the decree of this Court dated 27th November 2017 and release the 2nd and 3rd Defendants from civil jail pending determination of prayer 3 and 4 of this Application.
- b) The Court to set aside/vary the ex-parte judgment obtained by the Plaintiff and all consequential proceedings emanating from the said judgment.
- c) The Court to grant leave to the 2nd and 3rd Defendants to file and serve the defense as well as defend the suit herein on merit.

4. Which application was based on the grounds and the Supporting affidavit of Atula Shantilal Shah as follows; -

- a) That the 2nd and 3rd defendants condemned to pay the Plaintiff **Kshs.34,000,000** together with accrued interest without being heard
- b) That the 2nd and 3rd Defendants were consequently arrested and committed to civil jail for failure to settle the decretal sum herein.
- c) That the 2nd and 3rd Defendants have a strong and meritorious defense that raises triable issues based on inter alia the following: -
 - i. The 2nd and 3rd Defendants are not party to the agreement dated 4th May 2016 being enforced by the Plaintiff in the suit.
 - ii. The agreement is solely between the 1st defendant and the Plaintiff.
 - iii. The Plaintiff through his agent, Brian Yongo, exploited the 1st, 2nd and 3rd Defendants' close family relations to harass, intimidate and coerce the defendants into the consent in **Misc. Criminal Application No.447 of 2014**.
- d) That further, the 2nd Defendant is old (85 years old) and frail and is in need of urgent and specialized medical attention.
- e) That the Plaintiff will not suffer any prejudice if the 2nd and 3rd Defendants are given an opportunity to defend the suit on merit.
- f) That this Court has unfettered jurisdiction under **Order 10 Rule 11 of the Civil Procedure Rules** to set aside default judgment on such terms as may be just.
- g) That the 2nd and 3rd Defendants are willing to abide by any conditions that this Court may require.

RESPONDENT'S REPLYING AFFIDAVIT

5. The Application was opposed vide a replying affidavit dated 16th September 2019, sworn by **Kennedy Milton Nthiga**. He stated that; -

- a) There is a valid and lawful decree of this court against the said judgment debtors and this judgment was lawfully entered in default of entering appearance and failing to file defence within the requisite time and not on the basis of any agreement with either the 1st Defendant/Judgment Debtor or any other party
- b) The judgment herein was entered against the three Defendants/Judgment Debtors **on 24th November 2017** and the decree drawn on **27th November 2017**. All the Defendants were fully aware of the entry of this judgment and did not challenge it or seek to have it reviewed, set aside or varied.
- c) On the contrary the Judgment Debtor personally appeared in court on several occasions, admitted that they were indeed indebted as decreed and pleaded for time to settle their indebtedness.
- d) The proceedings thereafter are replete with admissions by the three debtors and pleas for time to pay until they ran out of excuses and skipped Court sittings and went into hiding and on this the Court record speaks for itself.
- e) It is therefore not true that the debtors herein were never served with notice to show cause on why they should not be committed to civil jail.
- f) The present application is an afterthought as the court committed the Judgment Debtors to civil jail on 27th May 2019 for a period of two months and thereafter the period was extended by a further four months by the Deputy Registrar.
- g) On 10th June 2019, the 2nd Judgment Debtor feigned illness in court, prompting the Deputy Registrar to order for his medical examination and on 1st July 2019 the court then delivered ruling in respect to the health of the 2nd Judgment Debtor in which it was found that he is medically fit and healthy to serve time in prison.
- h) On 27th May 2019, this Court committed the 3 Judgment Debtors to civil jail for 2 months. Thereafter, the period was extended by a further 4 months by Deputy Registrar.
- i) In light of the numerous instances of admission of indebtedness by the three Defendants/Judgment Debtors in the court file and in the backdrop of the attached draft statement of defense, the 2nd and 3rd Defendants/Judgment Debtors have no plausible or reasonable defense to his claim.

NOTICE OF MOTION DATED 9TH SEPTEMBER 2019

6. The 1st Defendant filed a Notice of Motion Application dated 9th September 2019 for orders; -

- i. The ex-parte judgment entered against the 1st Defendant on 15th November 2017 and the subsequent decree for execution issued on 27th November 2017 and all other consequential orders be set aside upon terms and conditions which the Court may deem fit and just to impose.
- ii. The 1st Defendant to be granted leave to deposit reasonable security into the Court for his attendance.
- iii. Pending the determination of the present application an order for stay of execution of the Decree against the 1st Defendant to be issued and thereupon the 1st Defendant to be released from civil jail.
- iv. The Court to release the 1st Defendant from civil jail on account of his serious ailment.
- v. The 1st Defendant to be granted liberty to defend the Plaintiff's suit on merit.

7. Which application was based on the grounds and Supporting Affidavit of **Hiten Shantilal Shah** as follows; -

- a) That the 1st Defendant is desirous to deposit reasonable security into the Court for his appearance during the pendency of the present motion.
- b) The 1st Defendant was placed under extreme pressure and intimidation by the Plaintiff and his security agents to the extent that the 1st Defendant succumbed and proceeded to execute a consent in favour of the Plaintiff which was the precursor of the institution of the suit herein.
- c) Through coercion and undue pressure, the 1st Defendant was unduly made to enter into unsolicited negotiations and consents whose aim was to block him from exercising his legal right to defend the Plaintiff's claim.
- d) The 1st Defendant is unwell and requires medical treatment for his eyesight which treatment is not available in prison with one being a civil debtor.
- e) The Plaintiff's Complaint filed in court on 30th August 2017 does not disclose a plausible and/or merited cause of action pleaded in the Complaint.
- f) The 1st Defendant who had no initial legal representation suffered prejudice and marginalization at the hands of the Plaintiff who colluded with some security officers to intimidate him on account of his vulnerability so as to subject him into submission through the execution of a consent admitting the Plaintiff's claim for Kshs.34,000,000.
- g) The Plaintiff/Decree holder occasioned calculated threats and harassment meted against 1st Defendant/applicant with assistance of hired Security Agents.
- h) The execution of the decree against the 1st Defendant offends the Principles of Natural Justice, which demand that a party should not be condemned unheard.

8. By the 1st Defendant's Supporting Affidavit which outlined the allegations of harassment and coercion by the Plaintiff and his agents and he deposed that there is a Draft Defense that raises triable issues marked **HSS 14**.

9. The 1st Defendant deposed that he was served with summons to enter appearance and he entered appearance but did not file Defence due to Plaintiff's incessant threats and intimidation and undue pressure that he was unable to file the Defence. His advocate on record wrote to the DPP and he recorded statement at the Police Station.

RESPONDENT'S REPLYING AFFIDAVIT

10. The Application was opposed vide a replying affidavit dated 22nd October 2019, sworn by Kennedy Milton Nthiga. He stated that; -

- a) There is a valid and lawful decree of this court against the said judgment debtors and this judgment was lawfully entered in default of entering appearance and failing to file defense within the requisite time and not on the basis of any agreement with either the 1st Defendant/Judgment Debtor or any other party;
- b) That not a single reason or explanation has been advanced to explain why they did not enter appearance or file their respective defenses on time as required in the Summons to Enter Appearance;
- c) The issues of harassment and intimidation by the debt collector are unfounded and prior to the commencement of this suit, the three Judgment Debtors filed an application (in **High Court Misc. Criminal Application No.447 of 2014**);
- d) On 27th July 2016, the three Judgment Debtors, out of their own free will and without any coercion recorded a consent order and this admission of indebtedness was made in Court. Further, on 4th May 2016, the Judgment Debtors executed an agreement

admitting their indebtedness in the sum of Kshs.34 Million;

e) Under **Clause 4** of the agreement, it was expressly contracted that the Plaintiff was at liberty to use the said agreement as evidence in a Court of law to enforce his rights in the event of a breach of any of the settlement terms therein contracted;

f) The present application is an afterthought. On the 27th May 2019, the court committed the three judgment debtors to civil jail for a period of two months. Thereafter the period was extended by a further four months by the Deputy Registrar;

g) If the judgment Debtors are released from prison without settling their debt, they will abscond from the local limits of the court and the Plaintiff will never recover his monies;

h) In light of the numerous instances of admission of indebtedness by the three defendants in the court file and viewed in the backdrop of the attached Draft Statement of Defense, the 1st Defendant has no plausible or reasonable defense to the claim.

2ND AND 3RD DEFENDANTS/APPLICANTS' SUBMISSIONS

11. The 2nd and 3rd Defendants filed submissions in respect to the Defendant's Applications dated 6th September 2019 and 9th September 2019.

Issue for Determination: -

Whether the default judgment should be set aside.

12. The Defendants submit that under **Order 10 Rule 11 of the Civil Procedure Rules** the Court has unfettered jurisdiction to set aside or vary default judgment and any consequential decrees or orders upon such terms as are just.

13. It is their submission that that due to the incessant intimidation and threats through various security agents, the Defendants were unable to lodge their defences within the period prescribed in the **Civil Procedure Rules**.

14. It is their position that, the Defendants' defences raise triable issues that warrant a meritorious consideration by the Court. Furthermore, the Plaintiff will not be prejudiced by setting aside the ex-parte judgment and in any case, an award as to costs will be adequate to cater for the resultant delay. The case of **Sebel District Administration -versus- Gasyali & Others (1968) E.A 300**, as quoted in the case of **Richard Muriu Wamai -versus- Attorney General & Another [2018] eKLR at Paragraph 42** is instructive thereto;

".....in summation, I wish to refer to the holding in the case of In Sebel District Administration versus Gasyali & Others (1968) E.A 300, the Court observed that: -

In my view the court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the Court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of the court. It is wrong under all circumstances to shut out the defendant from being heard. A defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defend."

15. It was their submission that the right to be heard saturates and flows from our entire justice system. The same is well guarded and anchored in our Constitution and should therefore be protected at all times. A court of law should therefore be hesitant at closing the doors to justice prior to a litigant being heard. The Court of Appeal pronounced as such in **Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR** where a party failed to file a defence and execution had proceeded up to his committal to civil jail;

"It suffices to comment that a Court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far, the applicant did have a chance to file a defense."

PLAINTIFF/RESPONDENT'S WRITTEN SUBMISSIONS

16. It is the Plaintiff's submission that on 27th July 2016, the three Judgment Debtors, on their own free will and without any coercion, appeared **before Justie Kimaru (Misc. Criminal Application No.447 of 2014)** and recorded a consent order. The consent order was neither appealed against nor set aside.

17. The Plaintiff relied on the principles of equity and submits that equity does not aid the indolent and thus it is an afterthought for the Defendants to wait over two years to challenge the decree of the court. Further, the plaintiff submits that this is a court of equity and anyone who seeks redress from a court of equity must come to the court with clean hands. The defendants treated the proceedings casually and contemptuously.

18. The Plaintiff submitted that the in the present case, no attempt has been made by the defendants to demonstrate that they have a *prima facie* defence to the Plaintiff's claim and the draft defences are generalized denials that cannot suffice as defences. It is now settled in law that setting aside a default judgment is a discretionary power and the party asking the court to exercise this discretion in his favour must meet

the basic criterion set out in Evans -versus- Bartlam, which is simply that he must demonstrate that he has a *prima facie* defence to the Plaintiff's claim. As stated by **Lord Atkin (page 480)**

“There must be an affidavit of merits meaning that the applicant must produce to the court evidence that he has a prima facie defence.”

For the foregoing reasons, the Plaintiff prays the Notice of Motion application dated 6th and 9th September 2019 be dismissed with costs.

DETERMINATION

19. The Court considered the pleadings and submissions by parties and issue for determination whether the default judgment of 15th November 2017 with all consequential orders should be set aside and the Defendants granted leave to file Draft Defense and opportunity to be heard on merit.

ANALYSIS

20. At the outset, the prayers sought in relation to hearing the applications on priority, and to grant release of the Defendants who were committed to civil jail and stay of execution of the decree are spent/overtaken by events as the Defendants have served their committal and were released.

21. The Defendants by their consolidated applications confirm that they were served with Summons to enter Appearance and they entered Appearance on 24th October 2017 but failed to file Defenses within the requisite period. Default judgment was entered on 15th November 2017 and decree issued on 27th November 2017.

22. The Court of Appeal in James Kanyiita Nderitu & Anor vs Marios Philotas Ghikas & Anor [2016] eKLR had this to state;

“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. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173). In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711”

23. This is a regular default judgment as the Plaintiff duly served the Defendants and they entered Appearance but failed to file Defences within the requisite period.

24. The Defendants vide their Draft Defenses raise the following issues;

- a) The 1st Defendant denies owing the Plaintiff Ksh 34,000,000/=
- b) The Consents were signed under duress, coercion asserted by Plaintiff through his security agents.
- c) The Plaintiff blackmailed the 1st Defendant to submit to the Claim.
- d) The Plaintiff discloses no cause of action against him and the Plaintiff's claim lacks merit due to non-disclosure of material facts

25. The 2nd & 3rd Defendants raised the following issues in their Draft Defense;

- a) The 2nd & 3rd Defendants did not enter into any agreement with the Plaintiff and there is no cause of action against them;
- b) The 2nd & 3rd Defendants did not enter into any transaction with the Plaintiff and he is put on strict proof thereof;

c) The Consents were obtained by coercion, misrepresentation and undue influence as the Plaintiff took advantage of family relations to harass and intimidate the Defendants.

26. The Plaintiff's claim against the Defendants jointly and severally vide the Complaint filed on 30th August 2017 is for Ksh 34,000,000/-The Defendants recorded consent in ***Criminal Application 447 of 2014*** on 27th July 2017 where the Defendants admitted and undertook to liquidate the said debt.

27. The Defendants depose that they failed to file Defences and alleged it was due to the incessant intimidation and threats through various security agents, the Defendants were unable to lodge their defences. The Court record confirms that from 2017 there has been litany of litigation culminating with the Defendants being committed to civil jail as execution of decree entered from the regular default judgment. It is plausible that these circumstances contributed to delay to file Defences.

28. The Court has gleaned through the various annexures and depositions by parties and what emerges is that there are issues raised by both parties that require hearing and determination at full trial.

29. The Plaintiff claims a colossal amount of Ksh 34,000,000/- as money advanced to the Defendant(s) and it is not clear at this stage what transaction(s) entailed; the type, quantity and cost of goods sought from the Defendants and how the payment was disbursed to the Defendants.

30. The Defendants on the other hand claim that whereas the 1st Defendant admitted the debt and drew various consents culminating with the one in Court has to confirm or deny by evidence receipt of the funds and why he did not deliver on goods or services sought and he refunded the funds to the Plaintiff. The Court shall hear and determine if the Defendants consents were valid or not.

31. Both parties contest the veracity of the claims of harassment, coercion, duress and threats to the Defendants by Plaintiff and named security agents as buttressed by reports to the Police Station by the Defendants, their advocates correspondence to DPP & DCI respectively.

32. All these issues raised in draft defences and as deposed by the parties affidavits raise triable issues that necessitate full hearing for parties to ventilate their claims and the Court to determine the disputes.

In ***Tree Shade Motors Ltd vs D.t Dobie & Anor (1995-1998) IEA 324*** held;

“Even if service of summons is valid, the judgment will be set aside if defences raises triable issues. Where a Draft Defence was tendered together with an application to set aside a default judgment, the Court hearing the application was obliged to consider if it raised a reasonable defence to the Plaintiff's claim. Where the Defendant showed reasonable defence on the merits, the Court could set the exparte judgment aside.

In ***Shah vs Mbogo [1968] E.A.93*** held;

“Secondly, discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

33. From the totality of the evidence on record, the Court finds that the Defendants were duly served with Complaint and Summons. They entered appearance but failed to file Defence due to claims of harassment and coercion and threats. The Draft Defences raise triable issues for determination at a full hearing.

DISPOSITION

34. The Applications of 6th & 9th September, 2019 by Defendants to set aside default judgment of 15th November 2017 are granted.

35. Draft Defences annexed to the Application are deemed as filed with leave of Court.

36. The Plaintiff may file Reply to Defences within requisite period (14 days).

37. Parties/Counsel to conduct Case Management within 60 days before taking a hearing date before DR Commercial & Tax Division.

38. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH MAY 2021.

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MBAABU FOR 2ND & 3RD DEFENDANT/APPLICANT

MR. ODHIAMBO H/B MAOSA FOR DEFENDANT

COURT ASSISTANT: GRACE