



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 222 OF 2019**

**GULF AFRICAN BANK LIMITED.....PLAINTIFF**

**VERSUS**

**SPACETECH LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHARLES THAIRU NJUGUNA.....2<sup>ND</sup> DEFENDANT**

**TITUS MWINZI MUTHAMA.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. Through the plaint filed on 10<sup>th</sup> September 2019 the plaintiff sued the Defendants herein for breach of a lending contract seeking the following orders: -

- a) Kshs 24,114,579.89 as at 30<sup>th</sup> July 2019.*
- b) Profits at 13.5% per annum from July 2019 till payment in full.*
- c) Costs of the suit without any interest thereon.*

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants entered appearance on 16<sup>th</sup> October 2019 but did not file a defence within the given timelines and on 28<sup>th</sup> November 2019, the plaintiff filed its request for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendant for the sum of Kshs 24,144,579.89. Interlocutory judgment was entered against the defendants on 5<sup>th</sup> December 2019 thereby precipitating the filing of the application that is the subject of this ruling.

**Application.**

3. Through the application dated 20<sup>th</sup> December 2019, the 1<sup>st</sup> and 2<sup>nd</sup> defendants seek the following orders:

- 1. Spent.*
- 2. That the firm of Kittony Maina Karanja Advocates be granted leave to come on record after Interlocutory Judgment for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants.*
- 3. That this honourable court be pleased to issue Stay of execution of the Interlocutory Judgment delivered by the Honourable S. A. Opande (D.R.) on 6<sup>th</sup> December, 2019 pending the hearing and determination of the application herein.*
- 4. That this honourable court be pleased to set-aside the Interlocutory Judgment delivered by the Honourable S. A. Opande (D.R.) on 6<sup>th</sup> December, 2019 pending the hearing and determination of the application herein.*
- 5. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants be granted unconditional leave to file their Statement of Defence, Witness Statements and List of Documents and to prosecute their case.*

**6. That costs be in the cause.**

4. The application is supported by the 2<sup>nd</sup> defendant's affidavit and is premised on the grounds that the defendant's defence has merit and that the defendants will be condemned unheard if the Interlocutory Judgment is not set aside.

5. The plaintiff opposed the application through the replying affidavit of **Lawi Sato**.

6. Parties canvassed the application by way of written submissions which I have considered. **Order 10 Rule 11 Civil Procedure Rules** gives the court or unfettered discretion to set aside an ex parte judgment. It provides as follows: -

**Where Judgment has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.**

7. Courts have taken the position that they have unfettered discretion to set aside interlocutory judgments as long as such discretion is exercised judiciously and only in deserving cases. In **Prime Bank Ltd vs Paul Otieno Nyamodi [2014] eKLR** it was held that: -

**“Ordinarily, the Court will not set aside or vary Interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case causing it to suffer prejudice. The Court must therefore be satisfied that the Defendant offered a very plausible explanation as to why he failed to file his memorandum of appearance and Defence within the prescribed period under CPR 2010 before such judgment can be set aside and/or varied.”**

8. In **Kingsway Tyres & Automart Ltd vs Rafiki Enterprises Ltd. Civil Appeal 220 of 1995** it was held: -

**“Notwithstanding the regularity of an ex parte judgment, a Court may set aside the same if a Defendant shows he has reasonable defence on its merits”.**

9. In this case I note that the defendant filed their statement of defence on 13<sup>th</sup> December 2019, albeit late, about 1 week after the entry of the Interlocutory Judgment on 5<sup>th</sup> December 2019.

10. A perusal of the affidavit in support of the application shows that one of the reasons for the apparent the delay in the filing of the defence was the defendant's change of advocates after the advocate who entered appearance on their behalf allegedly fell ill. I am satisfied that the delay in filing the instant application and the defence is not inordinate and that the explanation given for the delay, though lacking in documentary proof, is still plausible. I am therefore satisfied that the application dated 20<sup>th</sup> December 2019 is merited.

11. The court is however still minded to consider the nature of the case and the interests of the plaintiff, to the fruits of its judgment. I will in this regard exercise my discretion and impose conditions to be met by the defendants so as to secure the decretal sum albeit partly.

12. Consequently, I allow the instant application in the following terms: -

**a) The firm of Kittony Maina Karanja Advocates are granted leave to come on record for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

**b) The Interlocutory Judgment entered on 5<sup>th</sup> December 2019 is hereby set aside but on condition that: -**

**i. The defendants shall, within 45 days from the date of this ruling deposit Kshs 12 million in an interest earning account with a banking institution of repute to be held in the joint names of counsel for the defendants and the plaintiff as security pending the hearing and determination of the main suit.**

**ii. That in the event of failure to comply with order in b) i) above, the Interlocutory Judgment entered on 5<sup>th</sup> December 2019 shall automatically be reinstated and the plaintiff will be at liberty to proceed with the execution.**

**c) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are granted leave to file their defence, Witness Statement and list of documents within 15 days from the date of this ruling.**

**d) The costs of the application are awarded to the plaintiff.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kongere for the Plaintiff.

Ms Kinyanjui for Defendant/Applicant

No appearance for 3<sup>rd</sup> defendant

Court Assistant: Sylvia.