



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 102 OF 2018

M-ORIENTAL BANK LIMITED.....PLAINTIFF

VERSUS

PHARMATIS LABORATORIES LIMITED.....1ST DEFENDANT

SAMUEL MUTINDA MUSILA.....2ND DEFENDANT

ELIZABETH NDENGU.....3RD DEFENDANT

PATRICK WAMBUA.....4TH DEFENDANT

PAUL MWANIKI NGANDA.....5TH DEFENDANT

WOTE PHARMACITICALS LIMITED.....6TH DEFENDANT

RULING

Background

1. On 9th March 2018, the plaintiff herein, M-Oriental Bank Limited, sued the 6th defendants herein seeking judgment against them as follows: -

a. The first, second, fourth and fifth defendants jointly and severally for Kshs 29,279,351.99 together with further interest at 14% per annum [being CBR (10% p.a) plus 4% per annum] from 1st November 2017 until payment in full.

b. The third and sixth defendants jointly and severally for Kshs 21,000,000.00 together with interest at 14% per annum [being CBR (10% p.a.) plus 4% per annum] from 2nd January, 2018 until payment in full.

c. Costs.

2. The defendants did not enter appearance or file a defence thus prompting the plaintiff to file a Request for default Judgment against them. The court subsequently entered judgment against the defendants.

3. A summary of the plaintiff's case is that it advanced loan facilities to the 1st defendant for which loan was guaranteed by the 2nd-6th defendants. The loan was not repaid as agreed thereby giving rise to the instant suit.

5th defendant application.

4 Following the entry of default judgment, the 5th defendant filed the application dated 14th November 2019 seeking the following orders: -

1. Spent.

2. This Honourable court be pleased to set aside the judgment and Decree issued on 11th July 2018 against the 5th defendant.
3. This Honourable court be pleased to issue an order for the cross-examination of the process server, David Muithya over the contents of his affidavit sworn on 20th June 2018.
4. Pending the hearing and determination of this application, this Honourable court be pleased to preserve status quo in view of any possible execution against the 5th defendant.
5. The costs of this application be borne by the plaintiff.

5. The application is supported by the 5th defendant's affidavit and is premised on the grounds that:

1. The plaintiff filed a plaint and named the Dr. Paul Mwaniki as the 5th defendant to the suit in his personal capacity.
2. The plaintiff did not serve the said 5th defendant either personally, or through his personal representatives with summons to Enter Appearance, nor with the plaint.
3. The plaintiff, instead of serving the 5th defendant personally, decided to affix the Summons to Enter Appearance on the door of the 1st defendant's office.
4. Ultimately, the proceedings went on without a participation of the 5th defendant, and the court issued a judgment against him, as well as a Decree.
5. The 5th defendant, having been denied a chance to put in a defence, is now adjudged to have ignored summons and proceedings that he was not even aware of in the first place, consequently suffering him an injustice against his right to a fair hearing.

6. The plaintiff opposed the application through the Grounds Opposition dated 6th December 2019 wherein it states that the 5th defendant was duly served with the suit papers in accordance with the law and that the setting aside of the judgment will not serve any useful purpose as the 5th defendant has failed to demonstrate a serious defence.

7. The plaintiff also filed the replying affidavit of **Mr. David Maithya**, the process server who allegedly effected service of summons to enter appearance and plaint upon the defendants. The process server avers that after making 3 unsuccessful attempts to serve the 5th defendant with the suit papers, he decided to serve him by affixing the suit papers on the main door of his place of business. He attached the affidavit of service to the replying affidavit as annexure marked "DM1".

8. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the 5th defendant has made out a case for the setting aside of the default judgment.

9. The principles governing the setting aside of ex parte judgment were set out in the oft cited case of *Patel v East Africa Cargo Handling Service Ltd* [1974] EA 75 as follows: -

a. Whether any useful purpose could be served by setting aside the judgment- no useful purpose will be served if there is no possible defence to the action; and

b. Whether the defendant has given a satisfactory explanation for how he came to have a default judgment entered against him.

10. In determining whether or not the setting aside of the default judgment will serve any useful purpose, I wish to consider the nature of the plaintiff's case against all the defendants jointly and severally. I note that the case against the 5th defendant is in respect to two guarantees namely: -

a. The guarantee dated 1st December 2014 whereby the 5th defendant guaranteed to the plaintiff the repayment of and undertook on writing in demand to pay to the plaintiff all sums of money due from the 1st defendant under the facility letter dated 28th November 2014 provided that the amount recoverable would not exceed Kshs 21,000,000/-.

b. The guarantee dated 16th March 2015 whereby the 5th defendant guaranteed to the plaintiff the repayment of and undertook on writing in demand to pay to the plaintiff all sums of money due from the 1st defendant under the facility letter dated 16th March 2015 provided that the amount recoverable would not exceed kshs16,000,000/-.

11. It is worthy to note that not only has the 5th defendant/applicant herein not disputed the fact that the 1st defendant, for whom he was a guarantor, failed to repay the sums due to the plaintiff under the loan facility, but he has also not attached a draft defence to the instant application, thus denying this court the chance to consider if it raises any triable issues. In *Chanzu Investments Ltd v Commissioner of Lands* [1993] eKLR it was held: -

“Now, in this instance, the judgment was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means, there must be a “triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication (see Patel’s case Ibid). Mr. Oyalo, for the respondent, had submitted in the Superior Court as well as in this court that the respondent did not deny liability for the principal sum and that the only issue in contention was with regard to the rate of interest applicable. In our view, no useful purpose could be served by setting aside the judgment as there was no possible defence to the action.”

12. In the present case, I find that the failure, by the 5th defendant, to annex a draft defence to the application is fatal to his case as allowing the application will be an exercise in futility when there is no triable defence to the plaintiff’s case.

13. I note that the 5th defendant argued that his right to fair hearing will be violated should the instant application be disallowed. I am however of the humble view that by failing to annex the draft defence in order to demonstrate that he has a formidable defence that raises triable issues, the 5th defendant gave up his own right to be heard as there will be no case to be heard in the absence of a defence.

14. I have also considered the affidavit of service attached to the plaintiff’s deponent’s replying affidavit and I am satisfied that the process server established that he duly effected service on 5th defendant.

15. For the reasons that I have stated in this ruling, I find that the application dated 14th November 2019 is not merited and I therefore dismiss it with costs to the plaintiff.

Dated, signed and delivered via Microsoft Teams at Nairobi this 16th day of July 2020 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ondieki for plaintiff.

Mr. Akusala for 5th defendant

Court Assistant: Sylvia