



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 163 OF 2019

EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

CONIER LIMITED.....1ST DEFENDANT

MICHAEL KINYUA KIBAKI.....2ND DEFENDANT

NANCY MUTHONI RUOYA.....3RD DEFENDANT

RULING

BACKGROUND

By a Plaint dated 26th June 2019, the Plaintiff (herein Equity Bank Limited), sued the 1st, 2nd, and 3rd Defendants claiming that vide an application dated 7th April 2014, the 1st Defendant applied for a loan facility from the Plaintiff of Kenya Shillings Eight Million (Ksh 8,000,000.00) which the 1st Defendant accepted by signing the letter of offer.

By an agreement and offer letter dated 24th April 2014 the Plaintiff agreed to advance the 1st Defendant a credit facility of Kenya Shillings Eight Million, (Ksh 8,000,000.00) which the 1st Defendant accepted by signing the letter of offer.

It was an express term of the said agreement that each invoice discounted would be repayable within 3 months or upon receipt of its repayment whichever was earlier. Further, all advances made would attract an interest from the date of draw at the Bank's Base Lending Rate which was 17% per annum plus 3% hence an effective rate of 20% per annum on a reducing balance basis as detailed in the terms and conditions of offer letter dated 14th May 2014.

It was further an express term agreement that in the event the 1st Defendant failed to pay any sum payable under the facility on its due date, the 1st Defendant shall pay interest on such sums from the date of such failure to the date of actual payment at the rate of 6 % above the rate specified hereinabove.

The Plaintiff averred that the 1st Defendant defaulted in loan repayment as agreed causing its account to fall into huge arrears as the outstanding amount of Ksh 10,447,137.80 as at 28th November 2014 continued to accrue default interest over and above the normal interest.

In seeking to resuscitate its financial status and rectify its default, the 1st Defendant by a letter dated 28th November 2018 notified the Plaintiff that they had directed the Catholic Diocese of Homa Bay to pay 25% of the project value of Ksh 25,252,158.00 to the 1st Defendant's account number [...] in the Plaintiff's Bank.

The Plaintiff avers that subsequently, the Catholic Diocese of Home Bay failed and/or neglected to honour the irrevocable letter of undertaking and instead diverted the agreed funds to other accounts of the 1st Defendant. This was contrary to the agreed terms and conditions and as at 17th September 2018, the facility had accumulated to Ksh 23,558,269.95 which is due and payable.

The Plaintiff obtained summons and served the Defendants on 31st July 2019, through Process Server who filed Affidavit of Service on 20th January 2020. On the same date, the Plaintiff filed Request for Interlocutory Judgment against the Defendants jointly and severally for Ksh 23,558,269.95 interest at 20% per annum and costs of the suit. Interlocutory judgment was entered on 23rd January 2020.

THE APPLICATION OF 4TH MARCH 2019

The Defendants filed a Certificate of Urgency application together with a Notice of Motion and Supporting Affidavit dated 3rd March 2020, urging the court to hear their matter on priority basis for reasons;

a) The Defendants/Applicants had just known that the Plaintiff obtained interlocutory judgment against them on 23rd January 2020 and unless this Court grants the stay of execution and/or stays any further proceedings herein, the Defendant/Applicants are bound to suffer irreparable loss.

b) On 19th February 2020, the Plaintiff served the Defendants with a notice of execution of the decree and was likely to execute any time.

In the Notice of Motion pursuant to **Order 10, Rule 11; Order 22, Order 51, Rule 1 of the Civil Procedure Rules, Section 3A & 63 (e) of the Civil Procedure Act, Articles 50(1) and 159 of the Constitution** and all other enabling provisions of the law, the Defendant/Applicants sought Orders;

a) Pending hearing and determination of the application herein, there be a stay of execution and/or of other proceedings herein.

b) This Court sets aside the judgment entered on 23rd January 2020 and any subsequent orders thereof.

c) That the Defendant/Applicants herein be given a chance to file a defence within such time as the court may deem fit and just.

d) That the costs of this application be provided for.

The Application is supported by an affidavit of Micheal Kinyua Kibaki a director of the 1st Defendant/Applicant, he averred that to his shock and consternation, he only came to learn about the entry of judgment in this matter when the Plaintiff served them with a notice of execution dated 19th February 2020, served on the 2nd Defendants' advocates on 21st February 2020. Marked "MKK-1" is a copy of a notice to execute, dated 19th February 2020.

He averred that him, 1st and 3rd defendants received summons to enter appearance and a Plaint herein on 31st July 2019 and immediately instructed the law firm of Naomi & Kilemi Advocates to act on the Defendants' behalf and under the leadership of Ms. Evelyn Kilemi, Advocate, the law firm acknowledged the instructions.

Marked "MKK-2" is a copy of a letter from the said law firm, dated 1st August 2019. He stated that in the ensuing months, their Advocates were engaged in a discussion with the Plaintiff's Advocates, to negotiate an out of court settlement. The advocates were in touch by 15th August 2019 there was an out of Court settlement, the Plaintiff's Advocates agreed to hold off any adverse action pending conclusion of negotiations between the parties.

He affirmed that it was an express term of the negotiation that upon communication from the Plaintiff's lawyers on the lapse of the negotiated terms of settlement, the Defendants were to file a defence within fifteen (15) days from the date of such communication.

That the Defendants advocates further engaged the Plaintiff's Advocates and based on the Defendants' contending that the interest rate was/is exorbitant, the they were later asked to consider a reduced settlement amount and a reasonable repayment period. Marked "MKK-3" is a copy of the defendant's advocates letter dated 20th August 2019.

He asserted that a draft consent was presented to himself by his then advocates for comments. Marked "MKK-4" is a copy of his then advocates' letter dated 18th September 2019 and the draft consent.

That, as parties were about to conclude the terms of settlement and file the consent, the Defendants' lead advocate, Ms Evelyn Kilemi fell ill as she was with child. As a result of unpredictable unwellness during pregnancy, she was unable to follow through the negotiations as to secure the defendants' position and the last communication was a letter dated 22nd October 2019, all the while the 2nd Defendant believed the consent was being concluded.

He stated that the mistakes or inadvertence of an advocate should not be visited upon a litigant- the client.

He stated that he persuades this Court to look at the unique role mothers play in child bearing and tie that to the fact that the Defendants were caught up in their former Advocate's such mission, thus not concluding the settlement.

That nevertheless, the said interlocutory judgment was entered herein against the Defendants despite an out court settlement being negotiated with the Plaintiff's advocates and a promise that should the talks collapse, the Defendants would be given 15 days to regularize the position and file their defence.

He stated that in any case the Plaintiff has reneged on the terms of settlement and by virtue of the promise to give the defendants' time to regularize their defence. That proceedings to execute without allowing compliance is *mala fides* and the Plaintiff is estopped from attributing any blame on the Defendants under the doctrine of estoppel.

That in view of the aforementioned events it is fair that the court grants a stay of execution and a stay of proceedings in the interim and the interlocutory judgment entered on 23rd January 2020 be set aside, further the Defendants be given the opportunity to defend the suit.

REPLYING AFFIDAVIT

The application was opposed by an affidavit dated 5th May 2020, sworn by Kariuki King'ori the Manager Legal Services at the Plaintiff Company. He stated that the application is fatally defective for want of written authority from 1st and 3rd Defendants contrary to the provisions of **Order 1 Rule 13 (1) and (2) of the Civil Procedures**.

That without prejudice to the above, in an application of this nature the Court considers;

- a) Whether summons were duly served upon the Defendants;
- b) Whether the Defendant has a plausible defence to the Plaintiff's claim.

As regards service of summons upon the Defendants the Plaintiffs avers as follows;

- a) That summons to enter appearance were duly served upon the 2nd Defendant personally and on behalf of the 1st and 3rd Defendants at the 1st Defendant's offices on 31st July 2019. Marked "EQ-1" is a copy of the Affidavit of service.
- b) The 2nd Defendant accepted service of the Summons in the presence of the 1st Defendant's Advocates, Ms Naomi Ong'ayo from the firm of Naomi & Kilemi Advocates.
- c) The affidavit of service is detailed, clear and unambiguous as to how service of the summons was effected.
- d) The 1st Defendant's Advocates on 15th August 2019 wrote to our Advocates on record with a proposal to settle the indebted sum in monthly installments of Ksh 1,780,000/- with the first installment on 25th September 2019 and the final installment on 25th May 2020.
- e) On 26th August 2019 with instructions from the Plaintiff, their advocates wrote to the firm of Naomi & Kilemi accepting the terms of the payment proposal on condition that the 1st installment be payable immediately.
- f) On 25th September 2019, the 1st installment was not remitted and instead the Plaintiffs received a variation of the proposal term to allow the Defendants remit the 1st two installments on 15th October 2019. Marked "EQ-2" are email correspondence dated 9th October 2019 and 24th October 2019.
- g) Despite the Plaintiff extending numerous occasions to allow the Defendants settle the indebted sum out of Court, the Defendant neglected and/or refused to execute the consent marked "MKK-4" and remit the agreed amounts.
- h) On 20th January 2020, being almost 3 months without any communication or remittance of any sums agreed by the Defendants or their Advocates, the Plaintiffs advocates on record proceeded to request for Judgment in default of appearance which was entered on 23rd January 2020.
- i) The 10 days' notice of entry of judgment was duly sent to the Defendants' last known postal and physical address. Marked "EQ-3" is a copy of the letter duly stamped and received.
- j) The decision by the Plaintiff to hold off any adverse actions was to allow the Defendants settle the indebted sum but the constant extension and ignorance regarding payments was interpreted as a delating tactic by the Defendants.

He stated that in response to paragraph 11, 12 and 14 of the Supporting Affidavit, that court have time and time again held that the parties are the owners of their cases and blame should not be placed upon the Advocates.

He stated further that the Defendants were not stopped from depositing the indebted sums they had agreed to remit by virtue of their Advocates being hospitalized.

SUBMISSIONS

DEFENDANTS/APPLICANTS SUBMISSIONS

The Applicants in their submissions relied on the case of **Bank of Africa Kenya Limited vs Put Sarajevo General Engineering Co. Ltd & 2 Others [2018]eKLR**, where the court stated;

"counsel has explained what led to the inadvertent mistake and the failure to file the defence in time.In other words this was not a case where counsel simply sat back and did nothing. There was activity in the file by counsel on behalf of the Defendant.

The intention to vigorously oppose the suit was clear. I find that this is not a case where there has been indolence on the part of the Respondent or his advocate. The present application has not been brought merely to delay and/or to obstruct justice. In the case of Martha Wangari Karua vs IEBC Nyeri Civil Appeal No. 1 of 2017 the Court of Appeal held as follows:-

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”

The Court of Appeal dealt with the issue of interest and unconscionable contract. In Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited (2014), the court stated;

“It is not for the Court to rewrite a contract for the parties. As this court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 “a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.” nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.

In Danson Muriuki Kihara vs Johnson Kabungo [2017]eKLR, the court addressed the issue of excessive interest thus:

“Further in the case of John G. Kamunyu & Another vs Safari ‘M’ Park Motors (2013) eKLR, ‘where the plaintiff’s argument was that the loan agreement entered into was unconscionable due to the usurious compounded monthly interest rates of 30%. The court entered judgment in favour of the defendant for the loan advanced to the plaintiff together with interests at court rates. The court stated:-

“this section (section 44A Banking Act) provides a statutory application of the in duplum rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is also applicable in the present case as it seeks to prevent lending contracts which provide usurious rates of interest. The rate of interest in the present case was therefore unconscionable to the extent that it provided for payment of interest that considerably exceeded the amount outstanding as the principal sum.

DETERMINATION

The Court after consideration of the parties’ pleadings and submissions the issues that emerge for determination are;

- a) Was/is the interlocutory judgment entered on 22nd January 2020 regular?
- b) Have the Applicants raised cogent and tangible reasons for delay, inaction in filing memorandum of appearance and Defence within the statutory period?
- c) Have the Applicants raised triable issue(s) to warrant setting aside the Interlocutory Judgment?

Whether the Default Judgment entered was merited/regular

1. Defence [Order 7, rule 1.]

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.

The Defendants/Applicants were duly served with Summons as evidenced by the Affidavit of Service filed on 20th January 2020. Mr Robert M. Nyagah, Process Server deponed that on 31st July 2019, he went to Design Place Suit No 2 along Church Road off Waiyaki Way where the 2nd & 3rd

Defendants operate their business under the 1st Defendant Company. The Applicants do not contest service of Court process.

The service was in compliance with **Order 5 (3) CPR 2010**

The Applicants complained that after service of Court process, they instructed the Law Firm of Naomi & Kilemi Advocates to represent them and engage in negotiations with the Plaintiff Bank.

In the ensuing months negotiations were ongoing and in their view the Plaintiff agreed to their filing of Defence within 15 days once negotiations failed.

The negotiations centered on exorbitant interest rates and the Applicants sought reduced interest rate and reasonable repayment period. The negotiations culminated with a Consent whose draft is attached to the Application. The Applicants were served with a Notice of execution

and could not reach their advocate.

They were about to conclude when their advocate fell ill, she was pregnant and was due to give birth and she delivered on 28th February 2020. They moved to their present Counsel, Mercy Kareithi & Co Advocates.

The Interlocutory judgment was entered prematurely while negotiations were ongoing. The Applicants feel the circumstances were beyond them and it is gravely prejudicial and unfair for the Defendants to be held liable for the Plaintiff's claim without grant of fair hearing. It was due to inadvertent mistake on their part while the Plaintiff misrepresented the issue(s).

The Draft Defence raises triable issue(s) as the claim contravenes the Banking Act, there is failure to take into account the DuPlum Rule and the interest rates are unconscionable, exorbitant, extortionist, unfair and illegal.

ANALYSIS

This Court observed as follows; any person/party is legally entitled to pursue his/her claim/dispute in Court as prescribed by **Articles 22, 48 & 50 of COK 2010**. So, the Plaintiff was within its legal mandate to institute this suit.

Secondly, on filing of pleadings within the statutory period cannot be suspended by parties it is mandatory a memorandum of appearance is filed within 14 days of service of Summons/Plaint and thereafter after another 14 days a party served files a Defence. Therefore, the Applicant and/or the Respondent could not legally suspend statutory requirements.

Thirdly, the Defendant /Applicants do not contest the fact that, the 1st Defendant approached the Plaintiff bank through its Directors 2nd & 3rd Defendants to obtain a loan facility. The Defendants applied on 7th April 2014 for the loan facility of Ksh 8,000,000/- and entered into an Agreement /letter of offer on 24th April 2014. The Defendants executed the agreement that set out terms that bound all parties. The terms included the Plaintiff Bank advancing the Defendants KSh 8,000,000/- to be repaid on terms as outlined in the Agreement and stipulated interest rates.

The Court has not been presented with any evidence by the Defendant/Applicants of any payments made in servicing the Loan Account with the Plaintiff Bank.

Even after the Plaintiff Filed Suit and served the Defendant and negotiations commenced and they reached a consent which is annexed as Draft Consent, the Plaintiff contended that the Defendants failed to make any payments and that is why they exercised their legal right to file suit.

c) Have the Applicants raised cogent and tangible reasons for delay, inaction in filing memorandum of appearance and Defence within the statutory period?

The issue of the previous advocate of the Applicants was at advanced stage of pregnancy and she delivered a child shortly thereafter during ongoing negotiations depict circumstances beyond anyone's control.

However, be that as it may, the case belongs to the Defendants and they ought to pursue it and be vigilant, they had opportunity to approach the Plaintiff Bank and explain their predicament, they did not do so.

I am satisfied that the Applicants were duly served with Court process and a regular default judgment was entered against them.

I have found no cogent and tangible reasons to justify why they did not file appearance and defence within the statutory period. They could have sought alternative legal Counsel before they were served with the notice of execution, approached the Plaintiff Bank directly and seek to hold the process or better still make payments to defray the debt.

d) Have the Applicants raised triable issue(s) to warrant setting aside the Interlocutory Judgment?

Shah v. Mbogo & Anor. (1966) EA 116 which set down the criteria for setting aside a judgment states as follows:

“In setting aside judgment, the court must establish: -

- 1. That there is a reasonable explanation for any delay;***
- 2. That there is a defence on merit;***
- 3. That it is just to do so.***

In Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 where the court held:

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN J put it “a triable issue” that is, an issue which raises a prima facie defence and which should go to trial for adjudication.”

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.”

James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR C.A. where the court held that:

“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...”

I find that the Applicants have not denied the advancement and benefit of loan facility by the Plaintiff Bank and have deprived benefit thereof. Although they are in default of servicing the Loan Facility and they tried to explain inadvertent mistake of not filing their memorandum of appearance and Defence on time, am called upon to consider whether the Draft Defence raises any triable issue for hearing and determination.

I have seen the Applicants have raised issues concerning alleged contravention of Banking Act and the DuPlum Rule on the issue of interest.

The justice of the case demands that a party person is heard on merit on the dispute. By virtue of **Order 10 Rule 11CPR 2010** am inclined to grant them an opportunity to canvass their issues at trial but on condition;

DISPOSITION

1. The Application to set aside the Interlocutory Judgment of 22nd January 2020 is granted as follows;
2. There is a regular judgment entered after proper service of Court process to the Defendants by the Plaintiff.
3. There Draft Defence raises a triable issue (s) to warrant the Applicants a hearing.
4. The Applicants shall file and serve the Draft Defence on Condition that within 90 days from delivery of the Ruling they shall jointly deposit Ksh 3 million either in Court or in a joint earning account with both parties advocates on record and provide documentary proof to the Court via Deputy Registrar Commercial & Tax Division before filing the Defence and serving the Plaintiff with the same.
5. In default, without further orders from the Court, the period to file Defence shall lapse forthwith and the Plaintiff is at liberty to exercise its legal rights under the Loan Facility contract.
6. Each Party to bear its own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH NOVEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS KAREITHI FOR THE APPLICANT

MS CHERUIYOT FOR THE RESPONDENT

COURT ASSISTANT- TUPET