



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. E 339 OF 2019**

**PRIME BANK LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BOOTH EXTRUSIONS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. There is a default Judgment against Booth Extrusions Limited because, although it was duly served with summons to enter appearance, it engaged in subsequent negotiations and did not enter appearance or file defence on time. It now seeks to set aside the interlocutory judgment entered herein on 20<sup>th</sup> January 2020 and to be granted leave to defend the suit. The plea is in a Notice of Motion dated 18<sup>th</sup> February 2020.

2. What Prime Bank Limited (the Plaintiff) holds is a regular default judgment as the Defendant was duly served with summons to enter appearance. The considerations to guide a Court in the exercise of discretion to set aside a regular default judgment have been discussed time and again. In **William Ntomauta M'ethanga Sued as M'mauta Nkari V Baikiamba Kirimania [2017] eKLR**, the Court of Appeal stated:-

11. This Court while discussing the criteria for allowing an application for setting aside a default judgment, such as the one in this case, in **James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR** expressed thus,

***“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...”*** Emphasis added.

3. I would think that in this matter, whether or not the Defendant deserves the orders sought, will turn on the strength or weakness of its proposed defence. These are the reasons.

4. Booth Extrusions Limited is a customer of Prime Bank Limited. At the customer's request, the Bank issued a short term promissory note in the Plaintiff's favour of Kshs.20,000,000/=. The date of issue was 26<sup>th</sup> March 2019 and was for tenure of 91 days to mature on 25<sup>th</sup> June 2019. The Bank's claim is that the customer failed to pay the sum of Kshs.20,000,000/= on the due date and it remains outstanding. It also claims interest at 22% per annum from 25<sup>th</sup> June 2019 until payment in full.

5. In Paragraph 14 of an affidavit of Ranjedra Tewary sworn on 18<sup>th</sup> February 2020 in support of the application, he raises the following as triable issue which will form the proposed defence of their customer:-

**“14. THAT the Applicant states that they have an arguable Defence which raises triable issues as stated herein below and in the Defence attached to this application:**

a) The Respondent's suit is premised on the allegation that the Applicant issued the Respondent with Promissory Notes, an allegation which the Applicant totally refutes.

b) The Respondent has produced an alleged copy of a promissory note in their favour and claim that the promissory note was issued with the by the Respondent. The alleged promissory note is a fabrication as the signatures appended thereon do not belong to the Plaintiff's authorized signatories.

c) The Respondent has failed to establish there was any consideration on their part in order for them to be issued with the alleged promissory note as alleged.

d) The Respondent has deliberately concealed crucial information to the Honourable Court and proceeded to obtain judgment in relation to this suit.

e) Any subsequent actions done, or documents made pursuant to the said void promissory notes are thus rendered obsolete.”

6. In the same affidavit, Tewary deposes that on 23<sup>rd</sup> October 2019, Booth was served with a Complaint and Summons herein and that on 25<sup>th</sup> October 2019 it made a proposal aimed at compromising the entire suit. That letter is crucial in determining whether the Defendant has a viable defence.

7. The letter of 25<sup>th</sup> October 2019 reads:-

“Booth Extrusions Limited

25<sup>th</sup> October 2019

The Managing Director

PRIME BANK

Attn: Mr. Bharat Jani

Dear Mr. Jani

Subject: Outstanding Short Term Notes Payment

This refers to your Court Notice dated 8<sup>th</sup> October on the captioned subject.

As discussed with you and our letter dated 22<sup>nd</sup> October (attached) from Kaluworks Ltd., we hereby request you to merge outstanding Short Term Notes of Kshs20 Million with Kaluworks Short Term Notes.

We propose to repay the same over a period of five years beginning January 2020 along with due interest.

Considering above, we request you to withdraw the Legal Notice and advise us schedule of payment.

We will arrange to send the required cheques to your office as soon we receive the above information.

Thanking you

Yours truly,

Booth Extrusions Limited

Authorized Signatory (Signed)

Authorized Signatory (Signed)”

8. In the application, and repeated in counsel's submissions in support, the customer states that the creation of the promissory notes was marred with controversy including the issue of interest chargeable and whether it was correctly negotiated on its behalf. What, however, is not explained is why the Defendant, through the letter of 25<sup>th</sup> October 2019, gave an unequivocal promise not only to pay the principal sum but also “due interest”. The letter was in reaction to Summons and Complaint served on the Defendant in which interest at 22% per annum for 25<sup>th</sup> June 2019 was claimed by the Bank. The Defendant has not explained why it made such an unqualified promise if indeed there was controversy around the creation of the promissory note and interest chargeable.

9. The Defendant's proposed line of Defence does not raise any triable issues and the Court is not inclined to exercise discretion in its favour. The Notice of Motion dated 18<sup>th</sup> October 2020 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 2<sup>nd</sup> Day of November 2020.**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>TH</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mutua for Plaintiff.

No appearance for Defendant.