REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 44 OF 2013

KWANZA ESTATES LIMITED.....PLAINTIFF

VERSUS

DUBAI BANK LIMITED (IN LIQUIDATION).....1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION.....2ND DEFENDANT

AND

HASSAN AHMED ABDULHAFEDH ZUBEIDI....PROPOSED DEFENDANT

RULING

1. There are three applications for consideration and determination by the court. The applications are as follows:

a) Application dated 16.9.2014 by 1st defendant seeking orders that:-

i) "This application is certified urgent and may be heard ex-parte in the first instance unless the Plaintiff/Respondent be present in court to be served.

ii) Pending the hearing inter-parties of this application the hearing of the suit on formal proof ordered by the Deputy Registrar on 21st July 2014 (sic 2013) is stayed.

iii) Pending the hearing and determination inter-parties of this application, the judgment noted in the record of the proceedings of the case by the Deputy Registrar on 21st May 2013 is stayed.

iv) Pending the hearing and determination inter-partes of this application and in the interests of justice under Order 10 rule 11 the proceedings in contempt of court due on 7th October 2014 and any adjourned hearing or mention thereof are stayed.

v) Upon hearing the parties inter-partes the judgment noted in the record of the proceedings of the case by the Deputy Registrar on 21st May 2103 is set aside and struck out.

vi) Upon hearing the parties inter-partes the hearing of the suit on 'formal proof' ordered by the Deputy Registrar on 21st July, 2014 is set aside and any hearing commenced is discontinued.

vii) Pending the hearing and determination of this application and in the interests of justice enable the Defendant/Applicant pursue this application, the proceedings on contempt of court founded on the Plaintiff's Application dated 20th September 2013 and fixed for mention for purposes of the Managing Director and the Chairman of the Defendant/Applicant to show cause why they should not be committed to civil jail set for 7th October 2014 and any adjourned hearing or mention thereof be stayed.

viii) The costs of this application shall abide the hearing and determination of the suit."

b) Application dated 27.6.2018 by 2nd defendant seeking orders:-

i) "THAT this application be certified as urgent and heard ex-parte service in the first instance.

ii) THAT the court be pleased to order stay of proceedings herein pending inter-partes hearing of this Application.

iii) THAT this Honourable Court be pleased to set aside the ex-parte default judgment and/or Orders entered in default of the 2nd Defendant filing a Defence and do stay all the proceedings and orders.

iv) THAT the Order enjoining the 2nd Defendant to these proceedings be set aside for being contra statute, in particular, contrary to the provisions and intention of the Kenya Deposit Insurance Act.

v) THAT without prejudice to the foregoing, the time within which the 2nd Defendant was required to file and serve its Statement of Defence be enlarged and the 2nd Defendant be granted leave to file and serve its Statement of Defence out of time.

vi) THAT the proceedings of 19th June 2018 be set aside and the hearing of the witnesses and case do commence de novo.

vii) THAT costs of this Application be provided".

(c) Application dated 4th July 2018 by the proposed defendant seeking orders;-

i) "THAT this application be certified urgent and heard on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.

ii) THAT the applicant be enjoined to this suit as a defendant.

iii) THAT this Honourable Court do make such further and/or alternative orders and issue such directions as it may deem fit to grant.

iv) THAT the costs of and incidental to this application be provided for.

2. I propose to deal with the two applications for setting aside and in the order of their ages then deal with the application for joinder last.

Application dated by 1st defendant

3. As framed and filed, prayers 1, 2,3,4,6, & 7 have lapsed or justovertaken by events disclosed in the proceedings taken so far and the only prayer outstanding is prayer 5. That prayer seeks that the default judgment noted on the court file by the deputy Registrar on 21st may 2013 be set aside and struck out.

4. The default judgment is faulted at grounds c, e, h & k as reiterated at paragraphs 4, 5, 7,& 8 of the affidavit in support sworn by Mr Stephen M Mwenesi Advocate. The gist of the application is that the suit as framed does not reveal a liquidated claim hence no judgment could have been sought nor obtained in default of appearance; that at the time the judgment was requested for and entered, there was an appearance on record which the plaintiff had never taken issues with and lastly that there was a subsequent statement of defense filed which the plaintiff had relied upon during proceedings taken before the court concerning an application dated 25th April 2014. The court record as it stood on the day I heard the parties on the application reveals that the first defendant was served with summons to enter appearance on the 30.4.2013 and it filed an appearance on the 17th May 2013. While that appearance was on record and before a defense could be filed, the plaintiff filed a request for judgment dated 16th April had the same filed on the 20th April 2013 and a default judgment entered and endorsed by the deputy registrar on 21st April 2014.

5. At the hearing of the application I drew Mr Buti's attention to those facts and sought his position whether in those circumstances the judgment was regularly entered and counsel took the position that as at the time the request was made and judgment entered the Appearance was not in the court file.

6. That request for judgment could only have been made pursuant to the provisions of **Order 10 Rule 6 Civil Procedure Rules** which provision reads:-

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be".

7. Under the law cited to ground the request for judgment, a right to request for the judgment on default of defense would only accrue, once the appearance was filed, after 15 days had lapsed after the date the appearance was filed. The request had to be limited to the prayer for

general damages and not the declarations or injunction. Here the request was made barely four days after the entry of appearance. That was utterly premature and irregular. It cannot be a justification that the appearance filed was not on record. It is enough that I was able to see an appearance entered before request and entry of a default judgment. The request for the default judgment was premature, irregular and overtly untenable. Where such facts present themselves to court, the court has no discretion to exercise. It can only answer to the principle of law that nothing put on a nullity can stand. The court has a duty to set aside the judgment as a matter of right and *ex debito justitiae.* That is the position of the law that requires no citation of any authority. It is basic and a matter of notoriety that judgment obtained in such an irregular manner takes the nature of denial of the right to be heard and present one's case and must be set aside. In the case of **JAMES KANYIITA NDERITU & ANOTHER VS MARIOS PHILOTAS GHIKAS & ANOTHER (2016)eKLR** the Court of appeal said :-

> **"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 defense, 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).**
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> **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…**
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> **The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In *Frigonken Ltd v. Value Pak Food Ltd*, *HCCC NO. 424 of 2010*, the High Court expressed itself thus:**
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> > ***"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process***." *(emphasis provided)*

8. Here there is no dispute as to the service of summons. The dispute is whether there had accrued upon the plaintiff/ Respondent a right to request and obtain a default judgment on the 21st may 2013 when the 1st defendant had entered an appearance dated the14th May 2013 on the 17th may 2013. I do find that an appearance having been filed as aforesaid there was no right upon the plaintiff to request for a judgment for failure to enter an appearance. Indeed the plaintiff had a second chance to request for judgment on default, not of appearance but defense, but that ought to have waited for 15 days to lapse after entry of appearance. The plaintiff did not wait for the chance to accrue and materialize and hurriedly applied and obtained a judgment on the fourth day after entry of appearance. That request was premature and the resultant judgment irregular and untenable in law. It must go in the interests of justice and I therefore set it aside.

9. There is yet another impropriety with the judgment as entered by the Deputy Registrar that needs to be highlighted if not for anything else but to set the position of the law right. The record of proceedings reveal that the judgment entered was for '***interlocutory judgment and for permanent injunctions declaration and damages as prayed in the plaint dated 25th April 2014'.***(emphasis added)

10. It is doubtless that the judgment overstepped the authority permitted by law for the Deputy Registrar to enter a default judgment. The power of the deputy registrar to enter an interlocutory judgment is limited to situation where a pecuniary claim is made and does not extend to entry of interlocutory judgment for injunctions, worse still permanent injunctions, and declarations. The second reason the judgment must be set out is therefore that it was entered in excess of jurisdiction.

11. The third and no lesser important reason this judgment cannot be left to stand is the reason that the plaintiff did seek to amend the plaint, was granted that leave and the plaint was indeed amended. At the time the plaint was amended, there had been the statement of defense dated 24th June 2014. The effect of the amendment was to open pleading and to give to a defendant who had filed a defense the choice to either amend its defense or rely on the defense on record. I do find that the moment the plaintiff amended its plaint, any defense on record then, however irregularly placed, could not be ignored but must be had regard of as having been properly on record. This is the view the court has held all along as shown in the ruling in this same matter dated 20.4.2017 in which the court said:-

> **"I take it that the moment the amendment was done the pleadings were opened, at least to the 2nd defendant, who to date has the right to file a defense if it wishes. I say so noting that since filing the the amended plaint and the service revealed by Mrs Mwenesi to have been on the 16.9.2016, there has never been a request for judgment. With that state of affairs one wonders the necessity to insist on proceeding with the application seeking to set aside the default judgment…"**

12. More than one and a half years later I have had to hear the application because no heed was taken by both defendants of what is otherwise an open and clear state of facts and position of the law. It is one of those scenarios a judicial officer gets the impression that the parties insist he has to make determination even where facts are indubitable. That to me is clear abdication of duty by counsel to court and practice that

ought to be frowned upon and discouraged. In arriving at the determination to set aside, I have read and understood the opposition offered by the plaintiff in the replying affidavit of **Mr Geoffrey Makana Asanyo** which has given a detailed history of the happenings in the file but failed to justify the entry of judgment four days after the appearance was filed.

13. Having set it aside, I do appreciate that even though the memorandum of appearance was filed on the 17th May 2013, the same was never served upon the plaintiff till the 21st, the same day the judgment was being endorsed. I hold the view that a prompt service immediately upon filling could have obviated the current application. Additionally, when the plaint was amended, the defendant's counsel, who then acted for both defendants, ought to have taken the opportunity to regularize the defense on record but did not. For those reasons, even though the first defendant has succeeded, it deserves no costs. I order that the costs of the application be in the cause.

14. The foregoing determination fundamentally influences what becomes of the other applications because it opens pleadings and the preparation towards trial would have to commence afresh. However, parties took time to address court on those applications and it is only just that I give my reasons for determining the applications as I do below.

Application dated 27.6.2018 by 2nd defendant

15. The application as drawn makes eight prayers but a keen look would reveal that the substantive prayers are for setting aside of trial directions that closed the window for filling witness statements and documents; an order striking out the 2nd defendant's name from the suit and extension of time to file and deliver a defense. Even though the defendant seeks, among other orders, that default judgment be set aside, the truth is that no such default judgment is on record because none was ever been sought or granted. What the defendant should have come out clearly to set aside are the trial directions resting with that of 21.9.2016 when the court having given to the defendant time to file its witness statements and documents to no avail, directed that the matter proceeds on the basis of the pleadings and documents on record as of that date. I will overlook the wording of the application and see it to seek in the main leave to deliver its defense and for its name to be struck out of the suit. I am however convinced that even with the directions of 21.9.2016 nothing in law stands on the way of the 2nd defendant to file a defense to the plaintiff's suit because in law only a judgment, interlocutory or final, closes the door to a defendant to file a defense. Not even a court of law has the discretion to forbid a party from defending a suit in court before the rules dictate. I there take the view that the request for enlargement of time is wholly unnecessary and an order made to that effect would be superfluous because that is a legal right that has not been taken away as at this day. I am hesitant to give court orders for the sake of giving. For clarity purposes, the 2nd defendant has the right to file its defense any time before a judgment is entered against it in accordance with the law. However for the sake for active case management and to avoid the repeat of the indolence exhibited by the second defendant so far, let that defense be filed and served within 10 days from today.

16. How about the need and merits to upset the consent orders by which the second defendant was joined to these proceedings? The 2nd defendant's position is that that order even though made by consent was made contrary to the law. Reliance was placed on the provisions of Kenya Deposit Insurance Act, No 10 of 2012, sections 50(4) and 56(3) in particular. In the second defendant's view that joinder was made *per incuriam* and intended to circumvent the same law. I hear the second defendant to say that the court in recording the consent of the parties misapprehended, misunderstood or misinterpreted the law and thereby made an illegal order. When such occurs the remedy is never to approach the same court to revisit its order. The remedy is strictly on appeal. In **National Bank of Kenya Ltd Vs Ndungu Njau,** the court of appeal said:-

> **"It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".**

17. I am guided by the above decision because even though there is no explicit application for review before me, the prayer being made is for the court to revisit its ruling of 19.2.2016. By whatever name called, I am being called upon to reconsider my own decision and to overturn it. That would amount to sitting on appeal of my own decision which I think the law does not permit me to do. That prayer fails and is dismissed.

18. Having set aside the default judgment against the 1st defendant; having held that the 2nd defendant has its options open to file a defense and having dismissed the prayer for striking off the 2nd defendant from the suit, I do not consider it necessary to consider the prayer for the enlargement of time for the 2nd defendant to file witness statements and bundles of documents. I consider that endevour unnecessary because while filing the defense the 2nd defendant will have the undoubted right under Order 7 Rule order 5 to have it accompanied with witness statements and bundles of documents as deemed necessary for the defense case.

19. With the foregoing determination, what remains of the 2nd defendant's application is the prayer for setting aside the proceedings of 19th June, 2018. Those proceedings were in the nature of formal proof and conducted on the foundation of the default judgment that has now been set aside. Having found that the default judgment was untenable, I find that everything founded upon it were equally untenable and thus those proceeding must follow suit and go with the judgment.

20. On costs I hold the opinion that the 2nd defendant acted with outright lack diligence and abrogation of duty to court in failing to file its papers as was its obligation and consider it the party to meet the costs of its application. It shall pay costs to the plaintiff who opposed the application in accordance with order 51 Rule 11. In coming to this determination I have taken due regard of the opposition by the plaintiff in the grounds of opposition dated 11. 07 2018, the list of authorities and the written submissions and I have held that interests of justice would be best served by orders made

Application dated 27.6.2018 by the proposed defendant

21. The substantive prayer in this application is for joinder of the applicant as a co-defendant in the suit. The grounds set forth to premise the application are that the plaint makes allegations against him to the effect that he entered into a memorandum of Understanding with the plaintiff's Managing Director and received some USD 2,500,000/ for deposit into the plaintiff's account but which he never deposited. For that reason the applicant sees himself as a proper party that ought to have been joined at the onset but was not joined and therefor e a party whose participation will enable the court to effectually and finally determine the issues in dispute without any prejudice being occasioned to the plaintiff.

20. The very wide power and discretion accorded to court to order joinder of a party to a suit either as a plaintiff or defendant must be seen to be purposed to serve the ultimate goal of justice system. I understand that purpose to be the need to hear parties on their disputes in a just, expeditious, wholesome and proportionate manner. All disputes between same parties should be handled in a single suit and same similar disputes between several parties also need to be consolidated with the purpose of achieving uniformity and saving the scarce judicial resource in time.

21. In this suit as initially filed and subsequently amended there run a single thread concerning some USD 2,500,000 said to have been handed over to the applicant in his capacity as the Managing director of the 1st defendant when that defendant traded as a bank. Paragraphs 9, 10, 11, 12, 13 and 17 of the plaint say it all. That sum is said to have been intended for commissions and negotiation fees to procure some financing for the plaintiff and that when the financing was never procured the sum was due for deposit in the plaintiffs account operated with the first defendant but was never so deposited. Those pleadings and assertions will require a word from the applicant on what he says in response. Those facts as pleaded grave in so far as they may lead to inference that the applicant was receiving money or deposits otherwise than through the banks operating system. The sum in dispute is equally colossal and this court finds and holds that the applicant is a necessary party who needs to be made a party so that he gets a chance, as such party, to answer to the allegations made against him and thus assist the court to justly determine the dispute. The application is therefore allowed as prayed with cost being in the cause.

22. Having allowed the application for joinder the court is minded to direct what steps parties need to take to progress the matter forward. The first step is that the plaint must be amended to disclose the added party as the 3rd defendant. I direct that the amendment be effected filed and served within 14 days from the date of delivery of this ruling. As the matter would essentially be starting afresh, I do direct that the plaintiff in filling the further amended plaint, files with it, a single fresh and paginated bundle containing all witness statements duly detailed and making reference to any document any such a witness would wish to rely on at trial and having such documents annexed to and numbered sequentially in relation to each witness statement

21. For avoidance of doubt, once the defendants are served, they shall be at liberty to file their respective defenses within 15 day from the date of service. Owing to the age of this matter in court, time shall be of essence.

Dated and delivered at Mombasa this 18th day of January 2019.

P.J.O. OTIENO

JUDGE