



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 200 OF 2015

PRIME BANK LIMITED.....PLAINTIFF

-VERSUS-

RELISH TEA PACKERS LIMITED.....1ST DEFENDANT

AYUBKHAN RASULKHAN WALIMOHAMED.....2ND DEFENDANT

ROSE ANN WAWUDA.....3RD DEFENDANT

RULING

1. This is a Ruling on the Notice of Motion dated 30th July 2018. The application was filed by **Rose Ann Wawuda**, the **3rd Defendant**, whom I shall henceforth refer to as Rose.

BACKGROUND

2. **Prime Bank Limited**, (hereinafter referred to as the **Plaintiff Bank**) filed this case against three Defendants on 24th April 2015. The Plaintiff Bank sought Judgment against the 1st Defendant, **Relish Tea Packers Limited** for Kshs. 14,102,090.93 with interest at the rate of 31.5% per annum from 2nd February 2015. The Plaintiff Bank also sought Judgment against **Ayubkhan Rasulkan Walimohamed**, the 2nd Defendant and against Rose for Kshs. 6,946,231.30 with interest at 31.5% with effect from 15th October 2012.

3. The 1st and 2nd Defendants filed their Memorandum of Appearance on 11th June 2015. Since the 1st and 2nd Defendants did not file their defence within the prescribed period, the Plaintiff Bank sought and obtained *ex parte* Judgment, in default of defence.

4. The Plaintiff Bank sought by an application, dated 24th September 2015, leave to serve Rose with the summons and plaint by substituted service, through the press. On leave being granted, by the Court, Rose was served by substituted service. The same Advocate who filed a memorandum of appearance for the 1st and 2nd Defendants, namely D. W. Muyundo, filed a Memorandum of Appearance for Rose on 17th December 2015. Similarly, no defence was filed for Rose. An *ex parte* Judgment, in default of defence, was entered against Rose.

5. A Notice of Motion dated 10th February 2016 was filed by the firm D. W. Muyundo Advocate, on behalf of the 1st and 2nd Defendant and on behalf of Rose. By that application all the Defendants, including Rose, sought the setting aside of the *ex parte* Judgment.

6. By this Court's ruling of 19th September 2016 the Court declined to grant the order sought. The application was dismissed.

7. The Plaintiff filed a Bill of Costs on 10th November 2016 to which the Plaintiff Bank and all the Defendants, including Rose, filed written submissions. The Taxing Master, after considering those written submissions, taxed the Bill of Costs on 19th October 2017 at Kshs. 553,581.30 against all the Defendants.

8. The Plaintiff Bank applied for execution of decree by issuance of warrant of arrest. Both the 2nd Defendant and Rose signed a bond for their appearance before the Deputy Registrar in respect to that execution.

9. It is in that background that Rose has filed a notice of motion application dated 30th July 2018, which is under consideration.

THE APPLICATION

10. By that application by Rose seeks that the Judgment entered on 7th August 2015, and the subsequent orders, be set aside. Further that Rose be granted leave to defend this suit.

11. That application is based on the following grounds:

- a) That she was not familiar with what was going on as the 2nd Defendant was the one running the company.
- b) That because she was informed that the 2nd Defendant had hired a lawyer, she was under the impression all was well based on the assurance received from the 2nd Defendant.
- c) That from the time she entered appearance, to the time of her arrest, the 2nd Defendant had assure her that all was under control.
- d) That it is only after her arrest that is when she realized all was not well.
- e) That she did not benefit in any way if at all from any sums paid.
- f) That the documents relied upon e.g. guarantee of indemnity are invalid documents, were not properly executed, some not signed by her, with no dates or company seal as required. They are generally inadmissible in evidence.
- g) That there is no evidence of any money being released to the company.
- h) That the debt if any (which is denied), is unrecoverable because it is based on invalid documents.
- i) That the 3rd Defendant/Applicant has a good case and it is fair that this case be heard on merit.
- j) That the orders sought will serve the interest of justice.

12. The single objection raised by the Plaintiff Bank is that the application is *res judicata*. That is the principle set out in Section 7 of the Civil Procedure Act, Cap 21. That Section provides:

“No Court shall try any suit or issue in which the matter directly and substantial in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

13. The issue that Rose raises in the present application was the issue raised by her then Advocate, D. W. Muyundo, which was ruled upon by this Court on 19th September 2016. The Court declined to set aside *ex parte* Judgment against all the Defendants, including Rose. Rose has admitted by her present application that she instructed D. W. Muyundo to appear for her.

14. Rose, by her submissions, has sought to distinguish the present application and the previous one, which was ruled upon on 19th September 2016, by stating that the Advocate D. W. Muyundo had failed to file an indemnity form, signed by the 2nd Defendant indemnifying Rose; and on the ground that Rose had not been heard on the previous application.

ANALYSIS AND DETERMINATION

15. This Court by its Ruling of 19th September 2016 found that no sufficient explanation had been given why the Defendants’ defences had not been filed within the prescribed period. If this Court was to entertain the present application by Rose it would amount to this Court sitting in appeal against a decision of coordinate jurisdiction.

16. Further and perhaps more important, the application by Rose is *res judicata*. This is so even if Rose now raises the issue of indemnity or that the documents relied upon by the Plaintiff Bank are invalid. The fact remains that this Court pronounced itself on whether *ex parte* Judgment should be set aside. The Court of Appeal in the case **STEPHEN WANG’ANG’A NJOROGE V STANLEY NGUGI NJOROGE & ANOTHER [2017] eKLR** had occasion to discuss the doctrine of *res judicata* as follows:

“In Uhuru Highway Development Ltd v. Central Bank of Kenya Ltd & Others, CA. No. 36 of 1996 this Court stated that in order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue, the parties must have been the same or litigating under the same title; a competent Court must have heard the matter in issue and the issue is raised once again in the fresh suit. The philosophical underpinning of the principle of *res judicata* were considered and explained as follows by the Supreme Court of India in M. Ngabhushana v. State of Karnataka, Civil Appeal No. 1215 of 2000:

“The Principles of *res judicata* are of universal application as it is based on two age old principles, namely, ‘*interestrepúblicae ut sit finis litium*’ which means that it is in the interest of the State that there should be an end to litigation and the other principle is ‘*nemo debet his ve ari, si constat curiae quod sit pro un aet eademn cause*’. This doctrine of *res judicata* is common to all civilized system of jurisprudence to the extent that a Judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.”

17. It is for the above reason that I reject the Notice of Motion dated 30th July 2018. Having rejected it, the Plaintiff will be awarded its costs.

18. In the end, the Notice of Motion dated 30th July 2018 is dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT

.....FOR THE 3RD DEFENDANT