



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 208 OF 2001**

**ANNE WANGUI GIKONYO.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....DEFENDANT**

**RULING**

1) Cooperative Bank of Kenya, the defendant herein, took out the motion dated 14<sup>th</sup> September 2018 and sought for the following orders:

- a) The application be certified as urgent and heard ex-parte in the first instance;*
- b) The honourable court be pleased to grant an Order for stay of execution of the judgment and decree issued on 27<sup>th</sup> August 2018 and any subsequent proceedings in the suit pending the hearing and determination of this application inter parties;*
- c) The honourable court be pleased to grant an order for stay of execution of the judgment and decree issued on 27<sup>th</sup> August 2018 and any subsequent proceedings in the suit;*
- d) The honourable court be pleased to review and set aside the judgment and decree of the court issued on 27<sup>th</sup> August 2018'*
- e) The honourable court be pleased to grant an order that the plaintiff's case be re-opened and be heard de novo, and in the alternative grant the plaintiff/applicant leave and opportunity to defend the suit and prosecute the counter-claim thereon;*
- f) In the alternative, the court be pleased to reinstate the defendant's counter-claim for hearing and determination on merits;*
- g) The costs of this application do abide the outcome of the inter parties hearing of this application.*

2) The motion is supported by two affidavits, one is sworn by Lawrence Karanja and the other by William K. Muthee. Anne Wangui Giokonyo, the plaintiff herein filed a replying affidavit she swore to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the submission of Mr. Muthee, learned advocate for the defendant that on 17<sup>th</sup> May 2018, he did not attend court for the hearing of the suit because he erroneously forgot to diarize the matter.

5) It is also pointed out that the plaintiff's advocate also failed to write to the defendant's advocate to inform him of the subsequent mention or judgement notices. The learned advocate stated that the defendant has and is keen and desirous to defend the suit and prosecute its counter-claim. This court was beseeched not to allow the mistake of counsel to debar the applicant from pursuing its rights in the suit.

6) The plaintiff opposed the motion arguing that litigation must come to an end. She averred that she has a valid and regular judgment which was obtained after due process. The plaintiff further averred that there was no order issued by the court directing the plaintiff and her counsel to serve mention notices upon the defendant and its advocate and therefore the plaintiff had no obligation to serve the defendant.

7) It is the submission of Mr. Osundwa learned advocate who appeared as holding brief for Ms Esonga for the plaintiff that the defendant has not shown justifiable cause as to why this court should exercise its discretion in its favour to either review or set aside the judgment entered on 16<sup>th</sup> August 2018. The plaintiff proposed that if this court is inclined to grant the order then the plaintiff should be awarded thrown away costs that the defendant should deposit the entire decretal sum in an interest earning account as security.

8) Having considered the rival submissions together with the material placed before this court, the main issue which commends itself for consideration is whether the defendant/ applicant's application meets the conditions necessary to determine an application for review. I have already outlined the rival arguments of the parties over the issue. It is apparent that the defendant/applicant seem to suggest that it is relying on the ground of "any sufficient reason".

9) In the case of **Pacras T. Swai =vs= Kenya Breweries Ltd (2014) eKLR**, the Court of Appeal held inter alia as follows:

**"There is another ground which can justify the application for review that is "any sufficient reason" this must be reason that is justifiable to warrant the court review its judgment, decree or order."**

10) It is not in dispute that this suit proceeded for hearing exparte when the defendant and its counsel failed to attend court. The defendant stated that the defendant and its advocate erroneously failed to diarize the hearing date of 17<sup>th</sup> May 2018. This averment is not controverted by the plaintiff/respondent. As a result of the defendant's absence, the suit proceeded for hearing exparte. The judgment was entered in favour of the plaintiff and against the defendant. This court has been urged to review and set aside the exparte judgment to enable the defendant defend the suit and prosecute its counter-claim

11) I am convinced that the ground relied upon by the defendant is plausible and can be regarded as any sufficient reason. It is admitted that the defendant failed to attend court because of the mistake of its counsel. Basically the defendant's advocate concedes that he inadvertently forgot to diarize the date of 17.5.2018. I am convinced that in the circumstances of this case that the defendant is entitled to benefit from the discretion of the court.

12) In the end, I find the motion dated 14<sup>th</sup> September 2018, to be meritorious. The same is allowed thus giving rise to the following orders:

**a) The exparte judgment and the resultant decree issued on 27.8.2018 is reviewed and set aside.**

**b) The plaintiff's case is reopened to be heard denovo.**

**c) The orders closing the defendant's case and dismissing the defendant's counter-claim are set aside and the defendant is allowed to defend the suit and prosecute the counter-claim.**

**d) In the circumstances of this case, the plaintiff is awarded thrown away costs assessed at ksh.30,000/= and payable within 30 days failure to which the plaintiff will be at liberty to execute to recover.**

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of November, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent