



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.98 OF 2017

BANK OF AFRICA LIMITED.....PLAINTIFF

VERSUS

TURITU SERVICE STATION LIMITED.....1ST DEFENDANT

HANNA WAIRIMU MUTURA.....2ND DEFENDANT

DAVID NJUGUNA NGUI.....3RD DEFENDANT

RULING

The Plaintiff herein filed application dated 28TH July 2017 seeking the following orders

1. Spent.
2. Spent.
3. Stay and setting aside judgment in default of appearance entered against the Defendant on 12th May 2017.
4. That the Defendant be allowed to file statement of defence.
5. Costs of the application be in the cause.

Grounds on the face of the application are that the Defendants filed Memorandum of Appearance before judgment was entered and that they have a good and triable defence; that the Defendants have brought this application without delay; that the failure to file defence on due date was occasioned by an honest lapse on the part by the Advocates.

The application is supported by 3 affidavits one by Defendants previous Advocate Onalo Ogessa sworn on 28th July 2017; the 3rd Defendant filed Replying Affidavit and Supplementary Affidavit sworn on 28th July 2017 and 17th October 2017 respectively.

Onalo Ogessa Advocate averred that the Defendant took the Plaintiff and other pleading documents on 13th April 2017 which was a day before Easter and that he travelled to Western Kenya where he engaged in Court matters on 24th and 27th April 2017. Counsel averred that during that period summons in respect of this case escaped his mind; he said that he called the 3rd Defendant on 28th April 2017 who was shocked to learn that that the Advocate had not entered appearance. He stated that the Defendant immediately instructed him to forward the file to Luis Wahome of Wahome & Co. Advocates. He said that failure to enter appearance immediately was due to breakdown of communication between him and the 3rd Defendant.

The 3rd Defendant averred that he has had a long engagement with the Plaintiff starting when the 1st Defendant applied for a loan of Kshs 5,720,000 to finance purchase of motor vehicle registration No. KAY 731A on 15th December 2006. He added that the loan was consolidated with another loan application of Kshs. 3,500,000 on 30th July 2017. He attached letters of offer in respect of the loans.

The 3rd Defendant averred that the statement furnished by the Plaintiff shows that the Defendant had cleared the loan and has credit balance of Kshs. 4,424,916.35.

He further averred that the Defendant has raised triable issues in the defence which ought to be ventilated in Court. He added that there was confusion initially as to entering of appearance as the summons were served on the 2nd Defendant who had limited knowledge of this matter. He said that he did not intentionally fail to give instructions to Ogessa Advocate. He said he promptly instructed another Advocate on learning that the said Advocate had not entered appearance.

In his Supplementary Affidavit, the 3rd Defendant denied the averments by Bernard Mwaura that Onalo Ogessa Advocate is not listed as an Advocate by Law society of Kenya and attached a snapshot of Law Society of Kenya Internet search. He averred that some of the several accounts opened by the Plaintiff for the 1st Defendant are strange to him. That the consolidated Account No. 01005870189 was opened on 19th February 2010 and not 4th January 2010 and was operated for only one year; that the account was closed with negative balance of Kshs. 478,109.

He averred that the Plaintiff has no clear and cogent claim against the Defendant. The 3rd Defendant stated that there are transactions that the Plaintiff carried out without notice to the Defendants which ought to be explained. He added that the Plaintiffs claim involve calculation of interest different from the Court rate and the matter should have been subjected to formal proof; that the Plaintiff should not have been favored with full judgment but interlocutory judgment.

He averred that the amount claimed by Plaintiff in the demand notice is at variance with the amount given in the affidavits and that there are confusions as to the amount owing to the Plaintiff.

He further averred that the Replying Affidavit has failed to disapprove the draft defence; that it has failed to disprove that the guarantees issued do not relate to the 1st Defendant as stated in paragraph 2 in the plaint; that no board resolution was tendered to allow the 1st Defendant borrow money from the Plaintiff and that the claim is time barred.

The 3rd Defendant further averred that the contents of Replying Affidavit are at variance with witness statements filed with the Plaintiff.

I have considered arguments by both parties herein. I wish to consider the following:-

1. Was the judgment regularly entered?

There is no dispute that Defendants were served with summons to enter appearance but failed to enter appearance within the stipulated period. The initial Counsel for the Defendants Onalo Ogessa confirmed that the Defendants gave him instructions to enter appearance before time lapsed but he failed to do so within the required time. What was to follow then?

The Defendants have argued that the matter should have been subjected to formal proof as interest claimed is beyond Courts rate.

I have perused the prayers sought and confirm and note that the interest indicated in both prayer ii & iii is 14% which is the Courts interest rate. It is not therefore true that interest prayed for was not the Courts rate. In prayers i to iii, the sum claimed are specified with interest at 14%. It was therefore proper to enter judgment as prayed and proceed to prepare decree without subjecting the claim to formal proof. I therefore find that entry of judgment was proper.

2. Did whether Defendants move Court without delay

The 3rd Defendant indicated that upon learning that their Advocate had failed to enter appearance and file defence, within the stipulated time, he instructed another law firm immediately to enter appearance on their behalf. This was confirmed by averments to that effect by the Defendants previous Advocates. It is evident therefore that the applicants moved the Court without unreasonable delay.

3. Whether the draft defence attached raises triable issue.

In the case of **ISAAC AWUONDO V SURGIPHARM LIMITED & ANOTHER [2011] eKLR** the Court of Appeal reiterated the following principles in **MOI UNIVERSITY V VISHVA BUILDERS LIMITED - CIVIL APPEAL NO. 296 OF 2004 (UNREPORTED)** as follows:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend.”

Upon perusal of the pleadings herein, I note that the Defendant has cast doubt on uncertainty in respect of the exact amount owing from the Defendant to the Plaintiff. Allowing the Plaintiff to proceed with execution without according Defendant an opportunity to participate in the exact amount owing to the Plaintiff is likely to occasion injustice. It will therefore be appropriate to allow the Defendant participate in the proceedings as their participation will assist the Court arrive at a fair and conclusive determination.

FINAL ORDERS

1. Stay of execution do issue pending hearing determination of this suit.
2. Judgement in default of appearance entered on 4th May 2017 is hereby set aside.

3. The above orders are granted on condition that the Defendants pay to the Plaintiff thrown away costs of Kshs 30,000 to be paid within 14 days from today's date.

Dated and Delivered at Nairobi this 11th day of May, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR PLAINTIFF/RESP.

.....COUNSEL FOR DEFENDANTS/APPL.