



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 265 OF 2016

JACKLINE WANJIRA NJERUPLAINTIFF

- V E R S U S -

EQUITY BANK (KENYA) LIMITED.....1ST DEFENDANT

METROPOL CREDIT REFERNCE BUREAU2ND DEFENDANT

APPLICANT

RULING

1) Metropol Credit Reference Bureau the 2nd Defendant/applicant herein took out the motion dated 5th December 2016 in which he sought for the following orders:-

- 1. THAT the service of this application be dispensed with in the first instance.***
- 2. THAT this matter be certified urgent.***
- 3. THAT the interlocutory judgement entered in default of defence against the second defendant on the 17th of November 2016 and any consequential orders be and is hereby stayed pending the hearing and determination of this application.***
- 4. THAT the interlocutory judgement entered in default of defence against the 2nd Defendant on the 17th day of November 2016 and any consequential orders be and is hereby set aside.***
- 5. THAT the 2nd Defendant is granted leave to file its defence unconditionally within 14days of this order.***
- 6. THAT the costs of this application be provided for.***

2) The motion is supported by the affidavit of Job Nyasimi Momanyi. When served the plaintiff herein Jackline Wanjira Njeru filed her replying affidavit opposing the motion.

3) The applicant has filed his written submissions which I have considered. I have also considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed in support and against the motion.

4) It is clear from this motion that the applicant is seeking for orders for setting aside the default

judgement against him, which if allowed then should allow him to file his defence out of time.

5) The applicant avers that it filed a Memorandum of appearance and a notice of appearance both dated 16th November 2016 and that the file containing this matter was misplaced at the Applicants advocates' offices. Due to this mistake the matter was not brought to the attention of the advocates and therefore a defence was not filed in good time. The applicant further avers that he has a good defence that raises triable issues which the court should be minded to listen to.

6) The Plaintiff/Respondent on the other hand avers that the reasons for delay in filing any documents and defence by the 2nd defendant/applicant are unconvincing and inexcusable. The Respondent is of the submission that the draft defence of the applicant does not raise any triable issues and therefore the 2nd Defendant should not be given a chance to defend this suit.

7) The well-established principles of setting aside interlocutory judgements were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P.** who detailed:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

This position was again reiterated in the case of; **Maina – Vs – Muriuki [1984] KLR 407, O’Kubasu J** (as he then was) held that

“The discretion to set aside Exparte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed for a party which has deliberately sought to obstruct or delay the cause of justice.”

8) It is trite law that the applicant must produce evidence that he has a prima facie defence before the court's discretion can be invoked and exercised in its favour.

9) I have considered the reasons that have been advanced by the applicant for failing to file a defence within the stipulated time. Its explanation is that it instructed its advocate in this matter, but the advocate's file was later misplaced by his office clerk and made him not enter file a defence within the statutory time. The file was later traced and the applicant entered appearance on 22nd November 2016 and later learnt on 29th November 2016 that judgement had been entered in default of defence when they were served by the plaintiff advocates with an invitation to take formal proof hearing date. This mistake and delay is admitted by the applicant who prays to this court not to penalize him for inadvertent mistake. Further to this the applicant avers that his defence raises triable issues and in the interest of justice the court should allow him file the defence. I am convinced that the applicant has given an explanation for its delay which is excusable in the circumstances.

10) In the end I find in the motion to be meritorious. It is allowed as follows:

i. The interlocutory judgment entered herein against the 2nd defendant in default of filing a memorandum of appearance and or defence and all consequential orders and actions based on the said interlocutory judgment be and are hereby set aside.

ii. The Applicant is granted leave to file its defence within 21 days of this order.

iii. Cost of this application to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 20th day of July, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent