REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 345 OF 2015

DANIEL NGUMBI MBUVI……..…….. PLAINTIFF

- VERSUS -

CHRISTOPHER KYALO MUTHAMA……...…….DEFENDANT

RULING

1. The defendant has asked the court to set aside the ex-parte judgement which was entered on 30th September 2015. He has also asked the court to grant him leave to defend himself against the claim which the plaintiff lodged against him.

2. According to the defendant, he was duly served with the plaint and the summons to enter appearance.

3. The defendant says that he instructed an advocate to enter appearance on his behalf and to also file a defence. However, the said advocate did not do any of the things he was instructed to do.

4. It is the defendant's case that on 19th October 2015, he visited the offices of his advocate. It is during that visit when the defendant discovered that the advocate had neither entered appearance nor filed a defence.

5. Upon becoming aware that he had not entered appearance or filed a defence, the defendant instructed his current lawyers, Owang & Associates Advocates, who perused the Court file and established that judgement had been entered against the defendant on 30th September 2015.

6. It is that judgement which the defendant wishes to have set aside. He says that he has a merited defence.

7. As a way of demonstrating the kind of defence available to him, the defendant pointed out the economic recession in the country had occasioned a cash-flow problem in his supply business, thus resulting in a delay in settling the loan balance.

8. The defendant also explained that the plaintiff used to be his co-director in a company. However, the plaintiff's sudden resignation from the company, worsened the company's financial position, thus making it impossible for the defendant to meet his financial obligations in accordance with the terms of the loan agreement.

9. The defendant also asserted that the plaintiff had only advanced to him, the sum of Kshs. 2,680,000/-; and not the sum of Kshs. 5,415,000/- which the plaintiff was now claiming.

10. Furthermore, the plaintiff is accused of instituting these proceedings prematurely. The suit was filed in July 2015, whilst the defendant says that the loan was repayable upto October 2015.

11. By moving to court prematurely, the plaintiff is said to have acted oppressively, and thus frustrated the defendant's efforts to settle the loan.

12. The defendant also accused the plaintiff of non-disclosure of material facts.

13. In answer to the application, the plaintiff pointed out that on 20th August 2015, the defendant had filed a Notice to Act in Person.

14. Obviously, if the defendant filed a Notice to Act in person, that fact was inconsistent with the defendant's contention, that he had instructed an advocate to act for him.

15. The plaintiff exhibited a copy of the Memorandum of Appearance dated 13th August 2015, which showed that the defendant intended to act in person.

16. The said Memorandum of Appearance bears a court stamp of the Commercial & Admiralty Division of the High Court at Milimani, Nairobi.

17. Upon the face of the Memorandum of Appearance was an endorsement by the Law Firm of Mulandi Kisabit & Associates Advocates, dated 21st August 2015. The said endorsement reads as follows;

> "***Received under protest as interlocutory judgement had been requested. Secondly, how has the defendant been allowed to serve when the file was not in the registry?"***

18. In the light of that Memorandum of Appearance, I hold the considered view that it was more probable than not than the defendant actually expressed an intention to act in person. Therefore, it is most improbable that he had also instructed an advocate to enter appearance on his behalf.

19. Having come to that conclusion, it would imply that the defendant is deemed to have been stating an untruth when he alleged that he had instructed the un-named advocate to enter appearance on his behalf.

20. But that also means that the defendant did enter appearance on 21st August 2015.

21. Does that mean that the Court ought not to have entered judgement against the defendant?

22. The answer is in the negative. In other words, it is only if the court had entered judgement before the lapse of 15 days from the date when the defendant had entered appearance, that such a judgement would have been irregular.

23. But the judgement in this case was entered on 30th September 2015. By that date, the defendant should have already filed his defence; but he had not done so. Therefore, the court acted properly by entering judgement in default of the Defence.

24. When an *ex-parte* judgement is regular, the court would normally not set it aside unless the defendant satisfies the court that he had an arguable Defence. The defendant would also need to demonstrate that he had moved the court without undue delay.

25. The defendant says that the plaintiff did not give him a loan exceeding Kshs. 5.4 million. He says that the loan was only for Kshs. 2.6 million.

26. At best, that contention, even if it were proved, would not defeat the entire claim. At the best, such a line of defence would only provide an answer to about one-half of the claim.

27. In the draft Defence, it is asserted that the plaintiff acted prematurely in filing suit.

28. The plaintiff denies that assertion, and insists that the contract had stipulated that the defendant would remit monthly installments towards the settlement of the loan. Therefore, when the defendant had defaulted, the plaintiff believes that he was entitled to institute the court action.

29. As far as the plaintiff was concerned, he did not need to wait for the default to continue for 12 months before he could file suit.

30. On the face of the Loan Agreement dated 4th June 2015, the Loan Amount is stated as being Kshs. 5,415,000/-.

31. The Agreement further states that Kshs. 1.0 Million would be paid back on 15th June, 2015.

32. Clause 3 reads as follows;

> ***"THAT the balance of Kshs. 4,415,000/- (Four Million, Four Hundred and Fifteen Thousand Shillings Only) to be paid within four months from the date of signing this agreement, which on the 4th day of October, 2015?.***

33. On a *prima facie* basis, there is no provision that the defendant would remit monthly installments.

34. Clause 4 reads as follows;

> ***"THAT on default of payment on the agreed date of the final payment the "Creditor? will and shall take all reasonable steps to recover the balance".***

35. That provision appears to support the contention of the defendant. In other words, the plaintiff appears to have only reserved to himself the right to take reasonable steps to recover the balance if the defendant defaulted on the agreed date of the final payment.

36. On a *prima facie* basis therefore, the plaintiff moved to court prematurely, when he instituted these proceedings on 19th July 2015, which was well before the agreed date of the final payment.

37. Therefore, in so far as the claim may have been made prematurely, the defendant may have an arguable defence to it.

38. Accordingly, the judgement entered on 30th September 2015 is set aside.

39. However, I order the parties to pay their respective costs of the application. I so order because I am convinced that the defendant brought about the application upon himself by having failed to act timerously, after being served with the Plaint and Summons. If he had acted within time, there would never have arisen the need to file an application to set aside the judgement.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **10th day** of **March** 2016.

FRED A. OCHIENG

JUDGE

<u>Ruling read in open court in the presence of:</u>

……..for the Plaintiff

…….....for the Defendant

Collins Odhiambo – Court clerk.