



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 258 OF 2006

JACKSON KIPROTICH ARAP KIBOR.....PLAINTIFF

-VERSUS -

AGRICULATURAL FINANCE CORPORATION.....DEFENDANT

RULING NO. 2

1. The defendant has asked the court to set aside the interlocutory judgement which was entered on 26th February 2007. It is the defendant's request that it be permitted to file its Defence out of time.
2. It is common ground that the defendant was duly served with the Plaint together with Summons to Enter Appearance.
3. Thereafter, the Defendant did not file a Defence.
4. After the lapse of the period of time when the defence could have been filed, the plaintiff asked the court to grant judgement. It was in response to the Request for Judgement dated 2nd February 2007, that the learned Deputy Registrar entered interlocutory judgement on 26th February 2007.
5. The defendant has blamed its former advocate for the failure to file a Defence. The said advocate is **CYRIL S. WAYONG'O**.
6. **Ms ROSE A. OCHANDA**, the defendant's Corporation Secretary, swore an affidavit in support of the defendant's application.
7. Ms. Ochanda explained that at the time when advocate Wayong'o was instructed, he was an employee of the defendant.
8. However, advocate Wayong'o then left the Corporation's employment. After advocate Wayong'o ceased to work for the corporation, his whereabouts were unknown.
9. Ms. Ochanda deposed that she was extremely shocked and horrified when she learnt that advocate Wayong'o had failed to file a Defence. Ms. Ochanda learned about the failure of advocate Wayong'o, when the defendant received a copy of an invitation from the plaintiff's advocates dated 28th September 2007. The said invitation was to have the defendant attend court on 9th October 2007, for the purposes of fixing a date for Formal Proof of the plaintiff's case.
10. As Ms. Ochanda is an advocate, she was well aware that the invitation to take a date for Formal Proof implied that the court had already granted judgement against the defendant.
11. In the light of that realization, Ms Ochanda instructed **Mr. J. KINYANJUI** Advocate to take over the conduct of the defendant's case.
12. Even whilst Mr. Kinyanjui was taking over the conduct of the defendant's case, Ms. Ochanda called for the **LOAN** and the **BRANCH** files, to enable her peruse the same.
13. On his part **JOHN T. KINYANJUI** advocate, wrote to advocate Wayong'o, notifying him that the defendant had instructed him (John T. Kinyanjui) to take over its case from advocate

Wayong'o.

14. The applicant has exhibited a letter from John T. Kinyanjui, advocate dated 12th November 2007. The letter was addressed to **MR. CYRIL S. WAYONG'O ADVOCATE, at P.O BOX 72109-00200 NAIROBI.**
15. Although that was the address which advocate had had provided in the Memorandum of Appearance, the applicant demonstrated to this court that the letter addressed to Advocate Wayong'o was returned to the applicant, marked;

“Unclaimed”.

16. The applicant attributed, the slow pace at which they went about making the application to set aside the judgement, to the fact that the defendant had to search for pleadings without the help of their former advocates.
17. Therefore, the applicant asked the Court not to unduly penalize it, for a mistake which could only be attributed to advocate Wayong'o.
18. Secondly, the defendant pointed out that their proposed Defence raised triable issues.
19. But the plaintiff believes that the defendant has not offered any explanation for the delay in bringing the application.
20. I understand the plaintiff to be saying that if the plaintiff had only been communicating with advocate Wayong'o, then the explanation for the delay may have been considered as plausible. However, the plaintiff also exhibited a letter dated 17th November 2006, which the Law Firm of **KATWA & KEMBOY**, the learned advocates for the plaintiff, wrote directly to the defendant.
21. Messrs Katwa & Kemboy Advocates drew the defendant's attention to the fact that there was no defence yet filed in court. Although the period for the filing of the defence had lapsed, the plaintiff's advocates informed the defendant that the plaintiff would only apply for interlocutory judgement after the lapse of a further 14 days.
22. In the light of that letter dated 17th November 2006, the defendant would not be right to insist that the only person who should bear responsibility for everything that went wrong was advocate Wayong'o.
23. True, advocate Wayong'o failed to file the Defence, and that failure led to the grant of the Judgement. But the defendant must also bear part of the blame, as the plaintiff wrote to it directly, notifying it that if no defence was filed within 14 days, the plaintiff would ask the court to grant him judgement.
24. Notwithstanding the errors, I find that there was no evidence at all, that the defendant was either fraudulent or that the defendant had any intention to overreach. Therefore, the defendant has brought itself within the scope of the situations envisaged by Apaloo J. in the case of **PHILIP CHEMWOLO & ANOTHER Vs AUGUSTINE KUBENDE (1982-88) KAR 103**, wherein the learned Judge said;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having the case heard on merits...”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

25. In the event, even though advocate Wayong'o's conduct was reprehensible, that ought not to be held against the defendant. If there was a felt need to undertake any disciplinary action against the advocate, that would not be the role of the court, or at any rate, it is not a role to be undertaken in the process of determining the defendant's application to set aside the interlocutory judgement.
26. In the case of **KILONZO & COMPANY ADVOCATES Vs JOHN NJENGA MUTHONI [2012] e KLR** Odunga J. dismissed the defendant's application for the setting aside of the judgement which had been granted in default of a defence.
27. The application had been brought some 24 months after judgement had been entered. The

defendant did not file any affidavit to explain the delay. Nonetheless, the learned Judge said;

“I have taken into account the fact that the defendant has not been vigilant in protecting his rights. He has not taken the necessary steps when they ought to be taken and in cases where steps have been taken, they left a lot to be desired. I have also taken into account the fact that the mere fact that there is dearth of plausible reasons for failure to take necessary steps does not necessarily deprive the court of the wide discretion to set aside *exparte* judgement”.

28. Ultimately, the main reason for the dismissal of that application was the lack of a *prima facie* arguable defence. It is that reason which led the court to find that it could not exercise its discretion in favour of the defendant.
29. In contrast to that case, the defendant herein did offer an explanation for the delay in bringing the application to set aside the judgement.
30. Furthermore, the defendant made available a draft Defence, which, *prima facie*, gives rise to issues which are best resolved through a full trial.
31. For instance, there would be need to ascertain whether or not the plaintiff was compelled by the defendant to provide the suit property as a security for the loan which the plaintiff was given.
32. Was it a term of the agreement between the parties that the charge registered against **L.R. No. 10827/2**, would be discharged upon the plaintiff providing alternative security?
33. Did the plaintiff, in any event, pay-off the full loan for which the suit property had been a security?
34. Should the defendant be compelled to discharge the charge? Or is the defendant entitled to continue holding onto the security in respect of an outstanding loan?
35. In the circumstances, I hold the considered view that the justice of the case demands that the judgement be set aside, so that thereafter, the matters in issue can be determined on merit.
36. Accordingly, I now order that the interlocutory judgement be set aside forthwith. The defendant will have 10 days from today to file its Defence.
37. As regards the costs of the application, the defendant will pay the same. I so order because the failure to file the Defence was attributable to the defendant and its advocates. Therefore, although the defendant has now been granted an opportunity to file its defence, the application which gave rise to those orders cannot be paid for by the plaintiff. The plaintiff had acted in a regular manner when he applied for and got the judgement in his favour. It is for that reason that although the application is successful, the defendant must still meet its costs.
38. The defendant will also pay the thrown-away costs, if any.

DATED, SIGNED and DELIVERED at NAIROBI this 15th day of July 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Ndegwa for Katwa for the Plaintiff

Mabonga for Ngaira for the Defendant

Collins Odhiambo – Court clerk.