

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 242 OF 2014

KENA HOLDINGS LIMITED PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED DEFENDANT

RULING

This court delivered a ruling on 8th July, 2015 (not 2011) in favour of the plaintiff following a formal proof. There is now before me an application by way of Notice of Motion under Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1 A, 1B and 3A of the Civil Procedure Act for orders that there be a stay of execution of the judgment dated 8th July 2015 (not 2011) and that the ex parte judgment be set aside and the defendant granted unconditional leave to defend the suit.

The application is supported by the grounds set out on the face thereof and a supporting affidavit sworn by the legal manager of the defendant. The application is opposed and there is a replying affidavit sworn by Job Kariuki Kamondia a director of the plaintiff.

The application was argued by way of written submissions which included some cited authorities and which I have read and considered. The defendant had been served with summons to enter appearance and did enter appearance to the suit. Indeed, when the matter came up for formal proof on 18th May, 2015 the learned counsel for the plaintiff observed as such. However, no defence was filed and the explanation now given is that the file could not be traced hence default in so doing.

There is also a draft statement of defence wherein the defendant says there are triable issues to be canvassed during the full trial. The authorities relating to such applications are in agreement that the order sought is at the discretion of the court, intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error. It is however not designed to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice – see **MBOGO VERSUS SHAH (1968) EA 93.**

The plaintiff has a judgment where execution has been initiated and in ordinary circumstances it should not be denied the fruits of such judgment. However, it is generally accepted that where a party has entered appearance, there is a duty imposed upon the plaintiff to notify the defendant of any step that follows to avoid any prejudice on the part of the defendant.

It was incumbent therefore for the plaintiff's counsel to serve a notice of formal proof upon defendant's counsel notwithstanding that no defence had been filed. The reason given for the misplacement of the court file appears plausible considering this is not an isolated case in that regard. Indeed, this is a systemic shortcoming which cannot be attributed to any litigant. Be that as it may, the draft defence filed by the defendant cannot be said to be a sham or a mere denial as it raises some triable issues which

justifies the defendant to have its day in court.

I am persuaded therefore that sufficient reasons have been advanced by the defendant to warrant the order for setting aside of *ex parte* judgment. Accordingly, the judgment delivered on 8th July, 2015 (not 2011) is hereby set aside in its entirety. The defendant is hereby given unconditional leave to defend the suit. It shall file and serve the defence within 14 days from the date of this ruling and thereafter the parties should comply with the pre trial provisions under Order 11 of the Civil Procedure Rules to facilitate the hearing of the main suit. Costs in the cause.

Dated and delivered at Nairobi this 3rd Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE