REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 204 OF 2011

BARCLAYS BANK OF KENYA LIMITED ……..……..…… PLAINTIFF

VERSUS

FARMERS PARTNER LIMITED …..…….……..... 1ST DEFENDANT

ISAAC NJOGU KIBERA ……..…….. 2ND DEFENDANT

ZIPPORAH WAMBUI NJOGU ……..……3RD DEFENDANT

RULING

By a Plaint dated 18th May, 2011, the Plaintiff claimed as against the Defendants jointly and severally for a sum of Kshs.32,872,141/60 together with interest at the rate of 23% per annum from 22nd January, 2011 until payment in full. The said debt arose out of advances, made to the 1st Defendant totalling Kshs.20,732,000/- in 1999. The 2nd and 3rd Defendants guaranteed the said advances to the tune of Kshs.15,000,000/- together with, inter alia, interest fees, and commissions. The 1st Defendant failed to repay the advances and in or about April, 2010, the Plaintiff sold by public auction, the properties that the Defendants had pledged as security. There was a short fall in the sum of Kshs.31,787,819.51 which the Plaintiff demanded through their Advocates Ms. Iseme Kamau and Company, vide a letter dated 15th December, 2010.

The Summonses were properly served on 13th June, 2011 at Nakuru. The Defendants entered appearance on 1st July, 2011 through the firm of Nyakundi & Company Advocates. However, no defence was filed and the Plaintiff requested for judgment on 2nd September, 2011 which was duly entered on 16th September, 2011.

By a Notice of Motion dated 10th October, 2011, the Defendants applied for the interlocutory judgment to be set aside and for the Defence annexed to the Supporting Affidavit to be deemed as valid. The motion is expressed to be brought under Order 22 Rule 22(1) of the Civil Procedure Rules, 2010.

The grounds upon which the application is brought is that the Defendants desire to defend the suit and that owing to logistical issues, they were unable to file the defence promptly, that the court file could not be traced to enable the filing of the Defence which had been prepared in good time and that the subject matter of the suit is pending in HCCC No. 526 of 2009.

Mr. Nyakundi, learned Counsel for the Defendants submitted that the existence of HCCC No. 526 of 2009 wherein the issue of accounts was pending was not in dispute, that a separate suit, the present suit is undesirable due to the existence of the aforesaid HCCC No. 526 of 2009 wherein all the matters should be settled, that because the rules require that the defence be filed with documents and witness statements there were logistical problems to fulfill all that, though the Defence was ready by 1st July, 2012. That since the Defendants assets had been auctioned, the Defendants also needed their day in court. Counsel urged the court to allow the application.

In opposition to the application, the Plaintiff filed a Replying Affidavit sworn by Nereah Okanga on 16th November, 2011. The Plaintiff contended that the judgment entered on 16th September, 2011 is valid and should be upheld, that no good or any reasonable explanation has been given to explain the failure to file the Defence, that the court file was at all times available, that HCCC No. 526 of 2009 had only sought for an injunction and since the injunction had been refused there was nothing else that was pending in that suit.

Mr. Munyu, learned Counsel for the Plaintiff submitted that since the appearance was filed on 1/7/11, the same day the Defence is dated, there is no reason why that defence was not filed on that day, that since the judgment was regular the court should not consider whether there is a defence, that no purpose will be served with the setting aside of that judgment. Counsel relied on the cases of **Baiywo –v- Bach (1987) KLR 89 and Uchumi Supermarket –vs- Amina Mohammed HCCC No. 1847 of 2001 UR** and urged that the application be dismissed with costs.

I have considered the Affidavits on record, the submissions of Counsel and the authorities relied on.

To begin with the application has not properly invoked the jurisdiction of this court for the grant of the orders sought. I have never known the court to be called upon to set aside a default judgment under Order 22 of the Civil Procedure Rules. It is bad enough that the Defendants failed to file a defence to the claim but it is worse that they can bring an incompetent application to save themselves from a judgment of a whopping sum of over Kshs.32 million. That may be a reflection of the attitude of the Defendants. They simply don't care whether they are getting their acts right.

Be that as it may, since the Plaintiff did not raise an objection to the application on that basis, of which I would have dismissed it, I invoke the saving inherent jurisdiction of this court under Article 159 of the Constitution and decide the application on merit in order to render substantive justice.

The Principles applicable in an application for setting aside an interlocutory judgment are well known. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & Others –vs- David Njeru Karingi CA No 181 of 1994 (UR)** the court of Appeal held:-

"In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

……..

However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence

or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice." (Emphasis mine)

Accordingly, in considering the present application, the court has a wide discretion which however has to be exercised on the basis of the evidence before it and sound legal principles. Such discretion is to be exercised in order to avoid an injustice or hardship arising from an accident, inadvertence or excusable mistake or error.

The evidence on record is clear. The summonses were properly served, appearance was entered within time but there was no defence filed. The only explanation given is that the court file was missing.

I do not accept that explanation for the reason that the Defence exhibited to the application is dated 1st July, 2011 the same day the memorandum of appearance was filed. If the appearance was filed on that date, why would the court file disappear immediately so as to make it difficult for the Defence to be filed? I cannot see how. Secondly, Mr. Nyakundi when submitting indicated that the delay in filing the Defence, it was the legal requirement to file the same with the documents and witness statements which proved a challenge to his firm to procure the same from his clients within time. To my mind these are not good and/or sufficient reasons why the defence was not filed in time or at all. There is no evidence that has been produced by the Defendants to support these allegations. For example there is no letter asking the registry to avail the file or a letter to the Plaintiff's Advocate requesting for an extention of the time for filing the defence.

The judgment sought to be set aside in my view therefore is a regular and a valid judgment. In the Court of Appeal case cited by the Plaintiff **Baiywo –vs- Bach (1987) KLR 89** it is indicated at the head note that:-

"6. the court in exercising its discretion to set aside the default judgment would be guided rule that where the judgment has been obtained regularly, there must be an Affidavit of merits, meaning that the appellant must satisfy the court that he has a prima facie defence.

7. if there are merits in the defence, it would be unjust not to allow them to be heard even if judgment was obtained regularly. On the other hand, if there are no merits judgment should stand."

This court must therefore consider if there is any defence to the Plaintiff's claim contrary to the submission by Mr. Munyu that I should not inquire as to whether there is a defence to the claim.

I have seen the draft defence exhibited to the Affidavit in support. In that defence, the Defendants have denied breaching their contracts with the Plaintiff. The Defendants contend that the Plaintiff levied exorbitant interest on the amounts advanced leading to HCCC No. 526 of 2009. The Defendants have also denied owing the Plaintiff the claimed sum of Kshs.32,872,141.60 and have averred that they will rely on the common law doctrine of the duplum rule to challenge the interest levied.

The Plaintiffs have contended that there is no good defence, that the amount being demanded are the balance of the amount due after giving credit to the Defendants from the proceeds of the sale of the Defendants properties.

I have examined the issues proposed to be raised by the Defendants in their Defence and I am of the opinion they may be arguable for the following reasons:-

(a) From paragraph 5 of the Plaint, it is clear that the principal sum advanced to the 1st Defendant was approximately Kshs.20,732,000/- way back in 1999. The 2nd and 3rd Defendants gave a guarantee dated 11th December, 2002 limited to the principal sum of Kshs.15,000,000/- together with interest, fees, commissions, costs, charges and expenses. The Plaint has prayed for judgment against all the Defendants, jointly and severally for Kshs.32,872,141/60. In effect, the liability of the 2nd and 3rd Defendants has been extended to the entire sum of Kshs.32.8 million. In my view, it will be an issue as

to whether having guaranteed the 1st Defendant up to Kshs.15,000,000/- only plus other costs as indicated in the document of guarantee, can the 2nd and 3rd Defendant be liable for the entire sum as at the date of default or demand under the guarantee?

(b) From the bank statement produced in the Plaintiff's bundle of documents prima facie, the loan seems to have been non- Performing from way back in 2004. The amount due as at 30th April, 2007 was Kshs.24,672,025/22. With the introduction of the duplum rule (which the Defendants propose to plead in their Defence) by virtue of Section 44A of the Banking Act which was introduced by the Banking (amendment) Act, 2006 Act No. 9 of 2006, can the Plaintiff legally claim and recover from the Defendants the claimed sum of Kshs.32,872,141/60 (on which judgment has been entered) having in mind that between May, 2007 and June, 2010 the bank statement shows that the bank had recovered Kshs.22,905,100/-. Allowing that judgment to stand, the bank will have recovered over Kshs.55million. Will that be lawful on the face of Section 44A of the Banking Act?

To my mind, the two issues set above are not frivolous. They are serious and they need to be interrogated upon.

For the foregoing reasons, I will exercise my discretion in favour of the Defendants, allow the application set aside the judgment in default that was entered herein on 16/09/11 and allow the Defendants to file their defence within 14 days of the date of this ruling.

Since that judgment was regular, I will order the Defendants to pay the Plaintiff's thrown away costs of the suit to date.

Orders accordingly.

DATED and Delivered at Nairobi this 4th day of June, 2012.

……..…
A. MABEYA
JUDGE