REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 244 OF 2011

EQUITY BANK LIMITED…….……. PLAINTIFF

VS

KATHREEN WAIRIMU WAMITI ….……1st DEFENDANT

PAUL NDERITU WAMITI…….……2ND DEFENDANT

ROSEMARY NYOKABI…….……3RD DEFENDANT

RULING

1. By Notice of Motion applications dated 9th September 2011 and 10th October 2011 respectively, the 1st and 2nd Defendants have applied to this court seeking orders for setting aside the *ex parte* judgments in this matter in default of appearance on 24th August 2011.

2. The applications are based on grounds set out on the face of each application and are further supported by the affidavits of Paul M. Mwangi counsel for the 1st Defendant and that of the 2nd Defendant Paul Nderitu Wamiti respectively.

3. The 1st Defendant's contention is that judgment in default of appearance was entered irregularly as appearance had been entered on 16th August 2011 which was within the time allowed for entering appearance. She further contends that she has a very good defence to the Plaintiff's case.

4. On his part, the 2nd Defendant denies having been served with summons to enter appearance. He disputes the averments made in the affidavit of service of the process server who is supposed to have effected service and terms the affidavit as containing material misrepresentations. He also claims to have a meritorious defence to the Plaintiff's claim.

5. In response to the 1st Defendant's application, the Plaintiff through an affidavit sworn by Purity Kinyanjui, its Head of Debt Recovery Unit and filed on 3rd October 2011.In the affidavit the Plaintiff maintains that the 1st Defendant did not enter appearance within the time specified in the summons. Consequently, the Plaintiff was entitled to apply for judgment to be entered in default of appearance. The memorandum of appearance served upon the Plaintiff's advocates on 25th August 2011 was served well after judgment had been entered. It further contends that the 1st Defendant in any event has no good defence to the Plaintiff's claim as the 1st Defendant had repeatedly admitted the debt. The proposed defence by the 1st Defendant did not therefore raise any triable issues and was plainly unsustainable.

6. In respect of the 2nd Defendant's application, the Plaintiff through the affidavit of Purity Kinyanjui filed on 27th October 2011similarly claims that the 2nd Defendant failed to enter appearance within the prescribed time prompting it to apply for judgment in default of appearance to be entered. The 2nd Defendant had purported to enter appearance on 13th October 2011 which was three months after the date of service of the summons. In any event, the 2nd Defendant had no good defence to the Plaintiff's claim having admitted the debt and made several repayment proposals. The Plaintiff further denies having failed to account for proceeds of sale of the 2nd Defendant's repossessed motor vehicles.

7. I have carefully evaluated the application on the basis of the affidavit evidence tendered and the rival submissions made by counsel for the parties.

8. The issue I am required to determine is essentially whether the applications by the1st and 2nd Defendants meet the established conditions for setting aside interlocutory judgment.

9. This court has discretion to set aside default judgment under Order 10 Rule 11 of the Civil Procedure Rules and to vary or set aside any consequential decree or order upon such terms as are just.

10. The principles that the court should apply in exercising its discretion to set aside the default judgment are fairly well-settled. In **Shah Vs. Mbogo (1967) E.A 116** the court laid the following criteria:

"The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise) to obstruct or delay the cause of justice".

11. The above position was expounded further in the case of ***Morris & Company Limited vs. Victoria Minerals & Chemicals Limited & Another (2007) eKLR***where **Justice H.P.G. Waweru** held as follows:

"The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error…… Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after judgment sought to be set aside. It will also consider if the Defendant has an arguable defence to the claim."

12.The applications by the 1st and 2nd Defendants to set aside the *ex parte* judgments entered on 24th August 2011 rely heavily on the contention that they were not served with summons to enter appearance and that the affidavit of service sworn by the process server comprises of complete misrepresentation of facts.

13. In my review of the court record in this matter, I have noted that the suit in this matter was filed on 20th June 2012. Summons to enter appearance were issued on 24thAugust 2011. These required appearance to be entered within 15 days from the date of service of the summons. According to the affidavit of service by Shadrack M. Katee a duly authorized court process server, the summons to enter appearance were served upon the 2nd Defendant personally on 14th July 2011. The 2nd Defendant is also said to have accepted service on behalf of the 1st Defendant who he said was staying with him.

14. Assuming that proper service had been effected, the Defendants had up to 29th July 2009 to enter appearance. However, the 1st Defendant only entered appearance on 16th August 2011 while the 2nd Defendant appointed its advocates on 10th October 2011 both of which were way out of time.

15.The Defendants fault service of the summons to enter appearance by denying that they were served as per the affidavit of service. In my review, the affidavit of service readily admits that the 1st Defendant was never served and service of summons in respect of her was effected upon the 2nd Defendant. On his

part, the 2nd Defendant denies having been served. The Plaintiff entirely relies on the affidavit of service aforesaid as evidence of service. Faced with this position, the court is unable to confirm if indeed service was effected upon the Defendants without further evidence. Indeed, it is apparent from the affidavit of service that there may have been need to cross-examine the deponent of the affidavit to obtain further evidence that service was indeed effected. For the present purposes, the court feels inclined to exercise its discretion in favour of the Defendants given the need to guard against doing injustice in the event that service turns out to have never been properly effected.

16. With regard to the test of whether or not the Applicants have arguable defences, in the context of the present application, I am not required to evaluate whether or not the points of defence raised will upon subjecting the matter to trial succeed. I am only required to establish that the points are *ex facie* reasonable points of defence to the claim. This approach was laid down in the case of **Tree Shade Motors limited v. D.T. Dobie & Another [1995-1998] EA317 (CAK)** where the Court of Appeal held as follows:

"Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex parte judgment aside".

17.In that regard, although the Plaintiff has exhibited considerable evidence of admission of the debts by both defendants, I note from the draft defences annexed to the supporting affidavits of each of the Defendant's applications that there are a number of challenges raised to the Plaintiff's claim. Salient of these are, firstly, the exact debts owing by the Defendants and, secondly, whether the Defendant gave account of the proceeds of sale of the Defendant's repossessed motor vehicles. These challenges in my view require full interrogation within the context of a trial and cannot be determined within the present application. The Defendants should therefore, in the interest of justice be accorded an opportunity to be heard, even in the face of the evidence of admission of the debts placed before me by the Plaintiff. As**Ringera J** (as he then was) remarked in the case of **Alloys Ongaki vs. Justus ArusiWamburu& Patrick Okolla - Bungoma HCCC No. 94 of 1999 (unreported):**

"to deny a litigant a hearing should be the last resort of a court"

18. For the above reasons, I am inclined to allow the Defendant/Applicants' applications dated 9th September 2011 and 10th October 2011, respectively, with no orders as to costs.

19. The parties are directed to prepare the suit for hearing within 30 days from the date of this ruling and to fix the matter for hearing within 14 days thereafter.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 5th day of July 2012.

J. M. MUTAVA

JUDGE