

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2743 OF 1987

KENYA COMMERCIAL BANK LTD.....APPLICANT

VERSUS

NYATAIGE & ANOTHER.....RESPONDENT

RULING

This is an application of the 1st defendant for orders that the *ex parte* judgment which was entered herein against him on 3rd July, 1989, in default of appearance be set aside and that he be granted leave to file defence. The application is expressed to be brought under order IX rule 10 and order V rules 16 and 32 Civil Procedure Rules. However the proper provision under which an application to set aside an *ex parte* judgment is to be brought is order IX A rule 10 Civil Procedure Rules. The error is one of a technical nature. I excuse it.

The application names Kenya Commercial Bank Ltd, as the respondent. It is the plaintiff in the suit which is for a liquidated sum. The claim arises from financial accommodation which was extended to the applicant by the respondent sometimes in 1980. It is averred in the plaint that by 31st March, 1987 the amount outstanding was Kshs 486,102 comprising of the principal sum and interest. As at the date of the suit, viz 1st July, 1987, the sums which were allegedly due from the applicant had gone up to Kshs 499,186.75. That is the sum claimed in the plaint.

Order IXA rule 10 Civil Procedure Rules donates a discretionary power to the court to set aside or vary an *ex parte* judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just: The discretion is a free one (*Patel v EA Cargo Handling Services* [1974] EA 75). The discretion is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice (*Shah v Mbogo* [1967] EA 116). The discretion being a judicial one must be exercised upon facts not on whims or caprice (*Shabir Din v Ram Parkash Anand* 22 EACA 48).

On the basis of the foregoing principles I propose to consider the instant application. The applicant's lamentation is that he was not served with the original processes in the instant case, and only was served with a notice to show cause why his third salary could not be attached to satisfy decree in the instant suit.

This suit was filed in court on 8th July, 1987. Summons to enter appearance was as per a return of service dated 7th January, 1987, and filed in court on 28th January, 1988, served personally upon the applicant on 5th December, 1987 at the DC's office, Kisii. It was effected more or less at the same time with the one effected on the 2nd defendant, Charles Otiso Otundo. The latter was served at 2.45 pm while the former was served 15 minutes later. The 2nd defendant was served at a different place from the 1st defendant. The distance between the two places is not known. It is doubtful whether they are close to each other for the process server to have made it from one place to the other within that short time. That is however conjecture.

The return of service I have alluded to above does not state how the process server knew or identified the applicant. The plaintiff's advocates must have realized this because a supplementary return of service was filed on 3rd May 1989, dated 10th March, stating, *inter alia*, that the applicant was pointed out to the

process server by the 2nd defendant. The 2nd defendant however swore an affidavit on 28th March, 1990, denying he ever pointed out the applicant to the process server. Regard being had of the fact that the original return of service did not state that the 2nd defendant pointed out the applicant to the process server it is doubtful whether the applicant was ever served with summons to enter appearance and the plaint. The deponment by the process server in a replying affidavit he swore on 28th May, 1990 and filed in court on 29th May, 1990 in no way persuades me to change my view. He filed a sketchy, return of service initially, which coupled with the fact that the 2nd defendant denied he pointed out the applicant casts aspersions on his credibility.

In applications of this nature it is usual and essential to indicate a defence an applicant has to the claim against him. The applicant did not state the defence he has to the claim herein. I would have been inclined to dismiss his application but for the finding that he was probably not served with summons to enter appearance and the plaint. Where service is defective it will, to my mind be unconscionable to insist on an applicant showing he has a defence to the claim before a court can exercise its judicial discretion in his favour.

I grant his application, set aside the *ex parte* judgment entered on 3rd July, 1989, and any consequential orders. Costs of this application to abide the outcome of the suit. Reference to be filed within 15 days from the date hereof. Orders accordingly.

Dated and Delivered at Nairobi this 7th Day of June 7, 1990

S.E.O. BOSIRE

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JUDGE