REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 461 OF 2017

JULIA WAMBUI MWANGI .... PLAINTIFF/RESPONDENT

VS

FAMILY BANK LIMITED ....1ST DEFENDANT/APPLICANT

RUTH NJERI KARANJA .... 2ND DEFENDANT/RESPONDENT

NAIROBI CHANNELS AUCTIONEERS .... 3RD DEFENDANT/RESPONDENT

RULING

1. On the 12/2/18 the 1st Defendant/Applicant filed a Notice of Motion seeking orders to set aside interlocutory judgment entered on the 4/12/17 in default of appearance and defence and to be permitted to defend the case.

2. The application is supported by the grounds stated therein as follows;

   a. The Plaintiff's Advocate requested for interlocutory judgement on 4/12/18.

   b. The interlocutory judgement was entered on the 4/12/17 and the matter was set for formal proof on the 15/1/18 and the same has been adjourned to 19/2/18.

   c. The 1st Defendant filed an application dated 19/12/17 seeking enlargement of time for filing the Memorandum of appearance and the statement of defence from the date when they became due.

   d. The 1st Defendant/Applicant will be condemned unheard should this application be dismissed.

   e. In the interest of justice and fairness that the interlocutory judgment entered on 4/12/17 be set aside.

3. It is supported by the affidavit of the Applicant sworn by Kelly Malenya Advocate on the 22/1/18 and 19.12.17. In it, he deponed and attributed the delay in filing the memorandum of appearance and defence on the departure from their law firm of the Advocate who had conduct of the matter. That the mistake is not willful but an oversight on the part of the law firm and is highly regrettable. That the mistake of the Advocate should not be visited on the 1st Defendant Applicant. He pleaded with the Court to give the Applicant the chance to present its defence. That the Plaintiff stands to suffer no prejudice as the final judgment has not been granted. He beseeched the Court to allow the application and the Applicants statement of defence on record be deemed properly filed in order for the matter to be heard on its merits.

4. In opposing the application, the Plaintiff in her Replying Affidavit stated that the Applicant has not indicated the name of the Advocate who was supposed to have filed the Memorandum and appearance on behalf of the 1st Defendant Applicant. That it would then be fair to conclude that no advocate made a mistake and/or omission in entering appearance and/or filing defence. She stated that that the said Advocate should have made a deposition on the said account of events. She contended that she stands to suffer prejudice if the judgment in her favour is set aside for no plausible reason given to the Court. Further she discounted any prejudice to be suffered by the applicant as it is relying on a fraudulent contract and /or charge document to cause the Plaintiff's property to be disposed by way of public auction.

5. The 2nd and 3rd Respondents did not oppose the application.

6. The Applicant filed its written submissions which I have read and considered. The Plaintiff did not file any written submissions but elected to rely entirely on the Replying affidavits dated 5 /2/18 and 23/2/18.

7. The issues for determination by this Court are;

   a. Whether there is sufficient explanation for the delay in filing the defence?

   b. Whether there is a meritorious defence?

   c. Whether the 1st Respondent will be prejudiced by the setting aside of the interlocutory judgement.

   d. Costs.

8. The Civil Procedure Rules donate power to the Court to set aside judgments. It has unfettered discretion to do so but under certain principles. Order 10 Rule 11 of the Civil Procedure Rules states that where judgement has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Whether there is sufficient explanation for the delay in filing defence?

9. The instant suit together with a Notice of Motion were filed on the 25/9/18. On the same day the Court ordered that the application by way of Notice of Motion be served on the Defendants for interpartes hearing on the 3/10/17. Similarly, on the same day the summons to enter appearance were extracted and are on record. It is on record that the 1st Defendant was served with the summons to enter appearance on the 27/9/17. The 1st Defendant was therefore duty bound to file their memorandum of appearance and defence 15 days upon service of the summons. None was filed. On the 7.11.2017 the Plaintiff filed a request for judgment against the 1st Defendant for failing to enter appearance and file defence within the prescribed time. On the 4/12/17 interlocutory judgement was entered and the matter was listed for formal proof. This is the subject of this ruling.

10. The fact of service of summons on the 1st Defendant is not in dispute. The applicant has attributed the delay in filing the statement of defence on the mistake of counsel for the Applicant and has urged this Court not to visit the mistake on the Applicant. Advocates have a duty to their clients to act in a professional and diligent manner and to the Court to facilitate the due administration of justice, they being officers of the Court. It is to be appreciated that Advocate firms like any other employer would go through changes of employees from time to time. That notwithstanding it does not excuse them from their responsibility to the Client and to the Court. It has been held time and again that a litigant should not suffer due to the transgressions of their Advocates. However, litigants are also duty bound to ensure that their Agents/Advocates attend court and prosecute the cases as they should. The reason advanced by the applicant is not convincing.

Whether there is a meritorious defence?

11. In the case of **Tree Shade Motors Limited Vs D.T Dobie 7 Company (K) Limited and Joseph Rading Wasambo CA 38 of 1998**, the Court observed that the Court must satisfy itself that the Applicant has a defence that raises triable issues to warrant the setting aside of an interlocutory judgement. Similarly, in the case of **Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd – v- Augustine Kubende (1982-1988)1 KAR 1036** the Court of Appeal stated;

> "…….Where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied there was a triable issue ……".

> In this instant case, it is a regular judgement being set aside and therefore the Court is invited to inquire whether the applicant has a valid defence.

12. It is on record that the Applicant has annexed a draft statement of defence. In it, the 1st Defendant denies fraud and insists that it followed all the legal processes in advancing the loan facility and in securing and recovery of the security which is the LR No LOC 2/Kangari/3373.

13. In the case of **Patel – Vs – Cargo Handling Services** the Court of Appeal considered the meaning of defence and stated that;

> "In this respect, a defence on the merit does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a 'triable issue'.

> Having considered the statement of defence annexed to the Application on record, I am persuaded that there are triable issues such as allegations and counter allegations of fraud that would be best tried in a trial so that the Court can determine the matter on its merits.

Whether the Plaintiff/Respondent will be prejudiced by the setting aside of the interlocutory judgement.

14. The Plaintiff/Respondent in her replying affidavit has opposed the application on grounds that she is aged and granting the application will prejudice her. She did not disclose to the Court how she will be prejudiced. It must be noted that directions to set down the matter for hearing of the formal proof had not been granted, although at this stage it is a natural consequence of events in the matter. If there is any prejudice to the Respondent, which this Court has not found, it will be in the form of time lost which can be compensated by costs in the case. Perhaps this is what the Plaintiff had this in mind when it sought costs in the sum of Kshs 60,000/-.

15. In the case of **Sebei District Administration Vs Gasyali (1968) EA 300** the Court held that an aggrieved party can be reasonably

compensated by costs for the delay occasioned by setting aside the interlocutory judgement. That to deny a party a hearing should be the last resort of a Court. Taking into account the circumstances of this case, and the balance of convenience, the Court finds no prejudice on the Respondent that cannot be remedied with the compensation in costs. In this regard the Plaintiff shall have the costs of the application.

16. In the circumstances of this case, the material presented before me and in the interest of justice, this Court makes the following orders; -

(a) That the interlocutory judgement entered on 4/12/17 be and is hereby set aside.

(b) That draft statement of defence dated the 18/12/17, subject to payment of the requisite Court filing fees, be and is hereby deemed to have been filed on record. The same to be served on the parties within 14 days from the date of this ruling.

(c) Parties be at liberty to list the matter for Pretrial once order b). above is complied.

(g) The 1st Defendant to pay costs of this application to the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19TH JULY 2018.

J. G. KEMEI

JUDGE

Judgment read in open Court in the presence of;

Mr Ndegwa HB for Mr Mugo Moses for the Plaintiff.

Mr Malenya for the 1st Defendant

2nd Defendant Absent

3rd Defendant

Ms. Irene and Mr Wainaina, Court Assistants.