



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

HCCC NO. 14 OF 2016

SHERACCO CO-OP SAVINGS AND

CREDIT SOCIETY LIMITED.....PLAINTIFF

VERSUS

KARUTURI LIMITED

(Under Receivership).....1ST DEFENDANT

CFC STANBIC BANK LTD.....2ND DEFENDANT

RULING

1. This suit was instituted by a plaint dated 19th March 2016. The firm of Iseme Kamau & Maema Advocates entered appearance and filed a defence for the 2nd Defendant CFC Stanbic Bank Ltd. The 1st Defendant is under receivership since the 10th February 2014. Leave to sue the 1st defendant was obtained vide **Nakuru High Court Misc. Application No. 103 of 2016** on the 15th March 2016.

2. The plaintiff's claim against the Defendants jointly and severally is for a sum of Kshs.24,936,647/97 as at 7th February 2016 plus interest at 5% per annum on compound interest basis upto full payment. It is stated to be the total sum deducted by the Defendants from the plaintiff's members monthly salaries but which the defendants failed to remit to its members savings – with the plaintiff.

3. A perusal of the affidavit of service filed on the 11th April 2016, shows that both Defendants were duly served with the plaint and all documents annexed thereto on the 22nd March 2016. The Legal officer one Erick Otongolo upon receipt signed on the face of the summons to enter appearance the same day that the 1st Defendant was also served.

4. The 2nd Defendant entered appearance on the 6th April 2016 but failed to file its defence.

Upon request the plaintiff obtained interlocutory judgment for the liquidated claim and a decree issued on the 23rd May 2016.

5. **By an Application dated 12th August 2016 the 2nd Defendant sought orders.**

1. Spent

2. Spent

3. That this court be pleased to set aside the default judgment and decree issued on the 23rd May 2016 and all consequential orders and the defendant be granted leave to defend the suit.

6. Grounds for the application are stated on the face of the application and in the affidavit of the Senior Legal Officer of the 2nd Defendant.

7. The Respondent opposes the application by a Replying Affidavit sworn on the 30th March 2017 by the Chairman of the plaintiff. Parties filed written submissions.

8. I have considered the rival submissions.

The 2nd defendant placed the 1st defendant under receivership in February 2014 and appointed its own receivers and managers.

There is no dispute that the plaintiff obtained leave of court to institute and proceed with court proceedings against the 1st Defendant in Misc. Application No. 103 of 2016 on the 15th March 2016 before filing the case on the 19th March 2016.

This is inline with provisions of **Section 228 of the Companies Act**.

9. **Section 432(2) Insolvency Act** states that

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be began or continued only with approval of the court and subject to such conditions as the court considers appropriate.”

Section 228 Companies Act is to the same effect.

10. Once the original leave is obtained, it is my opinion that no further leave is required to continue with the case - **Republic–vs- Lucas M. Maitha Chairman, Betting Control & Licensing Board and 4 Others Exparte Interactive Gaming and Lotteries Ltd (2017) e KLR, and Section 432(2) of the Insolvency Act**.

11. The Applicant has not demonstrated to the court why or for what reasons it failed to file its defence after filing is Memorandum of Appearance save its submission on the application of **Section 228 of the Companies Act, and Section 432(2) Insolvency Act** which I do not think concern itself as it is not under receivership or liquidation. The court has not been told that the 2nd defendant is the receiver of the 1st Defendant.

12. I note that the applicant was also served with the notice of entry of judgment on 22nd April 2016. It was therefore well aware of the judgment against itself. It has also not been explained why it took over four(4) months to approach the court for the reliefs it seeks.

13. The applicant too has not explained why it is arguing the 1st Defendant’s case yet as I have stated above, the application is by and for itself alone. The legal firm of Iseme Kamau & Maema Advocates as far as the court record shows acts for the 2nd Defendant only.

To that extent I find the applicant’s submissions and averments in its supporting affidavit to be irrelevant to the present application.

14. Essentially setting aside an exparte judgment is at the discretion of the court. Failure by a party to file defence must be sufficiently explained – **Multiscope Consulting Engineers –vs- University of Nairobi & Another (2014) e KLR**.

The discretion is intended to be exercised to avoid injustice or hardship resulting from either accident, mistake or inadvertence or excusable mistake or error but not designed for a party which deliberately seeks to delay or cause injustice – **Maina –vs- Muriuki (1984) e KLR 407, and Order 10 rule 11 CPR**. See also **Python Waweru Maina –vs- Thuku Mugiria (1983) e KLR**.

15. The applicant has been frank and honest as to its failure to file the defence, being its understanding of the application of the two statutory provisions – Paragraph ii above.

The court by its unfettered discretion may set the *exparte* judgment aside if it is persuaded that justice will be done by doing so.

The decretal sum is no doubt colossal. The 1st defendant is being wound up.

16. Under **Order 20 rule 11 of CPR** the court has power to set aside an ex parte judgment upon terms if the intended defence raises trial issues and with the aim of doing justice to both parties – **Mbogo & Another -vs- Shah and Jaribu Holdings -vs- Kenya Commercial Bank – CA No . 314/2007**, and applied in **Kenya Power & Lighting Co. Ltd. -vs- Abdulhakim Abdulla Mohamed & Another (2017) e KLR**.

It is draconian to shut out a party from being heard if the situation can be reversed, for ends of justice to be done to both parties.

This was rendered by the Court of Appeal in **D.T.Dobie & Co. (Kenya) ltd –vs- Muchina (1982) KLR 1**.

17. Looking at the intended defence it cannot be said to be frivolous, scandalous, offensive or an abuse of the court process. It shows some semblance of a cause of action, and triable issues, albeit having been filed out of time and without leave of the court.

I am persuaded that the applicant is not deliberately trying to delay or cause justice by the application.

18. For the above reasons, I shall exercise my discretion in favour of the applicant and allow the application dated 12th August 2016 but upon terms and condition that

- 1. The ex parte judgment entered against the 2nd defendant and all consequential orders hereof are hereby set aside.*
- 2. The 2nd defendant is granted leave to defend the suit by filing and service of its defence within 7 days of this ruling.*
- 3. That the 2nd defendant shall pay throw away costs of the suit to the plaintiff, taxed or agreed within 45 days of this order.*
- 4. In default and non-compliance by the 2nd defendant of (2) and (3) above, the orders shall lapse.*

Dated, signed and delivered this 21st Day of February 2019.

J.N.MULWA

JUDGE



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