REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 390 of 2001

KENYA FINANCE BANK LTD

(IN LIQUIDATION) ……PLAINTIFF

VERSUS

FIRMWAY WOOD INDUSTRIES LTD …… 1ST DEFENDANT

JOSEPH MUTURI……2ND DEFENDANT

RULING

1. Default judgment was entered against the defendant on 26th June 2001. On 8th May 2008 the Defendants filed a Chamber Summons under **Order 9A Rule 8** and **Order 21 Rule 22** of the **Civil Procedure Rules**. The Defendants are seeking for an order of stay of execution of the decree issued on 10th November 2003 pending the hearing and determination of this application. Secondly, the judgment entered against the Defendants be set aside. This application is premised on the grounds stipulated on the body thereto. Those grounds are elaborated in greater detail by the matters deposed to in the supporting affidavit sworn by Joseph Muturi on 8th May 2008.

2. Both Defendants deny that they were served with the summons to enter appearance, according to the 2nd Defendant, it was not until 27th April 2008 when he received a call from somebody informing him that he intended to serve upon him with a notice to show cause. The summons to enter appearance in this case was served upon the 1st Defendant by registered post. Counsel for the Plaintiff

obtained the leave of the court to serve the summons upon the 2nd Defendant by way of advertising. That leave was sought by the application dated 19th December 2002.

3. The 2nd Defendant denies that he was likely to have been in Kenya at the time the notice of the suit was published in the newspapers, and therefore, was not able to know about the case. The Defendants are also challenging the validity of the summons which they contend had expired by the time they were renewed by a court order.

4. This application was opposed, Counsel relied on the replying affidavit sworn by L. A. Wambete sworn on 1st December 2008. The Plaintiff insists the summons to enter appearance were duly served, first there were efforts to trace the Defendants which were futile, an application dated 19th December 2002 was filed to extend the validity of the summons. The validity was extended and the defendants were served after leave was obtained from court to serve them by way of substituted service. An advertisement was carried out in the Nation Newspaper of the 15th September, 2003. The Defendant did not enter appearance and no defence was filed. The plaintiff applied for judgment which was entered on 12th November 2003. The application by the Defendant was dismissed as a mere attempt to delay the conclusion of this matter which has been in court for the last eight years. The application is also said to be incompetent for failure to comply with the provisions of the law.

5. Both counsel for the Defendant and Plaintiff filed written submissions in support of their respective positions. The Plaintiff's claim is for a liquidated sum of Kshs.38,031,932.05. This application seeks for both setting aside of the default judgment and stay of execution of the decree.

6. The first issue to determine is whether the judgment against the Defendants was regularly obtained. The second issue is whether the defence which the Defendant intends to file raises triable issues. Under **Order IX (a) r 10** of the **Civil Procedure Rules** it is provided as follows:-

> ***"Where judgment 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."***

In the case of **Ceneast Airlines Ltd v Kenya Shell Ltd East African Law Reporting [2000] 2 EA**

362(CAK) the Court of Appeal cited with approval a passage by Duffus P. In the case of **Patel v East Africa Cargo Handling Services [1974] EA** as follows:-

"The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on he merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication".

7. There is an affidavit by the Process Server which show several attempts which were made to serve the summons without success. Eventually the summons expired and an application was made seeking the extension of the validity of the summons and also seeking to serve the summonses by substituted service. On 15th September 2008 an advertisement was carried in the Daily Nation notifying the Defendants of the suit and requiring them to enter appearance within 21 days. No appearance was entered and default judgment was entered on 12th November 2003.

8. The 2nd Defendant denies that he was in the country or that he saw the advertisement. Under **Order 5 Rules 17** substituted service is permitted if the court is satisfied that the summons could not be served personally. Leave having been granted to the Plaintiff to use the substituted method of service the Defendants have not been able to persuade me that service was defective. The 1st Defendant claims to have been out of the Kenya; if that was the case, the 2nd Defendant should know where he was on the 15th of September 2003. If he was out of the country nothing would have been easier than for him to annex documentary evidence such as passport or other travel documents to show he was out of the country.

9. I find judgment was regularly obtained against the Defendants after the 1st defendant was served by registered post and the 2nd Defendant by advertisement in the Daily Nation.

10. When determining an application seeking to set aside a default judgment, the court has to determine whether the defence raises triable issues. The court is obliged to consider whether a draft defence which is filed with the application to set aside, raises triable issues. I have looked at the draft

defence which is annexed to this application. The Defendants claim that their property was sold and the entire loan advanced was recovered sometimes in 2004. This however is contradicted by the averments on paragraph 8 of the draft defence when the Defendants claim that they had agreed with the plaintiff to pay a sum 1 million on the account, and that would settle the entire account. Unless there is a typographical error, that defence in my opinion does not raise any triable issue. Moreover, when the 2nd Defendant makes allegations of payment by way of averments, in his supporting affidavit, he should have annexed receipts of payment to show that he had actually settled the outstanding account. The upshot of the above is that the application by the Defendants to set aside the judgment fails with costs to the Plaintiff.

RULING READ AND SIGNED ON **11th December 2009** AT NAIROBI.

M.K. KOOME

JUDGE