Shyoni Ltd v Sarah Mbithe Mutinda Kivuva Practicing as S. Mutinda & Co. Advocates (Civil Case 116 of 2010) [2023] KEHC 1660 (KLR) (Commercial and Tax) (21 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 116 OF 2010

NW SIFUNA, J

FEBRUARY 21, 2023

BETWEEN

SHYONI LTD ..... PLAINTIFF

AND

SARAH MBITHE MUTINDA KIVUVA PRACTICING AS S. MUTINDA & CO. ADVOCATES ..... DEFENDANT

RULING

1. This court (Njagi, J) on March 13, 2010 entered against the defendant, an ex parte judgment in default of appearance and defence. Twelve years later, the defendant (now judgment-debtor) files this notice of motion dated February 18, 2020 seeking the following orders:

    a) (Spent)

    b) That there be a stay of execution of the judgment, decree and any consequential orders arising therefrom, until the application is heard and determined.

    c) That the plaintiff and its auctioneer Bealine Auctioneers be restrained from tampering with her current position having by a court order, been declared bankrupt.

    d) That she be allowed to defend the suit and the ex parte judgment be set aside/stayed and/or reviewed, together with all its consequential orders.

    e) That leave be granted to her to file a defence, and the suit be fixed for hearing.

2. The application on its face states that it is based on the following three grounds:

    a) That the defendant was not served with summons, plaint, verifying affidavit, witness statement, and documents.

b) That the defendant acted in her capacity as an advocate, hence not liable to the claims raised by the plaintiff.

c) That the defendant has been declared bankrupt and the position has not changed todate.

3. The application on its face states that it has been brought under order 10 rule 10, order 22 rule 22 (1) & (2) of the *Civil Procedure Rules*; as well as section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya.

The arguments of parties

4. The defendant filed a further affidavit as well as written submissions (dated February 2, 2023). She in her said submissions reiterated the prayers and grounds in her application. She has also in the submissions filed in support of this application cited *Giella v Casman Brown Ltd [1973] EA 358*, apparently in support of the injunctive relief sought in prayer 2 of the application.

5. The plaintiff for its part stated that it was not filing any written submissions, and that it is instead relying on the replying affidavit of Patrick Muchemi Gitonga its director. In which it opposed the application for being belated, and lacking merit. But at the highlighting session added that it is unfortunate that an advocate who received and is holding a client's money on a sale transaction and in respect of which she has given a professional undertaking, can start looking for all manner of excuses to avoid releasing the money to the client.

Analysis and determination

6. This court has identified two main issues for determination in this application, namely:

(a) Whether the ex parte judgment entered by this court (Njagi J) against the defendant was a regular judgment or an irregular judgment.

(b) Whether the said judgment should be set aside, and the defendant granted leave to defend the suit.

7. It is important to from the outset note that the power of the court to set aside an ex parte judgment is discretionary. The discretion should however be exercised judiciously, and in a manner that promotes justice and the rule of law. It was held in *Mbogo v Shah [1967] EA 166*, that the object of that discretion is to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but that it is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.

8. In an application to set aside an ex parte or default judgment such as is the case here, the applicant must show, at the very minimum two things:

(a) That he/she was not aware of the suit for want of service, or that the service was improper; and

(b) That he or she has a good defence that raises triable issues determinable only after a hearing.

9. On an application of this nature, a diligent applicant will have annexed to the application, a draft defence in which he or she has controverted and answered to the plaintiff's claim. A setting aside application that bears no draft defence such as this one, commends itself for dismissal.

10. Mere lamentations by the applicant, as is the case in this application, are not enough. This is a court of law, and not a court of conjecture, emotions, mercy or sympathy. As such, it can only be persuaded, not by mere lamentation and emotion-whipping, but by the applicant diligently laying before court,

compelling facts and evidence; as well as demonstrating diligence. The application should also be grounded on law and established legal principles. Therefore, an applicant in this kind of application, should not merely lament and hope that the court will be moved by such lamentation and just set aside the judgment.

11. Setting aside a duly entered judgment where the defendant has not annexed to the application their intended or proposed defence to the plaintiff's claim, will be arbitrary, whimsical and speculative. In applications to set aside judgment, the applicant need supply the court with tangible material on which to exercise its discretion. Judicial discretion must be exercised judiciously, and not in the manner urged by this applicant. Courts should not be expected to act like fortune-tellers and magicians.

12. This being a court of justice and equity, it must balance the judgment-debtor's interest and rights, with the decree-holder's interest and rights. More specifically, while the judgment-debtor has a right to defend the suit, the decree-holder has a right to enjoy the fruits of its judgment. This is a delicate balancing act. Before judgment, both parties to the suit are at arm's length as their respective positions in relation to the suit claim will not have been determined yet. But after judgment, fortunes will have changed, with one party having an upper hand over the other; usually the decree-holder in whose favour the judgment has been made and who needs to enjoy the fruits of its judgment.

13. For the losing party to upset the tables again, he or she will need to place before the court tangible and sufficient enough material, especially where an affidavit of service has been filed and is on record. Otherwise merely denying that you were served is not enough; and neither does it pose a formidable and legally sufficient challenge to an affidavit of service on record. To challenge the service, one has to not only deny having been served, but go further and contest the contents of an affidavit of service, as well as its truthfulness, credibility, and even point out other defects and impropriety in it, or of the service itself. Such contestation is usually peaked by applying to cross-examine the process server on his filed affidavit of service. In the case of this applicant, there has been no potent challenge to the affidavit of service of Wambugu Gitonga,sworn and filed herein on March 17, 2010.

14. This court (Njagi, J) at page 3 of its judgment held that service had been effected, and stated that the affidavit of service on record showed that the defendant was served on March 11, 2010. That despite having been served, she did not enter appearance. Simply denying that you were served and not bothering to go beyond that denial, as is the case with the defendant herein, does not provide the court with enough fodder on which to set aside an impugned judgment on ground of improper service, or the lack of it.

15. The defendant has in the submissions filed in support of this application cited Giella v Casman Brown Ltd [1973] EA 358, apparently in support of the injunctive relief sought in prayer 2 of the application. With due respect, the principles laid down by the East Africa Court of Appeal in that case, were for interlocutory injunctions, where a suit is pending. Typically for applications brought under order 40 of the Civil Procedure Rules 2010, and not a setting aside application brought under order 10, such as this one.

16. The impugned judgment although ex parte, is regular, and is hereby upheld. The defendant having failed to show sufficient cause for setting it aside, her application is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2023.

PROF NIXON SIFUNA

JUDGE

Delivered in the presence of:

Ms Awino for the Defendant/Judgment-Debtor

Ms Wangechi Mwangi h/b for Mr Gitonga for the Plaintiff/Decree-Holder

Dennis Nyaga- Court Assistant