



African Banking Corporation Limited v Zeituns Holdings Limited & 5 others (Civil Suit 648 of 2005) [2022] KEHC 40 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 40 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 648 OF 2005
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

AFRICAN BANKING CORPORATION LIMITED PLAINTIFF

AND

ZEITUNS HOLDINGS LIMITED 1ST DEFENDANT

ABDIRIZAK MAALIMU AHMED 2ND DEFENDANT

JABRI ABDULNASSIR SEIF 3RD DEFENDANT

SONIA WANJIRU 4TH DEFENDANT

ANITA NYAMBURA 5TH DEFENDANT

CHIEF LANDS REGISTRAR 6TH DEFENDANT

RULING

1. On 9th April 2021, this court concluded this matter on the following terms:
 - a. Judgment be and is hereby entered for the Plaintiff against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and severally for KES 227,626,588.49.00 save that judgment against the 2nd, 3rd, 4th and 5th Defendants shall be limited to KES 84,000,000.00 for each defendant.
 - b. Interest (a) shall accrue at court rates from the date of filing suit.
 - c. The suit against the 6th Defendant is struck out.
 - d. The 1st, 2nd, 3rd, 4th and 5th Defendants shall bear costs of the suit.



2. What is now before the court is a Notice of Motion dated 9th July 2021 by the 4th Defendant seeking to set aside the judgment against her under the provisions of Order 10 rule 11 of the Civil Procedure Rules. The application was supported by her affidavit sworn on 9th July 2021. The Plaintiff (“the Bank”) opposes the application through a Notice of Preliminary Objection dated 19th July 2021 and the replying affidavit of Louis Omukhulu, it Legal Officer, sworn on 17th September 2021.
3. The thrust of the application is that the 4th Defendant was never served with the Plaint and Summons to Enter Appearance, that she never received any notice to attend court for any hearing or delivery of judgment and that she never instructed the firm of Busaidy, Mwaura, Ng’arua and Company Advocates (“the Advocates”) to act for her in this matter. She also depones that she was out of the country when the hearing proceeded. She states that she has a good defence to the suit and prays that she be given an opportunity to present her case.
4. On the issue of service, Mr Omukhulu depones that the Bank’s process server duly effected service on the 1st Defendant and was informed to see the Defendants’ Advocates who informed him that they had instruction to receive Summons on behalf of the 1st, 2nd, 3rd, 4th and 5th Defendants. Subsequently, the Advocates filed a Memorandum of Appearance dated 25th September 2018 and a Statement of Defence dated 17th October 2018 on behalf of the 4th and 5th Defendants. The Bank states that even after judgment was delivered, the Defendants not only filed an appeal to the Court of Appeal but also filed an application seeking to stay the judgment hence the 4th Defendant cannot at the same time file an application to set aside judgment.
5. The application before the court is one to set aside judgment for want of service and consequent ex-parte proceedings under Order 10 rule 11 of the Civil Procedure Rules. the general principle is that the court has unfettered discretion to set aside judgment on such terms as it deems fit and just. This principle was summarized as follows in *Shah v Mbogo and Another* [1967] EA 116:

The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

More recently the Court of Appeal in *Richard Nchapai Leiyangu v IEBC & 2 others* NYR CA Civil Appeal No. 18 of 2013 [2013] eKLR expressed itself as follows:

We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

6. In this case, the Bank claims that it served the Advocates who informed its process server that they had instructions to accept service on behalf of the Defendants including the 4th Defendant. Service on an agent is permitted as Order 5 rule 8 of the Civil Procedure Rules provides that:
 - 8(1) Wherever, it is practicable, service shall be made on the Defendant in person, unless he had an agent empowered to accept service, in which case service on the agent shall be sufficient.



- (2) A summons may be served upon an advocate who has instructions to accept service and to enter appearance to the summons and judgment in default of appearance may be entered after such service.
7. The issue in this case is whether the Advocates had instructions to accept service on the 4th Defendant's behalf. The Advocates filing the Memorandum of Appearance and Statement of Defence impliedly admitted that they had instructions to so act on behalf of the 4th Defendant. I cannot fault the service of the Summons to Enter Appearance on the Advocates who held themselves out as agents of the 4th and 5th Defendant in this matter. On the other hand, the Advocates did not file any affidavit contesting the very grave allegation that they did not have any instructions to file the defence on behalf of the 4th Defendant. That they elected to keep mum in view of such serious allegation must be deprecated and they shall now show cause why they should not pay the costs of the application. If anything, had they explained their position, the court time and parties expense would probably have been saved.
8. At the end of the day, I have to decide whether to set aside the judgment. Under sub-rule 8 aforesaid, the Advocates must have instructions to accept service. The Advocates who are still acting for the other Defendants in this matter, have not denied the 4th Defendant's assertions. In the circumstances, I am constrained to give the 4th Defendant the benefit of doubt and hold that service was not effected in terms of Order 5 rule (8)2. In *James Kanyita Nderitu & Another vs. Marios Philotas Gbikas & Another* MSA CA Civil Appeal No. 6 of 2016 [2016] eKLR the Court of Appeal held that, "if there is no service of summons to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex-debito justitiae. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the Judicial process."

Disposition

9. For the reasons I have set out above, I allow the 4th Defendant's application dated 9th July 2021 on the following terms:
- a. The Judgment dated 9th April 2021 be and is hereby set aside only in respect of the 4th Defendant.**
 - b. The 4th Defendant shall file and serve its Statement of Defence within 7 days from the date hereof.**
 - c. The firm of *Busaidy, Mwaura and Ng'arua and Company Advocates shall show cause why it should not pay costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Owino instructed by Kimani Michuki Advocates for the Plaintiff.

Mr Murambi instructed by Musyoka, Murambi and Associates Advocates for the 4th Defendant.

Mr Memba instructed by Busaidy, Mwaura and Ng'arua and Company Advocates for the 1st, 2nd, 3rd and 5th Defendants.

