



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO.E126 OF 2018**

**CLAIRE NJERI MUIGAI.....APPLICANT/DECREE HOLDER**

**VERSUS**

**LARRY M. CONSULTING LIMITED**

**T/A HALIFAX SYSTEMS.....RESPONDENT/JUDGMENT DEBTOR**

**AND**

**FAMILY BANK LIMITED .....GARNISHEE**

**RULING**

1. This ruling in respect to the application dated 29<sup>th</sup> May 2019 wherein the judgment debtor/applicant seeks the following orders:

***1. That this Honourable court be pleased to grant leave for the respondent/applicant advocates, MNP & Associates Advocates, to enter appearance and file a Notice of Appointment.***

***2. That this Honourable Court be pleased to stay its orders made ex-parte on the 27<sup>th</sup> November 2018 and 11<sup>th</sup> April 2019 pending the hearing and determination of this application.***

***3. That the Honourable court pleased to set aside its orders made ex-parte on the 27<sup>th</sup> November 2018 and 11<sup>th</sup> April 2019 and any consequential orders thereto.***

***4. That costs be provided for.***

2. That application is supported by the affidavit of **Lawrence Maina**, the applicant's Director and is premised on the grounds that the applicant is reasonably apprehensive that the decree holder may proceed with execution of orders obtained ex-parte on 27<sup>th</sup> November 2018, recognizing the arbitral award, and 11<sup>th</sup> April 2019, for garnishee order nisi, unless this court intervenes.

3. The applicant states that it is desirous to have its day in court and to have the matter determined on its merit as it was not served with the applications for recognition of the Arbitral Award and for the garnishee orders.

4. The respondent/decree holder opposed the application through her replying affidavit dated 6<sup>th</sup> June 2019 wherein she avers that the applicant was duly served with the application for recognition and enforcement of the Arbitral award. She attached copies of affidavits of service and receipt of postage dated 26<sup>th</sup> October 2018 as annexures "CNM1" and "CNM2" to her replying affidavit. She aver that the applicant neglected/declined to honour the court order thereby prompting her to engage the services of auctioneers to execute the court decree, which execution was not successful.

5. She further states that the applicant was subsequently served with all the court processes in respect to the garnishee proceedings that she initiated after the execution of decree through the attachment of applicant's movable property bore no fruits. She attached copies of affidavits of service and certificates of postage as annexures CNM6, 7a, 7b, 8, 9, 10 and 11 to her replying affidavit.

6. She contends that she will suffer great prejudice if the prayers sought by the applicant are granted as the applicant has shown blatant disregard to the court's orders and is likely to withdraw all the funds in its account in order to frustrate her realization of the fruits of her

decree.

7. It is the decree holder's case that the applicant should be compelled to comply with the court order issued on 11<sup>th</sup> April 2019 and immediately settle the decretal sum of Kshs 1,026,779.90 together with interest thereon.

8. On 10<sup>th</sup> June 2019, prayer No. 1 of the instant application was allowed by consent after which directions issued that the instant application be canvassed by way of written submissions to be filed before 17<sup>th</sup> September 2019 when the same was listed for highlighting of submissions. The matter did not however proceed on 17<sup>th</sup> September 2019 and was by consent rescheduled for highlighting of submissions on 13<sup>th</sup> November 2019.

9. On 13<sup>th</sup> November 2019, the applicant/Judgment Debtor did not attend court and had not filed written submissions while counsel for the decree holder was present and had filed submissions which I have carefully considered.

10. Considering that the applicant/judgment debtor did not file submissions or attend court to prosecute its application, the instant application ought to be dismissed for want of prosecution. The court is however, in the interest of justice, still minded to consider the merits of the application.

11. The gist of the application is to set aside the orders made on 27<sup>th</sup> November 2018 and 11<sup>th</sup> April 2019 on the basis that the applicant was not served with the said applications that gave rise to the said orders.

12. On her part, the decree holder maintains that the judgment debtor was duly served with all the applications and hearing notices before the impugned orders were made.

13. The principles governing the setting aside of judgment or orders on grounds of lack of service were discussed in the famous case of *Shah v Mbogo & Another* [1967] EA 116 as follows:

***“applying the principles that the court’s 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 error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.....”***

14. In the present case, I note that on 22<sup>nd</sup> November 2018, prior to granting the impugned order recognizing the Arbitral Award issued on 27<sup>th</sup> November 2018, Makau J. noted that the application dated 16<sup>th</sup> October 2018 had been duly served on the judgment debtor and that the said application was unopposed. I have also perused the affidavit of service in respect of service of the application dated 16<sup>th</sup> October 2018 scheduled for hearing on 22<sup>nd</sup> November 2018 and I note that the judgment debtor was duly served by way of registered post as shown in the decree holders annexures “**CNM1 and 2**”.

15. Turning to service of the application dated 8<sup>th</sup> April 2019 that gave rise to the impugned order of 11<sup>th</sup> April 2019, I note that the judgment was similarly duly served with the said application and mention notice as exhibited in the decree holders annexures marked **CNM6** and **7(a)** and **(b)**.

16. Having found that the judgment debtor was properly served with the applications, and hearing notices I find that the applicant herein has not made out a case for the granting of the discretionary orders to set aside the impugned orders.

17. It is quite clear to this court that the applicant opted to ignore court summons despite proper service and only woke up from its deep slumber upon noting that garnishee proceedings had been instituted against it. To my mind, the applicant has not shown any sufficient reason for its failure to turn up in court when required and is therefore not entitled to the orders sought in the application.

18. Consequently, I find that the instant application is not merited and I therefore dismiss it with costs to the decree holder.

**Dated, signed and delivered in open court at Nairobi this 30<sup>th</sup> day of January 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Maingi for Miss Weswa for the applicant.

Mr. Otieno for Mwangi for the respondent

Court Assistant – Sylvia