REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL SUIT NO. 01 OF 2018

ELIZABETH KAVERE.....1ST PLAINTIFF

TERESA GIMISI.....2ND PLAINTIFF

VERSUS

LILIAN ATHO.....1ST DEFENDANT

REAL TIME COMPANY LTD.....2ND DEFENDANT

RULING 2

1. This is a ruling on an application for the setting aside of a judgment entered on 2nd October 2018 in default of appearance and defence upon a Request for Judgment dated 17th September 2018, pursuant to Order 10 Rule 4 of the Civil procedure Rules, 2010 as follows:

> ***"Orders***
>
> ***For the reasons set out above, in accordance with Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010, Judgment shall be entered in favour of the Plaintiffs as against the 1st defendant only for the liquidated claim of ksh.25,537,900/- together with interest at court rates from the date of the suit and costs of the suit."***

2. The 1st defendant now seeks the setting aside of the default judgment on the principal grounds that the entry of the default judgment was irregular; that she has a defence which discloses triable issues which ought to be heard on the merits and consequently seeks the discharge of the orders subsequent to the entry of judgment in execution being a Notice to Show Cause and the warrant of arrest issued upon failure to attend court for the hearing of the Notice to show cause.

3. The 1st defendant's Amended Notice of Motion is as follows:

> "**AMENDED NOTICE OF MOTION**
>
> *1. THAT this Honourable Court do certify this Application as urgent and place the same to be heard on priority basis and service of the same be dispensed with in the first instance.*
>
> *2. THAT this Honourable Court be pleased to set aside and or vary its interlocutory judgment entered on the 2nd October 2018 for the Plaintiffs against the 1st Defendant only in default of entering appearance and filing a Defence together with any consequential Decree and Orders of the Court as the Court may deem fit and just.*
>
> *3. THAT this Honourable Court be pleased to grant the 1st Defendant herein and indeed all the Defendants to the suit leave to file their Defence and defend the suit albeit out of time as per draft Defence annexed to this Application that raises cogent triable issues.*
>
> *4. THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree entered on the 2nd October 2018 and/or any further proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application.*
>
> *5. THAT the Honourable Court be pleased to lift the warrant of arrest and set aside all execution proceedings and/or Order to commit the Applicant herein to civil prison pending hearing and determination of this Application and the suit.*

6. THAT costs of this Application be provided for.

WHICH APPLICATION *is based on the annexed Affidavit of* ***LILIAN ATHO*** *in support of the Application and upon further and/or other grounds to be adduced at the hearing thereof.*

a) ***THAT*** *this Honourable Court was moved to enter a Default Judgment in this suit and judgment was indeed delivered against the 1st Defendant only on the 2nd October 2018 awarding some of the prayers in the Plaint together with costs thereof to the Respondents.*

b) ***THAT*** *the Default entered was irregular and ought to be set aside ex debitio justiciae.*

c) ***THAT*** *further and in addition to the above, the interlocutory judgment is irregular by virtue of the fact that the judgment was entered.*

i. On account of the prayers set out in the Plaint, which prayers are not amenable to a default judgment owing to the fact that the demand claimed is not for liquidated damages only as per Order 10 Rule 4;

ii. Service of the Pleadings and summons to enter appearance was never effected upon the Defendants as per Order 5 of the Civil Procedure Act and Rules and the Defendants have never instructed any advocate to accept service on their behalf and or to appear for them in this matter;

iii. Any service purportedly effected upon the Defendants was flawed and essentially not effective in law and the Defendants will with leave of Court seek to cross-examine the Process server on the same.

d) ***THAT*** *even though a default judgment had been entered for the liquidated sum pending the other prayers being determined, the Defendants ought to have been notified of the suit and or even hearing of the remainder of the suit by way of formal proof.*

e) ***THAT*** *no Notice of Entry of Judgment was equally served upon the Defendants to make them aware of the judgment entered against them ahead of any execution proceedings, thereby giving them an opportunity to Appeal the said Judgment.*

f) ***THAT*** *the 1st Defendant only became aware of the conclusion of the suit when she was apprehended and arrested within Eldoret town.*

g) ***THAT*** *the Applicant/1st Defendant herein has been committed to civil prison against warrants of arrest in execution without an opportunity to show cause why execution should not issue her as per the law, which dictates that a Notice to Show Cause be served personally upon the person intended to be imprisoned.*

h) ***THAT*** *Applicant herein faces unfair execution proceedings based on a decretal sum unjustly and irregularly awarded to the Plaintiffs who intentionally withheld material facts from this Honourable Court and who have come to Court with unclean hands.*

i) ***THAT*** *the Applicant herein is apprehensive that she shall be grossly prejudiced should the execution be allowed to proceed and committal to civil jail should take place as presently intended.*

j) ***THAT*** *the Plaintiffs/Respondents will not be prejudiced should the Applicant herein be allowed and the record set straight.*

k) ***THAT*** *the Applicant therefore prays that the Orders sought herein be allowed as prayed."*

4. In response, the plaintiffs have filed a replying affidavit by counsel Kiplagat Kirui Hillary sworn on 20th February 2020 in which the plaintiffs' case hereon is set out principally in paragraphs 10-22 thereof, as follows:

"**REPLYING AFFIDAVIT**

4 THAT on 27th April, 2018, acting on the instructions of the Plaintiffs herein, we filed a suit against the Defendants for the recovery of a liquidated sum of Kshs.25,637,900= , interests thereon and costs arising out of a breach of joint venture agreement between the Plaintiffs and the Defendants.

5 THAT we subsequently instructed Patrick Munyi Njue, a licensed process server, on 27th April, 2018 to effect service of the Court Summons upon the Defendants, which he did on the same day. (Annexed and Marked "KKH-1" is a copy of the Affidavit of Service dated 14th May, 2018).

6 THAT the Defendants having failed to enter appearance and/or file their statements of defence within the statutory timeframes, we requested for judgment in default of defence against the Defendants on 30th May, 2018, which request was not allowed and this Honourable Court directed us to effect proper service.

7 THAT on 31st August, 2018 we re-instructed Patrick Munyi Njue to effect fresh service of summons and plaint on the Defendants.

8 THAT Mr. Patrick Munyi Njue, upon visiting the Defendants' place of business at the Kenya Medical Practitioners' and Dentists Board Building in Hurlingham, he called the 1st Defendant who was not present in her office through her cell phone number and the 1st Defendant directed him to effect service of summons and pleadings on her Advocates, being the firm of Otieno Arum & Company Advocates.

9 THAT there is in Court record an affidavit of our process server, Patrick Munyi Njue dated 3rd August, 2018 with which he returned the Summons to Enter Appearance duly stamped and signed by the firm of Otieno Arum & Company Advocates.

10 THAT despite appointing advocates to receive Summons to Enter Appearance on their behalf, the Defendants failed to enter appearance and/or file their respective defences to the Plaintiffs' suit thus the Plaintiff's Application for Entry of Judgment dated 17th September, 2018 which was allowed by this Honourable Court on 2nd October, 2018.

11 THAT upon entry of judgment in default of appearance, the said judgment and decree were mailed to the 1st Defendant via her address.

12 THAT attempts to reach the 1st Defendant to settle the decretal sum was futile as the 1st Defendant became elusive and dodgy forcing us to came back to this Court to obtain the Notice to Show Cause why warrants of attachment should not issue against her, which again she did not honour.

13 THAT upon being issued with warrants of attachment, we subsequently instructed Mssrs. Nasioki Auctioneers Ltd to trace and attaché the assets of the 1st Defendant in recovery of the decretal sum.

14 THAT efforts by the said auctioneers to trace the assets of the 1st Defendant was futile thus our application for a notice to show cause why the 1st Defendant should not be arrested and committed to civil jail which the 1st Defendant also snubbed prompting us to obtain the warrants of arrest against the 1st Defendant.

15 THAT both the warrants of attachment and notice to show cause why the 1st Defendant should not be arrested and committed to civil jail were duly served upon the 1st Defendant.

16 THAT there is no mandatory requirement in law of personal service of the notice of entry of judgment, decree or notice to show cause and by dint of Order 22 Rule 6 of the Civil Procedure Rules, sending the foregoing process to the address of the Defendants is deemed as proper service.

17 THAT the 1st Defendant's denouncement of the firm of Otieno Arum & Company Advocates is utterly misleading and a futile attempt to cure her failure to enter appearance and/or file defence to the Plaintiffs' suit.

18 THAT further, having admitted that Mssrs. Otieno Arum & Company Advocates have previously acted for her in other matters, nothing would have been easier than the 1st Defendant asking the Managing Partner of the said firm to swear an affidavit confirming her allegations.

19 THAT by denouncing the said firm of Otieno Arum & Company Advocates is insinuating that we randomly picked on the said firm out of hundreds of other firms in Nairobi to receive summons on behalf of the Defendants and that the said firm accepted to receive the summons without the 1st Defendant's instructions, an insinuation born out of the 1st Defendant's fertile imagination

20 THAT in any event, the Defendants have merely denied instructing the firm of Otieno Arum & Company Advocates to receive summons on their behalf, a matter which is non-issue in this case, but have not denied directing our process server to participate in the said process.

21 THAT in the circumstances, the suit was instituted and proceeded with full knowledge of the 1st Defendant who elected, out of her own volition, not to participate in the said process.

22 THAT there is therefore no just cause to warrant the exercise of discretion of this Court to set aside the judgment in default of appearance and the consequential decree entered by this Court on 2nd October, 2018.

23 THAT by lying about her instructions to the firm of Otieno Arum & Company Advocates, the 1st Defendant had approached this Court with unclean hands and is therefore underserving of the discretion of this Court to set aside the interlocutory judgment under Order 10 Rule 11 of the Civil Procedure Rules.

24 THAT further, it has taken over 14 months since the judgment was entered against the 1st Defendant yet she only brought this Application upon her arrest and committal to civil jail and the 1st Defendant is thus guilty of inordinate delay and is underserving of the remedies prayed for.

25 THAT paragraph 9 of the 1st Defendant's Supporting Affidavit is misleading as the whole of the Plaintiffs' claim against the Defendants was liquidated and therefore not amenable to formal proof within the meaning of Order 10 Rule 4 (1) of the Civil Procedure Rules.

26 THAT in response to paragraph 11 of the 1st Defendant's Supporting Affidavit, I wish to respond as follows:

(a) THAT whereas it is not denied that the business relationship between the Plaintiffs and the 1st Defendant was based on a joint venture, the joint venture agreement placed the responsibility of accounting the profits earned on the 1st Defendant, which responsibility she shirked.

(b) THAT the nature of contractual relation in this case does not extinguish the 1st Defendant's indebtedness to the Plaintiffs arising from the Plaintiffs' capital agreement placed the responsibility of accounting the profits earned on the 1st Defendant, which responsibility she shirked.

(c) THAT the Defendants have not demonstrated that the suit amount is not owing by them to the Plaintiffs or that they distributed the profits claimed by the Plaintiffs as required by joint venture agreement.

(d) THAT in absence of a material evidence to back up the Defendant's allegations in the annexed Statement of Defence, the Court cannot ascertain whether the Defendants have defence in law to warrant the exercise of Court's discretion to set aside the judgment of the Court.

(e) THAT the annexed Statement of Defence consists largely of mere denials and does not establish a plausible defence in law.

(f) THAT in the circumstances, the 1st Defendant has failed to establish that she has a case with merits to warrant's this Court's exercise of discretion in her favour.

27. THAT this Honourable Court considered the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors entering the judgment exparte.

28. THAT the annexed draft defence raises no triable issues is a mere sham, frivolous, scandalous and entertaining such defence is a waste of judicial time.

29. THAT the Plaintiff would be greatly prejudiced if the Application is allowed as the 1st Defendant has long tactfully evaded execution of this Court's decree with result that the decretal sum remains unpaid entirely.

30. *THAT the said application is in my firm belief devoid of merits in that the Defendants have not seriously demonstrated on the face of the application, as legally required, that there is any just cause to warrant setting aside of the Court's judgment and decree of 2nd October, 2018."*

5. Counsel for the parties then made submissions before the court, counsel for the applicant also taking advantage of the liberty by the court to make written submissions and counsel for the respondent filing a list of authorities relied upon, and the court is grateful to both counsel for the exposition of the law on the subject.

Issues for determination

6. **The issues arising for determination in the application for setting aside are –**

1. Whether the default judgment in this case was a regular judgment on a liquidated claim;

2. Whether the execution proceedings herein by arrest and detention the judgment debtor were valid; and

3. Whether the defendant / applicant should be given leave to defend the plaintiff's suit.

The law

Jurisdiction of the Court and to set aside ex parte judgment

7. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The discretion of the court to set aside ex parte default judgment is conceded and both parties cited the Court of Appeal for Kenya ***PITHON WAWERU MAINA V THUKA MUGIRIA*** **[1983] eKLR, where Kneller JA observed as follows:**

"The former relevant order and rules were order IX rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran v Velji Ramji [1954] 21 EACA 20: and the power to set aside the judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company v Frederick Muigon Wargoe [1958] EA 118.

The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC.

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable

mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.

The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..." So the magistrate should have recalled these points. The respondent has a judgment which was not obtained by consent or as the consequence of a trial. The nature of the action is one that concerns land and who purchased it first and whether or not consent of the local land control board to the transaction was necessary and obtained by either of them and, altogether, it is not a trivial matter. A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. Shabir Din v Ram Parkash Anand (1955) 22 EACA 48, 51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/ a Khudadad Construction Company Nairobi HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in The El Amria [1981] 2 Lloyd's Rep 539."

Principles for the grant of setting aside

8. The principles for the setting aside of ex parte judgment were considered by the predecessor Court of Appeal for East Africa in ***Mbogo v. Shah*** (1968) EA 93, 95 referred to in ***Pithon Waweru***, as follows:

"Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under O.9, r. 10, to set aside a judgment entered ex parte; the second is the circumstances in which this Court, as a Court of Appeal, would interfere with the exercise of the discretion of a Judge made on any such application.

Dealing with the first question, ***it is quite clear that the Judge has discretion under O. 9, r. 10, but of course he has to exercise that discretion judicially. In Kimani v. McConnell [1966] E.A. 547), HARRIS, J., dealing with the question as to the circumstances to be borne in mind by a judge on an application under that rule, said this (ibid. at 555G):***

"…in the light of all the facts and circumstances both prior and sub-sequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

(per Sir Charles Newbold, P.)

9. The object of the discretion to set aside is ***avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice*** and authorities cited by counsel including ***Pithon Waweru***, supra,***Japeth Mogaka Onyaru v. Alpha dairy Products Ltd*** (2014) eKLR all cited the principle of Harris, J. in ***Shah v. Mbogo*** as approved by the Court of Appeal in ***Mbogo v. Shah*** (1968) EA 93.

Regular or irregular judgment

10. The court respectfully accepts the principle of law set out in the Court of Appeal ***James Kanyita Nderitu & Another v. Marios Philotas Ghikas & Another*** (2016) eKLR urged by the counsel for applicant that the an irregular default judgment, that is one in which the judgment debtor not been heard by reason lack of proper service of summons is one which the court should set aside ex *debito justitiae.* However, as held in ***Philip Keiptoo Chemwolo & Another v. Augustine Kubende***, Court of Appeal Civil Appeal No. 103 of 1984, it also the settled practice of court to require as defence on the merits, so called prima defence, where it is sought to set aside a judgment which is entered regularly.

Existence of triable issues

11. Defence on the merits. In considering *'the respective merits of the parties'* the court must consider an defence put forward by the applicant who seeks leave to defend, whether such defence is disclosed in a draft defence filed with the application for setting aside, even where the defence is irregularly brought to its notice. See ***Sebei District Administration v. Gasyali*** (1968) EA 300. This Court is also aware of a Court of Appeal decision on principle for consideration as to whether to grant conditional or unconditional leave to appeal. See ***Continental Butchery Limited v. Nthiwa*** **[1978] KLR** where the court (Madan, JA with whom Wambuzi and Law agreed) held:

"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary

procedure provided by order 35 subject to there being no bona fide triable issue which would entitle a defendant to leave to defend. ***If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.*** *This would be in accord with the well-known words of Jessel MR and the Lord Chancellor (Halsbury), spoken respectively in Anglo – Italian Bank v Wells, 38 L T at page 201, and in Jacobs v Booths Distillery Company, 85 LT Reports at 262, as follows:-*

Jessel, MR.: "When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.

Lord Halsbury: People do not seem to understand that the effect of OXIV (the equivalent of our Order 35) is, that, upon the allegation of the one side or other, a man is not to be permitted to defend himself in a court, that his rights are not to be litigated at all."

Or, on our home plane, in the words of Newbold, P, in Zola and Another v Ralli Brothers Limited and Another, [1969] EA 691 at p 694 that –

"Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant."

With respect, the foregoing was perhaps re-echoing in a different language the following words of Lord Halsbury in Jacobs v Booths Distillery Company (supra), i.e. :-

"There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

The Annual Practice, 1973, states, p 139, that the value of Jacobs v Booths Distillery Company (supra) as an authority against giving conditional leave to defend may not be as great as has been thought. In my opinion in Kenya there should be no hesitation in giving only conditional leave to defend if the circumstances so call for."

12. Whether the defence raised by the defendant/applicant is a sham is considered below.

Arrest and detention of a judgment debtor

13. Section 38 of the Civil Procedure Act and Order 22 rule 22 of the Civil Procedure Rules make provision for the grant of an order for arrest and detention in prison of a person in execution of judgment.

Determination

Whether there is against the 1st defendant/applicant a regular judgment or an irregular judgment which ought to be set aside ex debito justiae.

14. This court held that Service on the 1st defendant was good. The court so held in granting the request for judgment at paragraph 5 and 6 of the Judgment dated 2nd October 2018 considered Order 5 rules 6, 7 and 8 of the Civil Procedure Rules, as follows:

"4. As relevant to this suit, Order 5 of the Civil Procedure Rules contains provisions for service of summons as follows:

[Order 5 rule 6.] Mode of service.

6. Service of the summons shall be made ***by delivering or tendering a duplicate thereof*** *signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.*

[Order 5, rule 7.] Service on several defendants.

7. Save as otherwise prescribed, ***where there are more defendants than one, service of the summons shall be made on each defendant.***

[Order 5, rule 8.] Service to be on defendant in person or on his agent.

8. (1) Wherever it is practicable, ***service shall be made on the defendant in person, unless he has 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 an appearance to the summons and judgment in default of appearance may be entered after such service.

5. Clearly, a service upon an advocate who has instructions to accept service and to enter appearance is good for purposes of default judgment under Order 5 Rule 8 (2) of the Civil Procedure Rules."

15. There is, of course, jurisdiction to set aside a default judgment under Order 10 rule 11 of the Civil Procedure Rules. However, this court having already determined that the service upon the defendant was proper and within the provision of Order 5 rule 8 (2) of the Civil Procedure Rules, the application for setting aside must disclose facts indicating that there was in fact no such service in accordance with the rules. There was no such evidence. The applicant merely renounced instructions on part of counsel to accept service on her behalf. As such application for setting aside in the nature of a review of the court order on the facts, and in addition, if it is contended that the court was wrong in its interpretation of the applicable provisions of law, this is a matter of law for which review, with respect, is inappropriate.

Whether this was a case of liquidated demand to warrant entry of default judgment

16. With respect, the submission by counsel for the applicant that the court has power to enter default judgment in cases there is liquidated demand **only** is incorrect. Order 10 Rule 4 of the Civil Procedure Rules provides for both instances "*Where the plaint makes a liquidated demand only*" which falls under Order 10 Rule 4 (1) and "*Where the plaint makes a liquidated demand together with some other claim*" which is the subject of Order 10 rule 4 (2). In the case of the latter, Order 10 Rule 4 (2) of the Civil Procedure Rules specifically provides as follows:

"[Order 10, rule 4.] Judgment upon a liquidated demand.

4. (1) ***Where the plaint makes a liquidated demand only*** *and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.*

(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, *on request in Form No. 13 of Appendix A,* ***enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim."***"

17. In accordance with the rules, this court in entering judgment on the liquidated demand left the other claims of fraud and account for full hearing in the usual way. The award costs, granted in error, which is hereby corrected under the slip rule of section 99 of the Civil Procedure Act, shall have to await the final determination of the matter.

Whether the applicant has a defence on the merits that raises triable issues

18. The cause of action in the plaintiff's liquidated claim was pleaded in paragraphs 5 – 9 of the Plaint dated 23rd April 2018 as follows:

"**PLAINT**

5. On or about 9th June 2017 the 1st Defendant being the shareholder and Director of Real Time Company Ltd, the 2nd Defendant herein, approached the Plaintiffs to participate in facilitating a joint business venture for the purchase and supply of dried grains. In return the 1st Plaintiff was to acquire 17% share of the net profits while the 2nd Plaintiff was to acquire 10% share of the net profits from the said business.

6. Pursuant to the aforesaid proposal, the Plaintiffs entered into a contractual arrangement with the Defendants to provide capital investment for purpose of achieving the said project in good faith. Full details about the agreement are well within the knowledge and possession of the Defendants.

7. Consequently, the Plaintiffs invested capital in the aforesaid joint business venture to a tune of Ksh.2,600,000/= which monies were paid to Real Time Company Ltd (the 2nd Defendant herein) by the Plaintiffs.

8. That the Plaintiff capital investment of Kshs.2,6000,000/= were channeled towards the initial purchase of One Thousand (100) bags of beans of ninety kilograms (70 kgs) each which good were sold out generating a profit of Kenya Shillings Eight Million (Ksh.8,000,000) only.

9. The aforesaid profits by consent of the parties were subsequently wholly ploughed back to the business for the purchase and supply of seven other consignments of green grams between 19th June 2017 to September 2017 with the same generating additional profits out of which the Plaintiffs are entitled to Kenya Shillings Eighteen Million, Seven Hundred and Thirty Seven Thousand, Nine Hundred (Kshs.18,737,900) only."

19. The defendants' draft Defence attached to the application for setting aside responds to the claim as follows:

"**STATEMENT OF DEFENCE**

4 The Defendant avers that it is the Plaintiffs who approached to join her business venture upon which the parties entered into a Joint Venture Agreement to trade as business partners in their different shares in the supply of cereals.

5 The 1st Defendant denies the content of paragraph 7 of the Plaint and puts the Plaintiff to strict proof thereof. The 1st Defendant in addition reiterates that the Plaintiffs and herself had at all times engaged as business partners with each having shares equal to their contribution and none of them made a capital investment in each other.

6 The 1st Defendant is a stranger to paragraph 8 and 9 of the Plaint and puts the Plaintiffs to strict proof thereof.

7 The 1st Defendant further states that if at any time the Plaintiff might have lost any profits from the Joint Venture Business then all the partners in their share contribution did as well and that resulted from other reasons and the Defendants are not to blame for the business loss."

20. The defendants allege a joint venture business which is described in the preambular sections of the Agreement dated 9th June 2017 as follows:

"***JOINT VENTURE AGREEMENT***

THE JOINT VENTURE AGREEMENT *is made the 9th day of JUNE, TWO THOUSAND AND SEVENTEEN among:*

· *LILIAN ATHO*

· *TERESA K. GIMISI*

· *ELIZABETH KAVERE GIMISI*

All of REAL TIME COMPANY LIMITED *of post office Box Number 56362-00200, Nairobi in the Republic of Kenya (hereinafter referred to as "partners" which expression shall where the context admits include their successors and assigns)*

WHEREAS:

The partners are desirous of jointly venturing into dried grains (products) supply business for a profit; the partners have jointly and severally agreed to be bound contents of this Agreement.

TERMS:

The terms of this agreement shall be outlined as follows:

1. CONTRIBUTIONS

The partners will make an initial contribution to the partnership as follows:

· *LILIAN ATHO: 7,200,000 (seven million two hundred thousand shillings.)*

· *ELIZABETH KAVERE: 1,600,000 (one million six hundred thousand shillings)*

· *TERESA K. GIMISI: 1,000,000 (one million shillings)*

NB: *The said contributions of Ksh.2,600,000 (two million six hundred thousand) has been paid to Real Time Co. Ltd as at 9th June 2017 by Elizabeth Kavere on account:"*

21. Although the receipt of the sum of Ksh.2,600,000/- is admitted, it appears to the court the claim of profits amounting 22million is disputed, the 1st defendant asserting that the joint venture business did not do well and the partners should be ready to absorb the losses in accordance with their partnership rights and liabilities. The counsel's submission on the point is as follows:

"*The main reason from seeking to set aside or vary the judgment in this case would be for the court to determine the defence being claims that the defendants are to blame for losses that occurred in the joint venture with the plaintiffs and the 1st defendant all partners and joint managers running the venture and thus if losses occur, all the three of them are to contribute in these losses.*"

22. That, I respectfully think, is a triable issue not necessarily one that must succeed but a *bona fide* trial issue between the parties nonetheless.

Whether conditional or unconditional leave

23. In ***Continental Butchery v. Nthiwa***, supra, the Court (Madan, Wambuzi & Law, JJA) granted leave to defend on condition that that the applicant deposited into court that portion of the judgment which the applicant had no good defence having admitted receiving the sum, as follows (per Madan, JA):

"I have also taken into account everything else on record such as the averments in the plaint, the defence, the sworn statements in the affidavits and the documents which have been produced so far, and I say that although the respondent is unable to show a defence enough to entitle him to interrogate the plaintiff. I however think that the case is within order 35 to the extent I point out because as I have stated the respondent did receive the total sum of shs 76,000/- and I would give him only conditional leave to defend.

I would therefore set aside the order made by the learned judge and substitute therefor an order that the respondent is given conditional leave to defend subject to his depositing in court shs 76,000/- within thirty days and costs of the application for summary judgment will be in the cause. Should the respondent fail to deposit the money as ordered, the appellant as the plaintiff will be at liberty to sign judgment as prayed against the respondent as the defendant together with costs of the application for summary judgment.

However as both Wambuzi JA and Law JA are of the opinion that unconditional leave to defend should be given in regard to the cheque for shs.10,000/-, it is so ordered. As regards the sum of shs.66,000/- the respondent is given conditional leave to defend upon the terms stated by me save that in case of default by the respondent in depositing this sum in court, the appellant will be at liberty to sign judgment only for the sum of shs.66,000/- with interest thereon and costs."

24. The 1st defendant admits receipt of ksh.2,600,000/- as the plaintiff's contribution to the alleged joint venture.

Whether the execution of the judgment was lawful

25. Order 22 rule 6 of the Civil Procedure Rules require notice of entry of a default judgment as follows:

"[Order 22, rule 6.] Application for execution.

6. Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

26. The requirement of notice applies to application for execution by way of '***payment, attachment or eviction'*** and may only have affected the initial attempt at attachment of the 1st defendant's movable property by application for execution dated 4th December 2018, which was unsuccessful prompting the application for execution dated 17th April 2019 seeking Notice to Show Cause why the judgment-debtor/applicant should not be committed to civil jail for failure to comply with the decree herein. The procedure for execution by arrest and detention already has statutory protections for **notice to show cause**, and the hearing thereof, making the notice of entry of judgment under Order 22 rule 6 of the Civil Procedure Rules unnecessary.

Execution by detention in prison of judgment debtor

27. There is power to enforce judgment by arrest and detention in civil jail under section 38 of the Civil Procedure Act which is on Powers of court to enforce execution and which under paragraph (d) includes *'by arrest and detention in prison of any person'*, subject to such conditions and limitations as prescribed in the proviso thereto. The procedure therefor is set out in Order 22 rule 26 of the Civil Procedure Rules as follows:

"[Order 22, rule 26.] Decree for payment of money.

26. Subject to the provisions of section 38 of the Act, every decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, ***may be executed by the detention in prison of the judgment-debtor, or by the attachment and sale of his property, or by both.*** *"*

28. However, the power to order arrest and detention in execution a **decree for the payment of money** is circumscribed by a statutory requirement of notice to show cause under the Proviso to section 38 as follows:

"Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied—

a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—

i. is likely to abscond or leave the local limits of the jurisdiction of the court; or

ii. has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

c) *that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account."*

29. The provision for Notice to Show Cause for execution sought after expiry of 12 months from the date of decree under Order 22 rule 18 of the Civil Procedure Rules is, with respect to counsel, not applicable in the application for execution by detention in prison for **a decree for payment of money** for which a notice to show cause is a statutory obligation. It is for the general execution, that Order 22 rule 18 of the Civil procedure Rules is relevant as follows:

"[Order 22, rule 18.] Notice to show cause against execution in certain cases.

*18. (1) **Where an application for execution is made—***

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

*(c) for attachment of salary or allowance of any person under rule 43, **the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:***

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him: Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him."

30. The court in this particular case for the execution of judgment by arrest and detention in prison is statutorily obliged to issue a Notice to Show Cause and to conduct a hearing thereon where it is satisfied of the matters set out in section 38 of the Civil Procedure Act before ordering arrest and committal to civil jail.

Constitutional freedom of the person

31. In view of the adverse effect of orders of committal to prison denying affected person of liberty or the constitutional freedom of the person, there is need to strictly comply with the provision as to notice under the Act and applicable rules. In this case, the court is not satisfied that the judgment debtor has been given notice of judgment and most importantly a Notice to Show Cause why she should not be committed to prison. The plaintiff's counsel said the notices were sent out by registered post to the last known address of the 1st defendant. For something as important as a Notice to Show Cause why a person should not be arrested and committed to civil jail, the court must do well to require personal service of the notice, unless substituted service is ordered by the court for sufficient reason in accordance with the rules.

32. It is testimony of the great premium placed by our legal system of constitutional freedoms that the court is generally empowered to careful consideration of an application for committal to civil jail and give directions in lieu of an order for arrest and detention under Order 22 Rule 31 of the Civil Procedure Rules as follows:

"[Order 22, rule 31.] Discretionary power to permit judgment-debtor to show cause against detention

31. (1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in prison of a judgmentdebtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor."

I respectfully agree with the court in ***Innocent G. Ondieki v. Julius Nakaya Kabole*** (2019) eKLR on the need for careful dealing with an

application of an application for way of arrest and committal which deprives the debtor of his liberty.

Service of Notice to Show Cause

33. Order 5 rule 8 of the Civil Procedure Rules on service of requires service to be effected-

> ***"[Order 5, rule 8.] Service to be on defendant in person or on his agent.***
>
> *8. (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has 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 an appearance to the summons and judgment in default of appearance may be entered after such service."*

34. Even where a notice of judgment is to be served under Order 22 rule 6, service is to be effected on the defendant ***"either at his address for service or served on him personally."*** The procedure for execution by arrest and detention for which a notice to show cause is required under section 38 of the Act cannot require anything less. The defendant herein having not filed appearance to show address for service must by served personally.

35. Moreover, the professed mode of service of the notice of judgment and notice to show cause herein by registered post is a method of service available only in respect of corporations under Order 5 rule 3 of the Civil Procedure Rules as follows:

> ***"[Order 5, rule 3.] Service on a corporation.***
>
> *3. Subject to any other written law, where the suit is against a corporation the summons may be served —*
>
> *(a) on the secretary, director or other principal officer of the corporation; or*
>
> *(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —*
>
> *(i) by leaving it at the registered office of the corporation;*
>
> ***(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or***
>
> *(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or (iv) by sending it by registered post to the last known postal address of the corporation."*

36. For individuals, such as the 1st defendant/applicant the prescribed mode is personal service on the defendant or agent under Order 5 rule 8 of the Civil Procedure Rules. A distinction must be made between an individual defendant and the company. See ***Sebei District Administration v. Gasyali & Others*** (1968) EA 300 (Sheridan, J.).

Validity of warrant of arrest

37. On the 4th June 2019 when the warrant of arrest was issued by the Deputy Registrar of the Court, Counsel Mr. Maina holding brief for Mr. Kiplagat for the applicant informed the court that the defendant had been served as follows–

> ***"Mr. Maina:*** *We served the defendant. There is an affidavit of service on record. I pray that Warrant of arrest (W/A) to issue. Affidavit dated 3rd May 2019.*
>
> ***Court: Warrant of Arrest to issue."***

38. By the affidavit of 3rd May 2019, the plaintiff's counsel Mr. Hillary K. Kiplagat, advocate deponed as follows:

> *"2. That on 24th May 2019, I caused service of Notice to Show Cause dated 7th May 2019 coming up for hearing on* ***4th June 2019*** *by way of registered Post upon the Defendants upon their last known address. I attach hereto copy of the forwarding letter and delivery receipt as* ***"HKK 1a &b".***"

The letter was addressed to Lillian Atho, P.O. Box 56352 -020 Nairobi with a post office certificate of postage dated 24.05.2019.

39. The 1st defendant/applicant has denied receiving the notice but registered postage is not the mode for service prescribed for service on an individual unless it is effected as substituted service by leave of court pursuant to Order 5 rule 17 of the Civil Procedure Rules.

40. For this reason, this court finds that the warrant of arrest was issued contrary to the provisions of section 38 proviso of the Civil

Procedure Act, and therefore invalid. The same shall, therefore, be lifted and the 1st defendant applicant who is in custody shall be released forthwith.

Conclusion

41. The default judgment of this court of 2nd October 2018 was regularly entered following service of the summons to enter appearance in accordance with Order 5 rule 8 of the Civil Procedure Rules. The judgment entered by the court was a judgment on a liquidated demand for which the court was empowered to enter judgment in terms of Order 10 rule 4 (2) of the Civil Procedure Rules.

42. However, the draft defence presented by the 1st defendant raises the triable issue whether the partners in the partnership agreement the subject of this suit were to all manage the business and share the profits and losses and, consequently, whether the losses alleged by the defendants were contributed to by the plaintiffs and therefore to be shared by the plaintiffs in their loss and profit sharing ratio, which would impact on the liability of the defendants to recompense the plaintiffs thereon and therefore the claim for refund of their contributions and profits the subject of the Plaint and default judgment.

43. It is settled that an arguable case need not be one that must eventually succeed at the end of trial. The triable issue herein raises an arguable case which may or may not succeed at the hearing but it is consistent with the right to hearing under Article 50 (1) of the Constitution that a fair hearing be granted to the parties to the dispute in accordance with the law.

44. Another triable issue which was not taken up by the counsel, and which, therefore, the court cannot base its decision on the application for setting aside herein on, is that the alleged joint agreement between the parties made provision for settlement of disputes by mediation and arbitration, which may affect the validity of the proceedings before the court.

45. Although the default judgment was properly and regularly entered having been on a claim of a liquidated sum the Plaint and Summons whereof was properly served on the defendant's agent in accordance with the rules of the court, the existence of a triable issue warrants the grant of leave to defend. In accordance with the authorities leave to defend in the circumstances where there is a triable issue but a lawful regular judgment is granted upon reasonable conditions imposed by the court.

46. Receipt of Ksh.2,600,000/- is admitted by the 1st defendant in the very terms of the joint venture agreement herein. I consider that the grant of leave to defend which occasions the setting aside of the otherwise regular judgment should be made conditional upon the deposit into court of the said sum, receipt whereof is acknowledged by the 1st defendant and which is the basis of the plaintiff's claim for profit and damages for breach of contractual duty to account. However, as regards the claim based on the profits at Ksh.22,937,900/- on the amount, which the defendant denies, there should be ***unconditional*** leave to defend. Accordingly, as a condition for the grant of leave to defend the suit, the 1st defendant shall, **within 14 days from the date of the ruling,** deposit into court the sum of Kenya Shillings Two Million Six Hundred Thousand (Ksh.2,600,000/-), in default whereof the ***conditional*** leave to defend granted herein shall lapse and be of no effect.

47. As regards the warrant of arrest issued on 4th June 2019, the same having been issued upon a Notice to Show cause without proper personal service thereof on the 1st defendant or by substituted service with leave of court, the contravention of the statutory obligation of section 38 of the Civil Procedure Act makes it invalid and liable to be set aside.

Costs

48. While the plaintiff obtained a regular judgment in default of appearance and defence, they did not serve on the judgment debtor/applicant the requisite Notice to Show Cause for execution of judgment for payment of money as required by section 38 of the Civil Procedure Act. Therefore, as both parties have partly succeeded in their respective contentions, there shall be no order as costs which will now abide the outcome of the suit.

Order

49. Accordingly for the reasons set out above, the Court makes the following orders:

1. The default judgment of this court entered on 2nd October 2018 is set aside.

2. The warrant of arrest issue by the deputy registrar of this court on 4th June 2019 is lifted for failure to serve notice to show cause and the 1st defendant applicant who is in custody shall be released forthwith.

3. The 1st defendant is granted a conditional leave to defend the suit and shall file a defence within fourteen days from the date of this ruling.

4. As a condition for the setting aside of the default judgment and the grant of leave to defend the suit, the 1st defendant shall, **within 14 days from the date of the ruling,** deposit into court the sum of Kenya Shillings Two Million Six Hundred Thousand (Ksh.2,600,000/-), in default whereof the conditional leave to defend granted herein shall lapse and be of no effect, and the default judgment shall be reinstated.

50. Costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/S H & K Law Advocates for the Plaintiff/Respondent.

M/S Advocates LLP for 1st Defendants/Applicant.