



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 458 OF 2015**

**BANK OF AFRICA LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PRIDENET TECHNOLOGIES LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JAMES KANGWAMA ROGERS .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PRISCILLAH WANGARI KARANJA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**FRANCIS MASWILL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 12<sup>th</sup> September 2019, brought under the provisions of; Rule 3(1) of the High Court vacation (Practice and Procedure) Rules and all other enabling provisions of the law.
2. The Applicant is seeking for orders that; the Honourable court do set aside the interlocutory judgment entered herein and all other consequential orders issued herein; any other orders/directions as the court may deem fit; and the costs of the application be provided for.
3. The application is premised on the grounds on the face of it and an affidavit dated 12<sup>th</sup> September 2019, sworn by the applicant herein; Priscillah Wangari Karanja. She averred that, since the filing of the suit, she has never been served with summons, pleadings or any document relating to this same.
4. That, she was not aware of the suit, until the 16<sup>th</sup> August, 2019 when; an unidentified person called claiming to be from the High court and informed her that, her salary would be attached in execution of a judgment issued in this matter. That, she has also never served been served with a notice of the entry of the interlocutory judgement in default of appearance as is required under law.
5. She ignored the call as she does not have an account with the plaintiff and nor dealt with the company since October, 2010. However, a few days later, she received several calls from a person who identified herself as Janet; from the plaintiff's head office; Recoveries department, who informing her about the case, and that a notice to show cause had been issued against her and the plaintiff was, expecting her to pay the debt, otherwise they would take any steps against her, as they had failed to trace the 2<sup>nd</sup> and 4<sup>th</sup> defendants.
6. That, her advocates on record M/S Wanja & Kibe Advocates perused the court file and informed her, that the suit had been filed against her and others and on 23<sup>rd</sup> march, 2016 an interlocutory judgment entered, in default of appearance and a notice to show cause issued due for hearing on 19<sup>th</sup> September, 2019. Therefore, she needed to take necessary steps to urgently defend the matter.
7. Upon further, perusal of the documents relied upon by the plaintiff; she found out that, without my knowledge or participation, the 1<sup>st</sup> defendant, was advanced a short term loan, overdraft and guarantee on the basis of; a letter of offer dated 5<sup>th</sup> June, 2012 and the advances were secured by amongst others;

a. A further Debenture over all the company's assets for the sum of; Kshs.11 million.

b. A first legal charge over the property known as Subdivision No. 152 of Section III Mainland North of Meridional District in the

name of; Kangwana James Rogers for the sum of Kshs. 13.5 million

c. Personal Guarantees and Indemnities allegedly given by myself together with the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

8. That she was extremely shocked by the discovery of the above facts for the following reasons: -

a. To her knowledge, the 1<sup>st</sup> defendant company had only two (2) directors, the 4<sup>th</sup> defendant and herself and they did not hold any meeting of the board of directors in 2012 or thereafter, where the issue of the loan and other advances to be advanced by the company was discussed;

b. Prior to August, 2010, the 4<sup>th</sup> defendant and herself jointly operated the 1<sup>st</sup> defendant's business but he pushed her out of the same sometimes in October, 2010 and relocated the same to a different office from where he continued operating the same together with its bank accounts by himself. Further due to the differences arising from the breakdown of the hitherto close relationship with the 4<sup>th</sup> Defendant in August, 2010, he kept her in the dark about the 1<sup>st</sup> defendant's operations and he did not allow her to operate its business to date;

c. She did not attend any board meetings where resolutions would have been passed authorizing the 1<sup>st</sup> defendant to apply for the credit facilities advanced which are the subject matter of this suit and if any such resolutions were presented to the plaintiff by the 4<sup>th</sup> defendant, then she was not party to the same, they are forgeries and are intended to defraud the plaintiff;

d. She has never received any money/benefitted from the amounts advanced to the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant has never revealed to her that the 1<sup>st</sup> defendant or himself applied and were granted the said advances;

e. he has also never met and does not know the 2<sup>nd</sup> defendant herein and she is not privy to the circumstances under which he offered his property as security for the advances to the 1<sup>st</sup> defendant or under which the said security was procured;

f. She did not sign the letter of offer dated 5<sup>th</sup> June, 2012 or the personal guarantee and indemnity dated 31<sup>st</sup> August, 2012 and the signatures thereupon purported to be mine are forgeries. She also does not know and have not met Thuita Kiiru Advocate, who is purported to have witnessed my alleged signature on the aforesaid two (2) documents;

g. Upon further inquiries, she has discovered that the 2<sup>nd</sup> defendant herein died sometimes in 2010 and it is therefore impossible for him to have given his property as security for the grant of the facilities advanced to the 1<sup>st</sup> defendant in June, 2012. It also impossible for them to have jointly signed the guarantee and indemnity dated 31<sup>st</sup> august, 2012 or to have been present before the said Thuita Kiiru Advocate who is shown have witnessed their signatures.

9. That as a result of the aforesaid matters, the credit facilities granted to the 1<sup>st</sup> defendant were procured through fraud and the matter discloses commission of, several criminal offenses by the persons involved. On 31<sup>st</sup> August, 2019, she has made a formal report at the Directorate of Criminal Investigations, Kiambu Road for the matter to be investigated and for appropriate action to be taken.

10. Further, if there was no collusion involving the plaintiff's employees, due diligence by the plaintiff would have revealed the correct position at the time the said credit facilities were being advanced. That she has a good and tenable defence to the plaintiff's suit, which will be rendered nugatory, if the judgment and the decree issued herein is executed without her being heard.

11. The issues raised in the defence are inter alia: -

a. The loan, overdraft and guarantee advanced to the 1<sup>st</sup> defendant at the behest of the 4<sup>th</sup> defendant was procured through fraud and collusion between the 4<sup>th</sup> defendant and the plaintiff's employees. In the absence of collusion, the plaintiff negligently failed to carry out due diligence before advancement of the said credit facilities;

b. The letter of offer which forms the basis of the contract of lending and the guarantee and indemnity which was intended to be part of the security for the advances allegedly signed by the 2<sup>nd</sup> defendant and her is not enforceable against her because the signatures thereon which are purported to be hers are forgeries;

c. The said advances were procured fraudulently at the behest of the 4<sup>th</sup> defendant without her authority (as a director) and that of the 1<sup>st</sup> defendant's board of directors. If any resolutions were given to the plaintiff, the same are forgeries and are of no effect. The entire contract of lending is founded on an illegality;

d. The 4<sup>th</sup> defendant was actively involved in the fraud and illegality complained of and ensured that she did not get notice of the 1<sup>st</sup> defendant's indebtedness to the plaintiff by withholding letters and other communication received from the plaintiff on the said credit facilities;

e. The plaintiff does not have a justifiable or legitimate claim against her because she was not party to the credit facilities the subject matter of this suit therefore, which were procured without her knowledge, consent, or authority therefore the suit against her is mischieved and bad in law.

12. That the 4<sup>th</sup> defendant had the keys to his post office box through which the letters and communication from the plaintiff appear to have been sent and she believes that he deliberately also failed to forward communication from the plaintiff to the physical address which he knew, even though they were not doing business together. He failed to keep her informed so as not to raise her suspicions about his fraudulent dealings.

13. However, the application was opposed through a replying affidavit, sworn by Ivy Ouya, the plaintiff's legal officer. She averred that, by a continuing guarantee and indemnity in writing dated 31<sup>st</sup> August 2012 and signed by the 4<sup>th</sup> Defendant as guarantor, in consideration of the plaintiff making or continuing loans or advances to, otherwise giving credit or granting banking facilities or accommodation or granting to the 1<sup>st</sup> defendant for so long as, the plaintiff may deem fit, the guarantors unconditionally guaranteed to pay the plaintiff on demand in writing all monies and discharge the 1<sup>st</sup> defendant's obligations without deduction, set-off, or counterclaim together with interest thereon from the date of such demand and together also with costs and expenses.

14. The 1<sup>st</sup> defendant defaulted in payment of the facility and the plaintiff issued various demand letter and notices to the defendants. As at 17<sup>th</sup> February 2015, the debt was at, Kshs 26,442,711.00. Following failure by the defendants to honour the demand, the plaintiff filed the suit herein and served the summons upon all the defendants by advertisement pursuant to leave and order of the court issued on 25<sup>th</sup> February, 2016.

15. However, the defendants failed to enter appearance and the plaintiff proceeded to request for Judgment. Upon entry of judgment, the plaintiff served the notice of entry of judgment on the defendants using the postal address known to the plaintiff.

16. The Plaintiff thereafter filed an application dated 14<sup>th</sup> July, 2016 seeking leave of court to sell the property which the defendants had deposited a title with the plaintiff as security for the facility to satisfy the decretal amount. The court directed the plaintiff to serve the application by advertisement in the daily newspaper which the plaintiff did.

17. Pursuant that advertisement, the 2<sup>nd</sup> defendant filed a response to the application and one Haroon Mohamed Noor also filed an application opposing the sale of the said property. It is then that, it was discovered that the 2<sup>nd</sup> defendant was deceased and the directors of the 1<sup>st</sup> defendant company fraudulently obtained a certificate of title of the 2<sup>nd</sup> defendant's property, to secure the facility. Thereafter, the plaintiff withdrew the proceedings against the 2<sup>nd</sup> defendant.

18. That the plaintiff has now commenced execution proceedings against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to recover the decretal sum and undertaken investigations into the whereabouts of the defendants. The 3<sup>rd</sup> defendant was traced at, NAS Airport Services Ltd, where warrants were served upon her as admitted.

19. That the 3<sup>rd</sup> defendant admits being a director of the 1<sup>st</sup> defendant company and continues to be a director and no evidence has been produced before the Honourable court to demonstrate that the 3<sup>rd</sup> defendant ceased to be a director of the 1<sup>st</sup> defendant company.

20. That, the allegation by the 3<sup>rd</sup> defendant that, she did not take part in the running of the company and the application for the Banking facility is false, as the 3<sup>rd</sup> defendant being a director of the company is aware of the affairs and decisions of the company. Further, the allegation that, she "kicked out" from the 1<sup>st</sup> defendant company is an attempt to mislead, the Honourable court as there is no evidence of such incident.

21. In addition, any fraud that may have been perpetrated against the plaintiff was with the full knowledge and/or participation of the 3<sup>rd</sup> defendant and now the *chickens have come home to roost*. Finally, the purported defence by the 3<sup>rd</sup> defendant is frivolous and vexatious based on mere denials and blaming the company's indebtedness on her co-director. She was duly served with all the court processes in this suit as demonstrated herein. The application is therefore without merit and should be dismissed with costs.

22. However, the Applicant filed a further affidavit dated 23<sup>rd</sup> January 2020, sworn by herself and reiterated what was deposed in the supporting affidavit save to state that, it is strange that the plaintiff with all the resources at its disposal failed to take further steps to confirm who perpetrated the said fraud from July 2016 when it discovered the same.

23. She denied receipt of a demand notice from the plaintiff in respect of the alleged monies and from the process server's affidavit, it is clear, there was no attempt at all by the plaintiff or its said process server to serve her with the summons to enter an appearance in this matter and the application for substituted service. Further, the advertisement in the papers was not placed in a conspicuous manner in the said newspaper, which unfortunately, she did not see.

24. The application was disposed of through filing of submissions. The applicant submitted that, the plaintiff did not disclose to the court that, it did not make any attempt to serve the applicant personally, with the summons as required under Order 5 Rules 6, 7 and 8 of the Civil Procedure Rules before using substituted service.

25. That she acted in good faith when she made a formal report to the criminal investigation department so as to unravel the circumstances surrounding the said advances, the forgeries of her signature and use of her name. It is therefore not plausible, as alleged that she was party to the fraud in obtaining the advances the subject matter of the suit.

26. Further, the fact that the deceased's title was forged and used as security for the money lent to the 1<sup>st</sup> defendant goes to the root of the matter because all those documents form the basis of the contract of lending which is the subject matter of this suit.

27. The applicant further submitted that, she deserves a right to be heard under Article 50 of the Constitution. She also relied on the case of; Richard Murigu Wamai vs Attorney General & Another (2018) eKLR, where the Applicant was granted a right to be heard as there was a defence with merit.

28. Further, the law on setting aside judgments is well settled and courts have held that, the jurisdiction to set aside judgment is based on judicial discretion, which must be exercised judicially and depends on the circumstances of each case. Further, courts have laid down three tests governing applications to set aside judgments, which are; defence on the merit; prejudice and explanation for the delay.

29. The applicant cited several other authorities: Sebei District Administration vs Gasyali & Others (1968) E.A. 300, where Sheridan J., cited with approval the words of Arinley J, (as he then was) in Jaminadas vs Sodha Gordhandas Hemraj (1952) 7 ULR 11, and held that, to deny the subject a hearing should be the last resort of a court. Further reliance was placed on the cases of; Tree Shade Motors Ltd vs DT Dobie & Another (1995-1998) 1EA 324, Mbogo & Another vs Shah. Patel vs EA Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another vs Kubende (1986) KLR 492 and CMC Holdings vs Nzioki (2004) 1KLR 173 where it was held that, “even if service of summons in valid the judgment will be set aside if defence raises triable issues, and Frigonken Ltd vs Value Pak Food Limited, HCCC No. 424 of 2010, where the court, stated

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justiae. 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”

30. Finally, in James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another (2016) eKLR, the Court of Appeal held that, the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system, and Sangram Singh vs Election Tribunal, Kotah, AIR 1955 SC 664, at 711:- it was held, “laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs.”

31. However, the plaintiff submitted that, the 3<sup>rd</sup> defendant has not denied the address of the company used to serve her as a director. That another conspicuous advertisement placed in daily nation newspaper on 22<sup>nd</sup> July 2016, pursuant to leave of the court and the 3<sup>rd</sup> defendant purports not to have seen the advertisement. The plaintiff questioned why the 3<sup>rd</sup> defendant and filed requisite statutory forms at the company registry if resigned as a director of the company.

32. The plaintiff relied on the case of; Beena K.Khambaita vs Talvinder Salgoo (2012) eKLR, where the court held;-

“the law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues.”

33. Further in the case of; Nelson Muguku Njoroge vs Furncon Limited (2016) eKLR, the court observed that, “the defendant failed to tender any credible evidence to establish the allegation of non-service of summons. The defendant’s advocate failed to summon the process server to attend court for cross-examination but it failed to take advantage of the opportunity offered by law.”

34. I have considered the application, the arguments advanced and the submission and I find that, the court record shows that, the summons herein were issued on 30<sup>th</sup> September 2015. The application to serve the same and/or pleadings vide substituted was filed on 29<sup>th</sup> January 2016. The affidavit in support thereof states that, the attempts to serve the defendants personally were not fruitful, as stated in the affidavit of the process server, Simon M. Mbinda. That, he attempted to serve the 1<sup>st</sup> defendant at its business premises and found it was not carrying out on the business at the premises. He called the 1<sup>st</sup> defendant mobile number 0722 388 764 and the 4<sup>th</sup> defendant answered directed the process server to travel to Naivasha and later to Kitengela to meet him. However, he did not show up on both occasions.

35. The supporting affidavit further states that, there was no other means of service upon the defendants, hence the need to use substituted service. I realize that, although the deponent of the supporting affidavit, Ben Mwaura avers, at paragraph 8, the process server’s affidavit is annexed and marked “No. 1”. I am unable to see the same thereon.

36. Be that as it were, the supporting affidavit, does not reveal there was an attempt to serve the 3<sup>rd</sup> defendant/applicant personally before the advertisement was carried out in the nation daily newspaper of 6<sup>th</sup> April 2016. I have also seen a copy of the advertisement and note that for all intent, and purpose, it is relatively medium sized, to be deemed conspicuous. The applicant denies she had knowledge thereof. That is possible as much as it could be a mere denial at this time of need.

37. That leads me to the principles of setting aside a judgment as herein. One of key factor is whether there is a defence that raises triable issues or has merit. In the instant matter, the applicant avers that, the loan to the 1<sup>st</sup> defendant company in which she is a director was obtained through fraud. That as a director of the company, she did not sign, inter alia, a letter of offer and/or guarantees and indemnity as her signature thereto is forged and the matter is under criminal investigation. If that allegation is true, then the applicant has a defence on merit. Similarly, if there was no board of directors’ resolution to authorize the loan facility, then the validity of the lending comes into issue. The plaintiff concedes the suit against the 2<sup>nd</sup> defendant was withdrawn as the certificate of title of, 2<sup>nd</sup> defendant property was obtained fraudulently.

38. The last issue is whether the court should set aside the judgment and if so, on what conditions, if any. I find that, despite averment that, the applicant could not be served in person, the plaintiff/respondent, subsequently traced the applicant at NAS Airport Services Limited, where she works.

39. The question is, how did the plaintiff manage to trace her to execute the judgment, when it could not trace her before judgment? It is alleged investigations revealed her whereabouts, but should have been done before the request to serve; pleadings and summons by substituted service.

40. In the given circumstances, I shall give the applicant the benefit of doubt and allow the application as prayed under prayer (3). However, in view of the fact that, there was an advertisement of the suit in the papers, which with due diligence the applicant should have been able to notice, and move the court earlier, I shall not award her costs of the application. Each party to meet its own costs.

41. It is so ordered.

**Dated, delivered and signed in an open court, this 29<sup>th</sup> day of April 2020.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Kimani for the plaintiff/respondent

No appearance for the other parties

Delivered by virtual communication