



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
MILIMANI LAW COURTS
HCCC NO. 345 OF 2018

ASU BALTIJA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

AKKADS SYSTEM LIMITED.....1ST DEFENDANT/APPLICANT

BENARD THEURI.....2ND DEFENDANT/APPLICANT

RULING

By a Certificate of Urgency application dated 22nd January 2019, the Advocate for the Applicants/Defendants urged the Court prioritize this matter for hearing on grounds that;

- a. The Plaintiff/Respondent likely to be in the process of commencing execution proceedings against the Defendants/ Applicants herein since the matter is for a liquidated amount and doesn't require formal proof;
- b. The Defendants/Applicants were served with court pleadings on the 21st November 2018 at Kobil Petrol Station along Eastern bypass and entered appearance on the 4th December 2018 which was within the 14 days period/time stipulated within the Law.
- c. The alleged date of service of court pleadings and summons on the 2nd Defendant of 24th September 2018, the 2nd Defendant was not at Garden Restaurant Limited and service was never effected upon the 2nd Defendant as alleged.
- d. That the Plaintiff's decision to request for judgment in default of entering appearance and failure to file a defense was not only made in bad faith as the 14 days period had not lapsed.

By a Notice of Motion Application dated 22nd January 2019 filed together with the Certificate of urgency, brought under the provision of **Section 1A, 1B and 3A of the Civil Procedure Act, Orders 10 Rule 11, and order 45 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the Law the Applicant sought orders;

- a. That the Court stays execution of the ex-parte judgment and Decree made on the 7th November 2018 and all other consequential orders pending the hearing and determination of this application and/or suit.
- b. That the *ex-parte* Judgment entered on 7th November 2018 against the 1st and 2nd Defendants and all other consequential orders be set aside and/or reviewed and the Defendants be granted unconditional leave to defend this suit.

The Application is based on grounds;

- a. That the *ex-parte* judgment was premised on an Affidavit of Service of one Mr. Wycliffe Shikuku M'Mada who alleged to have served the 2nd Defendant on behalf of 1st Defendant and himself on the 24th September 2018 at Bonds Garden restaurant limited at around 4.40 pm which the 2nd Defendant denies.

b. That the alleged date of service of court pleadings and summons on the 2nd Defendant of 24th September 2018 the 2nd Defendant was not at Bonds Garden Restaurant Limited service was never effected upon 2nd Defendant as alleged and the Defendants shall on and before the hearing of this application require thee process server to be availed for cross-examination.

SUPPORTING AFFIDAVIT

The application was supported by an affidavit dated 22nd January 2019, sworn by Benard Theuri the 2nd Defendant/Applicant herein. He stated that the *ex parte* Judgment was premised on an affidavit of service of Mr. Wycliffe Shikuku M'Mada who alleged to have served the 2nd Defendant /Applicant on behalf of 1st Defendant and on his behalf on 24th September 2018 at Bonds Garden Restaurant Limited at around 4.40 pm.

That however the same is not true at all as I was served with court pleadings on the 21st November 2018 at Kobil Petrol Station along Eastern bypass.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit dated 15th February 2019, sworn by Rt. Col. Sigitas Gudeik the Quality Director of the Plaintiff herein. He stated that as he was informed by the process server herein that on 21st November 2018, the Defendants were served with a Notice of Entry of Judgment but not the court pleadings as alleged or at all.

That the Defendants advocates should have advised the Defendants that what was served upon them was a Notice of entry of judgment, which is not a pleading. In any event the memorandum of appearance filed by the Defendants on 4th December 2018 was of no consequence, legal or otherwise. At the time of filing of the memorandum of appearance on 4th December 2018, *ex parte* judgment had been already entered in favour of the Plaintiff way back on 7th November 2018 almost a month there before.

He averred that contrary to what is stated by the Defendants in paragraph 13, 14 and 17 of the supporting affidavit by the said Bernard Theuri, the statutory time limit for entering appearance and filing the defence by the Defendants had long lapsed at the time they purported to file the memorandum of appearance on 4th December 2018.

That whereas the court file herein could not purportedly be traced by the Defendants herein as at 5th December 2018, there was no sufficient explanation at all that had been offered by the Defendants to explain why they did not seek the court's intervention until on 21st December 2018, almost 3 weeks thereafter.

He stated that the Defendants had not sufficiently explained why the instant application was not filed until on 22nd January 2019 almost a month thereafter.

FURTHER AFFIDAVIT

The application was further supported by an affidavit dated 12th March 2019, sworn by Benard Theuri the 2nd Defendant/Applicant herein. He asserts that in further response to the allegations in paragraph 23 and 24 of the Replying affidavit;

- a. At no point had the Plaintiff loaned the Respondent any monies.
- b. The money transfer deposit slips attached herewith was in regard to payment of monies to the Respondents accounts by a Company called Amber Universal Security Ltd.
- c. Early 2016, the Respondent was awarded a contract by Kenya Pipeline Company or their services of security survey work in the entire Company.
- d. The Respondent pursuant to a teaming agreement with Amber Universal Security Ltd dated 7th May 2016 earlier signed by parties, entered into a more specific contract in regards to the contract with Kenya pipeline company vide a subcontract dated 11th May 2016.
- e. As part of the parties agreement, security money was to be deposited by Amber Universal Security Ltd with the Respondent and the same was duly deposited for expenses etc and the project commenced.
- f. Subsequently the said sub-contract was terminated on the 20th June 2016 after there was breach of contract by the representative of Amber Universal Security Ltd who was handling the work.
- g. Accounts were fully settled and as it is no party owes the other any money.

CERTIFICATE OF URGENCY DATED 23RD SEPTEMBER 2019

On 23rd September 2019, the advocates for the Plaintiff/Applicant filed a Certificate of Urgency application urging the court to be heard on priority basis for reasons;

a. That in order to defeat any successful judgment the Defendants have mischievously incorporated Kingdom Paints Limited and Filtronic International Limited and intends to initiate the process of winding up or declaring the 1st Defendants insolvent and transferring the assets of the 1st Defendant to the said companies.

By a Notice of Motion application dated 23rd September 2019 and filed on the same date, pursuant to **Order 51 Rule 1, order 39 Rule 1(a) (iii), 5, 2, and 6, order 51 and Section 1A, 1B, 3A & 63(b)(e) of the Civil procedure Act, Cap 21, Laws of Kenya**. The Applicant sought orders;

a. That the Court to issue summons to Directors of the 1st Defendant and also the 2nd Defendant to appear before this Court to show cause why they should not furnish security for their appearance.

b. That upon hearing the said directors and the 1st Defendant, this Court to order the said directors o the 1st Defendant and the 2nd Defendant to deposit before this Court such sums of money, bank bond or other sufficient property to answer the claim as against them.

DETERMINATION

After consideration of the pleadings and submissions of parties through Counsel the matters that emerge for determination are as follows;

a. Was/is service of Plaintiff and Summons to the Defendants adequate and is there a regular judgment on record?

b. Are there triable issues raised by Draft Defence of the Defendants?

c. Has the 2nd Defendant formed another Company and transferred assets of the 1st Defendant Company to avoid settling any legal claims/Liabilities?

ANALYSIS

Order 5 Rule 7 CPR Service on several defendants

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

Order 5 Rule 3 CPR - Service on a corporation

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;

Order 5 Rule 8 CPR Service to be on defendant in person or on his agent

(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.

See also *National Bank of Kenya vs Puntland Agencies Limited & 2 Others [2006] eKLR.*

CROSS-EXAMINATION OF THE PROCESS SERVER

The 2nd Defendant contested service that he was not served on 24th September 2018 at Bonds Garden Restaurant in Upper hill at 4 pm, but was served on 21st November 2018 at Kobil Petrol Station along Eastern Bypass by someone who introduced himself as Wycliffe who wore a grey suit and was accompanied by motor bike rider.

The 2nd Defendant demanded that the Court summon the Process server and be subjected to cross-examination. As Process Server he was cross examined on 26th June 2019 by the Applicant's Counsel Ms Chepngeno. The Process Server Wycliffe Shikuku M'Mada was cross-examined and he had the following to say during his examination in chief. He informed the Court and he further informed the court that he is a licensed court process server.

He further stated that at the time of serving the court summons and court pleadings upon the 2nd Applicant herein he had a valid court

process server license.

He produced in court two original process servers certificate No. 1090 for the year 2018 and another for 2019.

On 26th June 2019, PW1 Wycliffe Shikuku M'mada testified and relied on the Affidavit of Service filed on 22nd October 2018 and Witness Statement and stated as follows;

He served the 2nd Defendant personally on 24th September 2018. He was accompanied by Mr Kamwenda Advocate who gave him the plaint and Summons to serve and he introduced him to a gentleman called Wycliffe Mokaya. They accompanied him to Bonds Garden Restaurant Limited, Upper Hill Menengai Road Nairobi County. Upon arrival at 4,40 pm both Mr Kamwenda and Mr. Mokaya pointed to a bespectacled man in a striped shirt. He introduced himself to him and the purpose of the visit and served him the Plaint and Summons. He also confirmed that he was Director of 1st Defendant Company; Akkad Systems Limited.

In cross-examination by Defendant's Counsel Ms Chepngeno, the Process Server clarified that he served the 2nd Defendant Mr Bernard Theuri with copy of entry of judgment on 21st November 2018.

He also added that the 1st Defendant's Company's office was in Ngara the and moved to Ruai.

He clarified that he used 4 different mobile numbers and had a total of 10 lines and agreed that 0711199467 & 0755868449 were his numbers too.

He also clarified that he deponed in the affidavit of Service that he was licensed number 1058 but that was for 2017 license and in 2018 his number was 1090.

This Court observed the witness, he was consistent in his answers and explanations without discrepancy. The Process Server confirmed that he was accompanied by persons who knew the 2nd Defendant and/or his whereabouts and led him there and also identified the 2nd Defendant. I formed the opinion he was a truthful witness. I found his testimony and evidence credible because, he was carrying out his professional duty to serve process and on instruction he was accompanied by the Plaintiff's advocate and colleague who identified the 2nd Defendant. On 24th September 2018, the Process Server confirmed service of Court process to the 2nd Defendant at Bonds Garden Restaurant, Upper Hill, Nairobi County.

The Plaintiff's advocate confirmed service and after statutory period applied for entry of default judgment. The Deputy Registrar would not enter judgment if not satisfied from the records that service was conducted and the requisite period had expired. There was/is no evidence to show the Process Server had any prior interest or concern in the matter or that he knew the 2nd Defendant before he served him with process that day.

On the other hand, the 2nd Defendant admitted service of process but contested date and place of service. He contended that he was served by PW1 but it was at Ruai Kenol Petrol station on 21st November 2018. He who alleges must prove as required by **Sections 107-112 Evidence Act**. The 2nd Defendant did not tell this Court who else was with him to confirm these facts or produce any document to confirm service on 21st November 2018. If he signed the Process Server's copy; then it would have been easier to confirm date of service. In the absence of any cogent evidence by 2nd Defendant presented to this Court of proof of service of Plaint and Summons on 21st November 2018 and not 24th September 2018 and to rebut the Process Server's evidence of service; the Court is satisfied from the evidence on record that the service of process was sufficient and adequate to enter regular judgment.

The Court has perused the Court file and confirmed that the Default Judgment was entered on 7th November 2018. How would the Plaintiff possibly and reasonably seek entry of judgment in default of entry of appearance if they had not served process? Why would the Plaintiff irregularly serve the Plaint and Summons to the 2nd Defendant on 21st November after default judgment was entered? Logically, if the Plaintiff succeeded in obtaining default judgment before serving process as the 2nd Defendant would like the Court to believe, then service after obtaining judgment was of no use or consequence. At least, the 2nd Defendant ought to have signed the documents he was served on 21st November 2018 so as to prove the Plaintiff's irregular service after judgment was obtained on 7th November 2018.

Thirdly, the 2nd Defendant alleged that he was not served with 10 days Notice after default judgment was obtained. If that is the case, it does not vitiate entry of regular judgment except that the plaintiff shall regularize the same by serving the Notice before the execution process.

The Court finds the 2nd Defendant's version not plausible in the circumstances that he was served on 21st November 2018 whereas default judgment was obtained on 7th November 2018.

The Plaintiff served the 2nd Defendant with the Plaint and Summons on 24th September 2018, in his personal capacity and as director of 1st Defendant Company.

a. Are there triable issues raised by Draft Defence of the Defendants?

Where judgment is regularly entered the Court would only set aside the *ex parte* judgment where the Defendant shows that he has a *prima facie* case to go to trial.

See; Ceneast Airlines Ltd vs Kenya Shell Ltd (2002) E.A. & Patel vs E.A. Cargo Holding (1974) E.A. 75.

Shah v. Mbogo & Anor. (1966) EA 116 which set down the criteria for setting aside a judgment as follows:

“In setting aside judgment, the court must establish: -

- 1. That there is a reasonable explanation for any delay;**
- 2. That there is a defence on merit;**
- 3. That it is just to do so. “**

The Defendant in the Draft Defence filed on 22nd January 2019 annexed to the application, the 1st & 2nd Defendants in paragraphs 4, 5 & 6 deny allegations contained in paragraph 4 of the Plaintiff, states they are strangers to the allegations and deny [them] totally and put the Plaintiff to strict proof thereof.

In Blue Sky Limited EPZ Limited vs Natalia Polyakova & another [2007] eKLR, the Court stated that:-

"In the case of a defense, a mere denial or a general traverse will not amount to a defense. A defense must raise a triable issue."

The Defendant's defense is mere denial of the Plaintiff Company and/or the transaction that gave rise to the suit, that the Plaintiff advanced to the 1st Defendant Company through its Directors, one of them being the 2nd Defendant USD 217,500 as a friendly loan advanced at the Defendant's request and instance.

The Plaintiff through Rt Col Sigitas Gudeika from Islandijos Rd Kaunas Lt -49165 Lithuania deposed in Replying Affidavit to Defendant's Applicant's application annexed copies of International Payment Order against the ProForma Invoice through KCB Bank Kenya for USD 50,000 on 21st April 2016 to Akkad Systems Limited From UAB Asu Baltija.

On 23rd March 2016, USD 30,000 was remitted in the same manner between the same parties.

On 6th May 2016 USD 180,000 was remitted in the same manner between the same parties.

The Plaintiff also annexed the Plaintiff Company's bank statements from its CBA Bank Current Account reflecting the remittances of funds to the 1st Defendant Company; Akkad Systems Limited.

On 12th March 2019, 2nd Defendant deposed a Further affidavit and explained at Paragraph 14 that they entered into a Teaming Agreement with Amber Universal Security Ltd and annexed the Teaming agreement.

The Teaming Agreement is between Amber Universal Security BV in Netherlands through its Director Mr. Tomas M Mirimba & Akkad Systems Ltd in Kenya represented by its CEO Mr. Bernard K. Theuri. Be that as it may, the International Payment Orders annexed to the Plaintiff's affidavit refers to 1st Defendant Company as beneficiary of the funds and not the said Team Company. The Plaintiff's statement of account reflects debit from its account in CBA Bank to credit the Plaintiff Company Account in KCB Bank through money transfer. Therefore, whereas there was Teaming, the Plaintiff Company lent the funds to the Defendants as per the annexed documents.

The Applicant raised in submissions the triable issue of joining the Teaming Company to these proceedings. With respect, the plaintiff's annexed Account Statement shows Akkad Systems and not Amber Universal security BV as beneficiary of funds. The Applicant may pursue a claim against the Teaming Company in a separate suit.

The above outlined evidence is overwhelming against the Defendant's defence which consists of a mere denial of the Plaintiff's claim. I find no *bonafide* triable issue for consideration at the hearing of the matter.

See Ecobank Kenya Limited vs Bobbin Limited & 2 Others [2014] eKLR

b. Has the 2nd Defendant formed another Company and transferred assets of the 1st Defendant Company to avoid settling any legal claims/Liabilities?

While the substantive application was pending Ruling, the Plaintiff filed under certificate of urgency an application of 23rd September 2019, the gist being that the Defendants deposit security in Court or grant attachment of motor vehicle Reg KCC 220 D in part satisfaction of any decree.

The application was/is by the Teaming Company Amber Universal Security BV in Netherlands through its Director Mr. Tomas M Mirimba. The said application was not served to the Defendants and they have not filed Replying affidavit. The Application was not canvassed *interpartes* and in the absence of service and filing of pleadings by all parties, it remains pending for hearing and determination on merit.

However, on allegation that the 2nd Defendant was transferring assets of the 1st Defendant Company to other Companies whose CR 12 forms were attached; **KINGDOM PAINTS LTD & FILTRONIC INT'L LTD** both of which the 2nd Defendant is director, this Court on 24th September 2019 granted interim orders of injunction on maintenance of status quo pending hearing and determination of the instant application. The application shall be heard when pleadings are closed and parties address the Court on the matter by either oral/written submissions.

DISPOSITION

- 1. The Defendants/Applicants application of 22nd January 2019 is dismissed with costs.**
- 2. The Defendants were duly and properly served with Plaint and Summons on 24th September 2018 and regular judgment was entered.**
- 3. The Defendant's Draft Defence does not raise *bonafide* triable issue(s)**
- 4. During the ongoing corona virus pandemic lockdown, there shall be no execution until official communication of return to normalcy or after 90 days from date of Ruling.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 29TH MAY 2020. (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

N M KAMWENDWA & CO ADVOCATES -PLAINTIFF

F N KIMANI & ASSOCIATES ADVOCATES -DEFENDANTS