



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 406 OF 2013

ADEN IBRAHIM ABDI.....1ST PLAINTIFF/RESPONDENT

HASSAN ABDI GULED.....2ND PLAINTIFF/RESPONDENT

VERSUS

EZEKIEL ANGWENYI.....1ST DEFENDANT/APPLICANT

SAMUEL ANGWENYI T/A

UKAY CENTRE FOREX BUREAU LIMITED.....2ND DEFENDANT

RULING

By a Certificate of Urgency Application dated 14th December 2018, the 1st Defendant/Applicant filed a Notice of Motion application dated 14th December 2018, pursuant to **Order 10 Rule 11 Civil procedure Rules Sections, 1, 1A, 1B, 3 & 3A Civil Procedure Act** and all other enabling provisions of the law. The Applicant sought Orders;

a) That this Court be pleased to set aside the interlocutory judgment entered on the 30th May 2016, final judgment and decree granted on the 8th December 2017 together with all consequential orders thereto.

The 1st Defendant/Applicant urged the court to grant the orders on grounds that;

a) Execution had commenced against the 1st Defendant/Applicant and his compensation of about Ksh 22 Million had been attached without granting the Applicant an opportunity to be heard.

b) Garnishee proceedings against the National Land Commission had been commenced without granting the Applicant an opportunity to be heard in exercise of his fundamental constitutional right.

c) Judgment was entered against the Applicant on the 30th May 2015 on a skeleton file opened on 28th May 2015 while the original court file was existing.

d) These proceedings were conducted, judgment entered against the Applicant on a skeleton file while the original file was in existence which was closed on the 25th October 2018.

e) Notices of entry of interlocutory judgment and final judgment had never been served upon the Applicant.

f) Summons to enter appearance had been served upon the Applicant.

g) The Applicant had a good defence which raised triable issued.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit dated 12th February 2019, sworn by Aden Ibrahim Abdi, the 1st Plaintiff/Respondent herein and on behalf of the 2nd Plaintiff Hassan Abdi Guled. He stated that in response to paragraph 2 of the Supporting Affidavit, the 1st Defendant

is/was a director of Ukay Centre Forex Bureau Limited by dint of his own admission contained in the Agreement and Memorandum of Understanding dated 24th December 2012 to which he executed in his capacity as director. Annexed and marked **AIA – 01** is a copy of the said Agreement and Memorandum

That in response to paragraph 3 of the Affidavit, that the Court rightly noted that the Defendants had failed to enter Appearance and/or file a defence and that Interlocutory Judgment was rightfully entered as a matter of law.

That in response to Paragraph 4 of the Affidavit, he averred that the suit did not halt for an uninterested litigant. That due regard was complied with or the Civil Procedure Rules pursuant to which his advocates moved the Court as per laid down procedure.

That with regard to Paragraph 5 of the Affidavit, he averred that his advocates on record made several requests to the Deputy Registrar to trace the Court file to no avail. That the Deputy Registrar confirmed that the Court file could not be traced and directed his advocates to bring photocopies of all pleadings so that the file could be reconstructed. Annexed and marked **AIA -02** a copy of letter dated 27th February 2015 from Deputy Registrar.

That furthers the 1st Defendant/Applicant as a litigant had a corresponding duty to constantly check the progress of his case. Had the 1st Defendant/Applicant been a diligent litigant, he would have been aware that the original Court file could not be traced and that in the interest of the justice and expeditious resolution of the dispute, the file was reconstructed.

That the allegation that the 1st Defendant could not file a Defence because of the missing original file is laughable and absurd. Had he intended to file a Defence to the Plaint dated 17th September 2013 he would have done so then or even thereafter as the file had been reconstructed and was available at the registry.

That the original Court file was traced after judgment was entered on 8th December 2017 and the matter concluded. In fact, the matter was listed before the Hon. Lady Justice Kasango on 25th October 2018 and Plaintiff's advocates on record confirmed to the Court that the file had been reconstructed in 2015 after the original file misplaced.

That in reply to Paragraph 13 of the affidavit, it is unfortunate that the 1st Defendant/applicant smeared the orders of a competent Court by calling them malicious and illegal yet due process was followed. It is within the Respondent's right to have the decretal sum of USD 300,000 lent to Defendants in 2012 to be repaid.

FURTHER AFFIDAVIT

The Application was further supported by an affidavit dated 18th March 2018, sworn by Ezekiel Angwenyi, the 1st Defendant/Applicant herein. He stated that in response to paragraph 4 of the Replying Affidavit, he had never been and he was not a director and/or shareholder of Ukay Centre Forex Bureau Limited. He annexed previous and current **CR -12** Forms marked **EA-1 (a) & (b)** that confirm he was not director of Ukay Centre Forex Bureau Limited.

He averred that in response to paragraph 5, 6 & 7 of the Replying Affidavit, he had never been notified of any proceedings in the skeleton file and the court should note that the Main File had been closed and it did not have the judgment and decree herein.

That it had not been disputed that the 1st Defendant/Applicant is a stranger to a lady known as "Alice Angwenyi", the person who was allegedly served with summons to enter appearance is unknown to 1st Defendant and was not his wife or relative. That the 1st Defendant did not know any person by name "Alice Angwenyi" and his wife is not known by the said name; she is not his representative in these proceedings.

That 1st Defendant had perused annexure **AIA-01** and wishes too state as follows;

- a) He had never signed the said agreement
- b) The clause 1 of the said agreement and the description does not in any way make him a shareholder and director of Ukay Centre Forex Bereau Ltd if at all the agreement was genuine.
- c) The Respondents have not disputed the payment of several cheques as stipulated in the draft defence and the supporting affidavit sworn on 4th December 2018.
- d) Even after tracing the original court file (if at all it was lost) the Respondent never bothered to inform 1st Defendant to enable him regularize his position.
- e) The 1st Defendant was never made privy to the proceedings of 8th December 2017 and 25th October 2018.

That in response to Paragraph 11 and 12 of the Replying affidavit, 1st Defendant was not aware of proceedings in the skeleton file and he deserved a right to be heard. The Respondents have not disputed the fact that his defence raises triable issues which could have affected the judgment herein. The 1st Defendant/Applicant averred that he was never served with a hearing notice for formal proof nor was he served with a notice of entry of Judgment.

REPLYING AFFIDAVIT

The 2nd Defendant filed Replying affidavit on 3rd April 2019 and sought the Interlocutory judgment set aside as he was not served with Plaint and summons to enter appearance or any pleadings from both original and skeleton file.

The 2nd Defendant claimed that the Plaintiffs and Ukay Centre Forex Bureau Limited had a business transaction but he denied he was involved.

The 2nd Defendant admitted that he is one of Directors of Ukay Centre Forex Bureau Limited and confirmed the Plaintiffs advanced the said Ukay Centre Forex Bureau Limited some cash which was later settled.

He attached Schedule of Payments made by the company to Plaintiffs marked **SAA-1** Deposit slips marked **SAA-2**.

Email Correspondence for the purchase of business franchise by Plaintiff from Ukay Centre Forex Bureau Limited marked **SAA-3**

Copies of original 2 cheques 000006 & 000007 of USD 30,000 each marked **SAA -4**, which were replaced with Cash and paid to Plaintiff.

Copies of 8 cheques of USD 30000 sent to the Plaintiffs marked **SAA-5**.

Copies of Charge sheets of **Criminal Cases 566 & 696 of 2014** respectively, where Plaintiffs claimed USD 300000 from Defendants and they were acquitted.

DETERMINATION

The court considered the Pleadings and submissions by parties and the issues that emerge for determination are;

- a) Was service of plaint & Summons sufficient to enter a regular judgment?
- b) Was there any irregularity in reconstruction of the original Court file that went missing?
- c) Do the Defendants/Applicants raise triable issues?

ANALYSIS

Was service of Plaint & Summons sufficient to enter a regular judgment?

Order 5 Rule 7CPR 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 8CPR 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.

In the case of **National Bank of Kenya vs Puntland Agencies Limited & 2Others [2006]Eklr** the court held;

“for the Court to validate a mode of service other than personal (which is mandatory), the person alleging proper service must have and prove in his return of service or otherwise the following:-

1. *Time when service was effected on the said person.*
2. *The manner in which summons were served.*
3. *The name and address of the person identifying the person served.*
4. *The exact place where service was effected.*
5. *Must state in the affidavit that the person served is known to the person the summons is meant for if the person is not known to the process server.*

6. *If no personal service the person serving should indicate the relationship between the person, served and the person summons were directed at.*

7. *The source of the information in paragraph 6 must be also stated.*

8. *That indicate that he/she required his/her signature and response (whether signed and/or refused to sign)."*

Non-compliance with any command of the above (Order 5, Rule 15) would make any such service fatally, defective. If there is no proper service there can be no regular judgment. The basis of judgment is whether the service was proper. The foundation is the proper service and if the foundation is faulty then the house built thereon cannot stand, definitely it would fall..."

The Process Server filed Affidavit of Service on 5th August 2015 and outlined process of service of Plaintiff and Summons. On 25th March 2014, the Process Server took the pleadings from Gakoi Maina Advocates to effect service to the Defendants. The 2nd Plaintiff Hassan Abdi Guled accompanied him to show him where the Defendants were working.

They arrived at Westlands at Nakumatt Ukay where both Defendants ran a Forex Bureau named Ukay Centre Forex Bureau Limited.

At the reception of Ukay Centre Forex Bureau he met a lady and upon enquiring of the Defendants, he was informed they went to a funeral and would be back in a week's time.

The 2nd Plaintiff gave him the defendants' mobile numbers **0722702795 & 0735 557 778** respectively. He called them and explained the purpose he came to fulfill.

The 1st Defendant instructed him to take the Plaintiff and Summons for him and 2nd Defendant to his wife Alice Angwenyi a Dentist at Better Living Hospital situated at Seventh Day Church Compound Opposite Integrity Centre along Milimani road Nairobi.

The Process Server proceeded as instructed and was accompanied by 2nd Plaintiff. On arrival at 1st Defendant's wife place of work he enquired of her at the Reception and she came and ushered them to her office. He introduced himself and the purpose of the visit and she said her husband had informed her to receive the documents on her husband and his brother's behalf. He served her with the documents in the presence of 2nd Plaintiff Hassan Abdi Guled and she declined to sign his copies as she had received the documents.

These are clearly detailed facts of the process of service of Court documents to the Defendants. The Process Server was led to Defendants' workplace by the 2nd Plaintiff, he also gave him their telephone contacts, they communicated with Process Server. The Defendants did not challenge the mobile numbers used as not being the numbers they communicated with or are that they were their mobile numbers.

How would the Process Server know the name and whereabouts of 1st Defendant's wife and serve her with documents which she accepted if he had not been instructed by 1st Defendant to serve his wife as he was away?

The 2nd Defendant's contest that Alice Angwenyi is not his wife is true as she is his sister in law and she accepted service of his documents as was instructed by her husband, the 2nd Defendant's brother, 1st Defendant. Alice Angwenyi was their agent because 1st Defendant instructed the Process Server to serve her on their behalf.

The totality of the evidence by Process Server confirms that the Defendants were duly served with Court Process as particularized in the Affidavit of Service. More so, the 2nd Plaintiff accompanied the Process server and could corroborate the service process. The service of Court Process was proper and therefore the judgment entered on 30th May 2016 was a regular judgment.

b) Was there any irregularity in reconstruction of the original Court file that went missing?

The Plaintiffs through their advocates wrote to the Deputy Registrar letter dated 16th February 2015 informing him the Court file went missing since early 2014. The Deputy Registrar wrote back to them vide letter dated 27th February 2015 and confirmed the Court file was missing. The Deputy Registrar advised the Plaintiff's advocate to avail photo copies of all pleadings so as to facilitate reconstruction of the Court file. They complied and the Court file was reconstructed.

The Plaintiff could not misplace the Court file yet they were the ones pursuing their claim, Secondly, the Court file disappeared after Pleadings were released to be served in 2014.

The Reconstruction of the Court file was by the Court and not the Plaintiffs.

The Defendants could not be served on reconstruction of the Court file as they had not entered appearance since service of Court Process and instead the Plaintiffs filed for default judgment almost after a year after service of Court Process.

c) Do the Defendant /Applicants raise triable issues?

The Plaintiffs relied on case-law;

Fidelity Commercial Bank Ltd vs Owen Amos Ndungu & Anor HCCC 241 of 1988 cited in Jamii Bora Bank Ltd vs Dagen Freight Ltd that provides;

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex-parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right.”

Mbogo vs Shah EALR [1968] provides;

“A Court’s discretion to set aside an exparte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

There was/is a valid Contract/Agreement between the parties duly executed by Plaintiff and Defendants. The Agreement & Memorandum of Understanding was signed on 24th December 2012 by Samuel Angwenyi ID No 0559169 & Ezekiel Angwenyi ID 0474081 trading in the name & style of Ukay Centre Forex Bureau Ltd and Aden Ibrahim Abdi & Hassan Abdi Guled before Hassan Bulle & Co Advocates. The Agreement was/is for receipt from the Plaintiffs USD 300,000 and to pay interest at 5% per annum.

The Borrowers were to repay the loan at USD 20,000/- each month from 1st April 2013 – June 2014.

The Defendants particularly 1st Defendant denied signing the said Agreement. The agreement is signed by the Defendants and Plaintiffs and witnessed by the advocate, Bulle Ahmed Advocates and Commissioner for Oaths. Secondly, the defendants names and their Identity card numbers are indicated and they have not provided any evidence from Registrar of Persons that these are not their ID numbers. How did Plaintiffs get their ID numbers if they did not engage negotiate and reach Agreement vide the signed Agreement?

The 2nd defendant admitted that there was an agreement with the Plaintiffs but it was some money advanced to the Company Ukay Centre Forex Bureau Limited and not himself. The 2nd Defendant admitted he is one of the Directors of the Company. A Company is a legal person and not human person and acts through the Board of Directors. He is one of the Directors and therefore he acted on behalf of the company.

The 1st Defendant contended he is not a Director of Ukay Centre Forex Bureau Limited and annexed **CR-12** to Further Affidavit. The **CR 12** of 7th July 2011 and one of 19th March 2019 confirm Directors of the Company as ;

- a) Esther Nzioki Angogo Angwenyi- 8000 shares
- b) Samuel Aunga Angwenyi -28000 shares

The 2nd Defendant’s assertion is confirmed, he was/is not one of Directors of the Company. However, the pleadings confirm he is sued in his personal capacity as 1st defendant. It is the 2nd Defendant only who is sued as T/A Ukay Centre Forex Bureau Limited.

The 1st Defendant not only signed the Agreement and Memorandum of Understanding but he also signed another Agreement annexed to application of 14th December 2018 marked **EA-3**; on 15th April 2013 with the Plaintiffs and 2nd Defendant on “Without Prejudice” basis. In the said agreement they agreed that the Defendants owed the Plaintiffs USD 300,000 and would pay upon the 2nd Defendant negotiated a facility with Eco bank and provide a title for the facility. The proceeds would be released to the Plaintiffs.

Again, all parties signed; Ezekiel Angwenyi ID 0474081; Samuel Angwenyi ID 0559169; Abdullahi A, Guled; Hassan Guled ID 2096460 Aden Ibrahim ID 25525906 witnessed by John Ngugi Gitau ID 0975970.

The 1st Defendant also signed with 2nd Defendant and both Plaintiffs on a letter with the Company’s letterhead on 13th September 2012, where they confirmed receipt of USD 300,000 and by issuance of cheques had paid part of the funds back; 6 of the 10 cheques of USD 30,000 each had been paid.

All these documents signed by both Defendants confirm that they received US 300,000 from Plaintiffs and agreed on terms of repayment. They later breached the Contract/Agreement and defaulted in full refund of the funds.

Whereas the Defendants claim they paid by issuing various cheques, the Plaintiffs contend various cheques bounced and there is a balance due and owing.

From the above facts, there is no triable issue for hearing and determination, documentary evidence confirm Plaintiffs and Defendants entered into Agreement, Plaintiffs gave USD 300,000 to Defendants. They breached terms of refund, they made part payment and despite demand they did not fully settle the amount. On filing suit, despite service the Defendants failed to enter appearance or file Defence. The only issue remaining is reconciliation of Accounts on proof of what is paid, how by whom and what has been received as part payment. The balance shall be paid by Defendants, execution may ensue, garnishee proceedings may resume and/or parties may agree on what the balance is and how it is to be repaid.

DISPOSITION

1. The Application of 14th December 2018 is dismissed with costs to Plaintiffs

2. The Service was proper and a regular judgment and formal proof proceedings and exparte judgment of 8th December 2017 were regular.

3. The Draft Defences do not raise triable issues for hearing and determination.

4. Judgment is entered as per exparte judgment of formal proof proceedings of USD 315,484, 3720 with costs and interest.

5. Parties through Counsel to establish part payments and the balance thereof. It is the balance that should be subject to execution processes.

6. No execution shall take place during the ongoing Corona virus pandemic lockdown and/or within 90 days.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND MAY 2020

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

ASLI HODING BRIEF FOR PLAINTIFFS

**N/A FOR OMWOYO MOMANYI GICHUKI & COMPANY ADVOCATES FOR 1ST
DEFENDANT N/A FOR M.N.OONGE & COMPANY ADVOCATES- 2ND DEFENDANT**