



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E333 OF 2019**

**LEEDS ENGINEERING COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**COSMOCARE LIMITED.....DEFENDANT**

**RULING**

1. This ruling is in respect of the application dated 11<sup>th</sup> June 2020 wherein the defendant/applicant seeks orders that: -

*i. Spent*

*ii. That the honourable court be pleased to allow the firm of KRK Advocates LLP to come on record for the defendant in the place of the firm of R.O Nyamweya & Company Advocates.*

*iii. That the honourable court be pleased to grant leave to the defendant to amend the Notice of Motion application dated 22<sup>nd</sup> January 2020 and that upon granting of leave, the Amended Notice of Motion application dated 11<sup>th</sup> June 2020 be deemed to be properly on record.*

*iv. Spent*

*v. That on the hearing date of the Amended Notice of Motion application, the honourable court be pleased to direct the Process Server, Mr. Daniel Kanyiri Watu to be availed in court for cross-examination on the contents of the affidavits of service sworn 7<sup>th</sup> November 2019 and 5<sup>th</sup> December 2019.*

*vi. That the honourable court be pleased to set aside the default judgment entered on 25<sup>th</sup> November 2019 as against the defendant and grant the defendant leave to file its statement of defence; and*

*vii. That the costs of the application be in the cause.*

2. The application is brought under Order 9 Rule 9, Order 8 Rule 3, Order 10 Rule 11 of the Civil Procedure Rules, is supported by the affidavits of the defendant's Director and Legal Manager **Mr. Amin Manji** and **Ms Elka Motanya** respectively.

3. The Plaintiff/Respondent opposed the application through the Replying Affidavit of its Director **Mr. Moses Nyamu Mutahi** who avers that the applicant is truly indebted to it on account of the contract that the parties herein entered into on 26<sup>th</sup> April 2016. He states that the applicant went ahead to propose a payment plan and made partial payments after admitting that it owed the debt.

4. He avers that the respondent only resorted to court action when the applicant failed to pay the amount due despite numerous demands. It is the respondent's case that it regularly obtained the default judgment when the applicant did not enter appearance or file a defence despite proper service with the Summons to Enter Appearance and Plaintiff. He maintains that the applicant's intended defence does not raise any triable issues and is merely intended to delay and frustrate the respondent's realization of the fruits of his judgment.

5. He further states that the defendant has previously made indications that it was willing to negotiate the terms of the judgment and that it was willing to settle the judgment at KShs 14 million.

6. Parties canvassed the application by way of written submissions which I have considered.

7. The main issue for determination is: ***Whether the applicant has made out a case for the granting of the orders for; -***

***a) Leave for the firm of KRK LLP to come on record for the defendant.***

***b) Leave to amend the Notice of Motion dated 22<sup>nd</sup> January 2020.***

***c) That at the hearing of the application dated 22<sup>nd</sup> January 2020, the applicant be granted leave to cross examine the process server Mr. Daniel Kanyiri Watu on the contents of the affidavit of service dated 7<sup>th</sup> November 2019 and 5<sup>th</sup> December 2019.***

***d) The setting aside of the default judgment recorded on 25<sup>th</sup> November 2019.***

**a) Leave to come on record for defendant.**

8. Order 9 Rule 9 of the Civil Procedure Rules stipulates as follows:

***“Change to be effected by order of court or consent of parties.***

***9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—***

***(a) upon an application with notice to all the parties; or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.***

9. Courts have taken the position that they will not stand in the way of a litigant who wishes to change its legal representation.

10. In *Changawa Ndundo Katembo & 41 Others v Kenya Airport Authority* [2019] eKLR, it was held:

***“In my mind, a litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not espousing his cause in the manner that he prefers or that his conduct is prejudicial to the interests involved or for any other reason.”***

11. Having regard to the above cited decision and provisions of Order 9 Rule 9 of the CPR, I allow the defendant’s application to change its legal representation.

#### **Amendment of the application dated 22<sup>nd</sup> January 2020**

12. Courts have also taken the position that they will freely allow amendments at any stage of the proceedings before final orders are made as long as the amendments do not prejudice the other party. (see *Lakhamshi Khimji & Another v Ajay Shantilal Shah & 2 Others* [2010] eKLR.

13. In the present case, save for the claim that the applicant had already admitted the claim and that the proposed amendments will serve no useful purpose apart from delaying the respondent’s realization of the fruits of the judgment, the respondent did not state how the amendments, per se, will prejudice it. I therefore find that the applicant is entitled to the prayer to amend the application.

#### **Leave to cross examine the process server**

14. I find that this is a prayer that has been overtaken by events as it ought to be canvassed first before the entire application dated 11<sup>th</sup> June 2020 is considered. I say so because the main prayer in the present application is the prayer to set aside the default judgment on the basis that the applicant was not properly served with the Summons to Enter Appearance. The process server was therefore to be cross examined to enable the court determine if he indeed served the application with the Summons to Enter Appearance and plaint as he had alleged in the affidavits of service.

15. My finding that the intended cross examination has, in the circumstances of this case, been overtaken by events notwithstanding, I am still minded to consider the affidavit of service dated 7<sup>th</sup> November 2019 in determining if it meets the mandatory threshold of validity test.

16. In *National Bank of Kenya v Puntland Agencies Limited & 2 Others* [2006] eKLR it was 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. *The 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 sources 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 the judgment is whether the service was proper. The foundation is the proper service and if the foundation is faulty then the house built therein cannot stand, definitely it would fall.”*

17. The process server stated as follows at paragraph 3 of the affidavit of service dated 7<sup>th</sup> November 2019: -

*“That on the same day with the help of the plaintiff and having previously served the defendant with a demand letter dated 15<sup>th</sup> July 2019 (annexed is copy) I took a matatu from the CBD to Kangundo road and alighted at Supa Loaf Complex Building where the defendant company operations are carried out and on arrival at around 10.45 am, found the security guard at the entrance who after enquiries they directed me to the Directors Office where I found the defendant Director Mr. Amin Akbar Habib Manji Kenya Asian guy of about 55 years of age who I introduced myself and the purpose of my visit and thereafter tendered service to him then upon perusal he confirmed to me that he is the owner and Director on the said company but upon request to sign my copy he declined by saying that he is aware of the issue and he will forward the said court papers to his lawyers to deal with the matter and at the point, he became rude and called the security guards and they chased me away but he remained with his copy I now return to this honourable court duly served upon the defendant.”*

18. From the contents of the said paragraph, it is clear that the process server did not indicate the name and address of the person who identified **Mr. Amin Akbar Habib Manji** to him or if the said **Mr. Manji** is person who was previously known to him.

19. I am therefore not satisfied that the affidavit of service meets the validity test as was stated in the **National Bank of Kenya** case(supra). Having found that the affidavit of service was doubtful, it logically follows that the default judgment entered on the strength of the said affidavit of service is irregular.

20. My finding on the issue of Service of Summons to Enter Appearance notwithstanding, I am still minded to consider the respondent’s position regarding the applicant’s alleged admission of indebtedness and proposal to settle part of the decretal amount.

21. I have considered the contents of the letter dated 26<sup>th</sup> February 2020(Respondents Annexure “MN5”) and I note that in the said letter, the applicants counsel addressed the respondent’s advocate as follows:-

*“Dear Sir/Madam*

*RE; CASE NO. E333 OF 2019*

*LEEDS ENGINEERING COMPANY LTD VERSUS COSMOCARE LIMITED*

*The above refers and our telephone conversation and further our commitment. We have instructions from our clients to settle this matter at kshs Fourteen Million (14,000,000) in full and final settlement of the claim. If agreeable these amount shall be paid in one instalment.*

*Kindly but urgently let us have your word the soonest possible.*

*Thanks you*

*Yours faithfully*

*R.O. NYAMWEYA*

**FOR: REUBEN OGACHI NYAMWEYA & CO. ADVOCATES.”**

22. From the contents of the said letter, it is clear that the Applicant attempted to negotiate the settlement of the decretal sum at Kshs 14,000,000. It is however not clear if the Applicant’s proposal to settle the debt was not accepted by the Respondent in view of the fact that the decretal sum stands at Kshs 23,373,000/-.

23. Having regard to the finding that the affidavit of service of Summons to Enter Appearance and Plaintiff was not fool proof, I find that it will be fair and just to make the following orders: -

*i. The prayer to set aside the default judgment is hereby allowed but on condition that the uncontested sum of Kshs 14,000,000 is deposited, as security, in an interest earning account with a banking institution of repute to be held in the joint names of the advocates for the applicant and the respondent within 30 days from the date of this ruling.*

*ii. In default of compliance with order No. (a) herein above the order to set aside the default judgment shall be vacated and the default judgment reinstated after which the respondent will be at liberty to execute for the decretal sum.*

*iii. I grant the costs of the application to the respondent.*

**Dated, signed and delivered via Microsoft Teams at Nairobi this 12<sup>th</sup> day of November 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Wangui for Rimui for Defendant/Applicant.

Mr. Omondi for Nyandoro for plaintiff.

Court Assistant: Silvia