



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E 066 OF 2018

SABCO MILLERS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

GEOHERMAL DEVELOPMENT LTD...DEFENDANT/APPLICANT

RULING

(1) Before Court is the Notice of Motion dated **20th December 2018** by which **GEOHERMAL DEVELOPMENT LIMITED** (the Defendant/Applicant) seeks for orders:-

“a. SPENT

b. SPENT

c. THAT this Honourable Court be pleased to set aside the ex parte judgment in default therein and any other orders issued subsequently as against the Defendant/Applicant in this matter pending the hearing and determination of the main suit in the matter.

d. THAT there be a temporary stay of execution of the decree issued against the Defendant/Applicants pending the hearing and determination of the main suit in the matter.

e. THAT the warrants of attachment and sale issued against the Defendant/ Applicant on the 14th day of December 2018 be lifted, set aside, and/or vacated pending the hearing and determination of the main suit in the matter.

f. THAT costs of this application be borne by the Plaintiff/Respondent.”

(2) The application which was premised upon **Article 50** of the **Constitution of Kenya, 2010**, **Sections 1A, 1B, 3A & 3B** of the **Civil Procedure Act, Cap 21 Laws of Kenya**, **Order 10 Rule 8, Rule 11, Order 45 Rule 6 Order 51** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law, was supported by the affidavit sworn on even date by **ADRIAN TOPOTI** the Company Secretary in the Defendant Company.

(3) **SABCO MILLERS LIMITED** the Plaintiff/Respondent opposed the application by way of the Replying Affidavit dated **22nd January 2019** sworn by **FARID AL-MAARY**, a Director of the Plaintiff Company.

(4) Pursuant to directions given by the court, the application was canvassed by way of written submissions. The Defendant/Applicant filed their written submissions on **20th February 2019**, whilst the Plaintiff/Respondent filed their submissions on **23rd February 2019**.

BACKGROUND

(5) On **13th September 2018** the Plaintiff/Respondent filed a suit against the Defendant/Applicant, in which they sought judgment for:-

“(a) Kshs.28,917,436.20.

(b) Interest on (a) above from the date of filing of the suit until full payment at commercial rates.

(c) Costs.”

Summons to enter appearance were served upon the Defendant/Applicant on **28th September 2018**. The Defendant/Applicant avers that it entered appearance in the suit on **11th October 2018**. This is denied by the Plaintiff/Respondent who insists that the Defendant/Applicant failed to enter appearance within 15 days as required by law.

(6) On **17th October 2018** the Plaintiff/Respondent filed a request for judgment in default of appearance Ex parte judgment was entered and a decree was extracted on **17th December 2018**. The Plaintiff/Respondent then proceeded to apply for and obtained warrants of attachment in execution of the decree against the Defendant/Applicant. Upon service of said warrants the Defendant/Applicant filed the present application.

(7) The Defendant/Applicant concede that they received the summons on **28th September 2018**. They submit that contrary to the averments made on behalf of the Plaintiff/Respondent they did enter appearance on **11th October 2018**, which was well within the 15 days provided for in by law. The Defendant/Applicant maintains that the request for entry of judgment was not served upon them. They further state that the Defendant/Applicant filed a Notice of Change of Advocates together with their Defence, and list of Documents on **25th October 2018** before the lapse of 14 days after filing their appearance. These pleadings were duly served upon the Plaintiff/Respondent on **31st October 2018**.

(8) The Defendant/applicant posits that the ex-parte judgment and the subsequent extraction of decree were all done irregularly as they were already on record and had filed their defence. The Defendant/Applicant state that they only became aware of the warrants upon being served by Base Auctioneers on **19th December 2018**.

(9) On their part the Plaintiff/Respondent insists that the ex parte judgment was obtained regularly. They contend that having been served with the Summons on **28th September 2018**, the Defendant/Applicant failed to enter appearance within the request period. Since no Memorandum of Appearance had been served upon them the Plaintiff/Respondent proceeded to apply entry of judgment in their favour. The Plaintiff/Respondent categorically denies the Respondent/Applicant allegation that they acted illegally, irregularly and/or fraudulently in their request for entry of judgment. The Plaintiff/Respondent insist that their request for entry of judgment was made on **17th October 2018** and not on **7th October 2018** as alleged by the Defendant/Applicant. They urge the Court not to allow the application.

Analysis and Determination

(10) I have considered the submissions made by both parties as well as the relevant statute and case law. I have also carefully perused this file. The key question is whether the ex parte judgment entered in this matter was regular.

Order 10 Rule 4(1) of the **Civil Procedure Rules 2010** provides for entry of ex parte judgment as follows:-

“Where the Plaintiff makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons or at all or all the defendants fail so to appear the court shall, on request in Form 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.

(11) In **SOUTHERN CREDIT BANKING CORPORATION LTD –VS- JONAH STEPHEN NGANGA [2006] eKLR** it was held thus:-

“Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is irregular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If the judgment entered is found to be irregular it ought to be set aside “ex debito justitiae.”

(12) A look at the court file clearly reveals that the Plaintiff was duly filed on **13th September 2018**. The Summons to enter Appearance was extracted on **17th September 2019**. The same was served upon the Defendant/Applicant on **28th September 2018**. (None of the above is in dispute). Thereafter according to the record in the court file request for judgment dated **17th October 2018** was filed in court on the same date. From what appears in the Court file the Plaintiff/Respondent acted lawfully and procedurally in seeking ex parte judgment as there was no record of Entry of Appearance on the court file. Ex parte judgment was duly entered on **7th November 2018**.

(13) However it is manifest from the annexures to the Notice of Motion dated **20th December 2018**, that the Defendant/ Applicant did in fact file a Memorandum of Appearance dated **11th October 2018**. The annexure “AT2” bears the High Court stamp indicating that the same was filed on that same date **11th October 2018**. I have no reason to doubt the authenticity of the court stamp appearing on this document, nor has any party raised any issue regarding the validity of said stamp. For one reason or other this document is not in the court file. I cannot tell whether this omission was due to human error or by design. All I can say is that unfortunately it is not a new thing for court documents to be found missing from the original file. An investigation would have to be conducted to determine how this document left the court file.

(14) Given that the Defendant/Applicant did enter Appearance on **11th October 2018**, this was well within the 15 days provided from the date of service of Summons and in the circumstances the Request for Entry of judgment ought not to have been allowed.

(15) The Plaintiff/Respondent deny that they acted malafides in filing the request for Entry of Judgment, as they were not aware that the Defendants had entered appearance. This was entirely possible given that the Memo of Appearance was not in the court file and the Defendant/applicant have not annexed any Affidavit of Service to show that the Memo of Appearance was served upon the

Plaintiff/Applicants.

(16) I further note from the annexures to the Supporting Affidavit dated **20th December 2018**, that on **25th October 2018** the Defendant did file in court a Notice of Change of Advocate, a Defence dated **25th October 2018** and a list of witnesses and Documents. Once again these are not in the court file. As stated earlier I cannot tell if this omission was due to error or by design. Again I have no reason to doubt the validity and/or authenticity of the court stamp appearing on these documents.

(17) From the evidence availed to this Court it is manifest that the Defendant/Applicant did in fact enter appearance in this matter 13(thirteen) days after service of summons, well within the 15 days stipulated by law. Accordingly the ex-parte judgment entered on **7th November 2018** was irregular and I do so find. As consequence all orders flowing from that irregular ex parte judgment are void ab initio.

(18) Based on the foregoing and in exercise of the Court inherent powers provided by Section 3A of the Civil procedure and taking into account the Courts duty to administer substantive justice as provided by **Sections 1A and 1B** of the same Act. I allow the Notice of Motion dated **20th December 2018** and make orders as follows:-

- (i) The Ex-parte judgment dated **11th November 2018** and all subsequent orders are hereby set aside. For avoidance of doubt I do order that:-
- (ii) The decree issued on **17th December 2018** is hereby set aside.
- (iii) The Warrants of attachment and sale issued against the Defendant/Applicant on **14th December 2018** are hereby set aside.
- (iv) The Defendant be and is hereby at liberty to defend the suit filed against it on **13th December 2018**.
- (v) The Notice of Change of Advocates, the Defence list of Witnesses and documents filed on **25th October 2018** are all deemed properly filed and on record.
- (vi) The documents listed in (v) above to be served upon the Plaintiff/Respondent within seven (7) days hereof.
- (vii) Each party to meet its own costs for this application.

Dated in Nairobi this 31st day of July, 2019.

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Justice Maureen A. Odera