



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 183 OF 2013

SMR LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL EZRA MULWOYA.....DEFENDANT/APPLICANT

RULING

Introduction

1. On 10th May 2013, the plaintiff/respondent herein, SMR Limited, sued the defendant applicant seeking the payment of the sum of USD 200,000 arising out of a loan agreement.
2. On 29th May 2013, the plaintiff filed a request for judgment under Order 10 Rule 4 of the Civil Procedure Rules on the basis that the defendant did not enter appearance or file a defence and on 29th May 2013 default judgment was entered against the defendant thereby precipitating the filing of the application that is the subject of this ruling.

Application

3. Through the application dated 3rd September 2013, the defendant/applicant seeks orders to set aside the default judgment and any consequential decree or order and for leave to defend the suit. The applicant also seeks the costs of the application.
4. The application is supported by the applicant's affidavit sworn on 3rd September 2013 and is premised on the grounds that the defendant was not served with the Summons to Enter Appearance and plaint. He also contends that has a formidable defence to the plaintiff's claim.
5. The applicant avers that the process server who allegedly served him with the Summons to Enter Appearance and plaint subsequently swore an affidavit (annexure "MEMI") wherein he categorically denies that he ever served him with the said summons and claims that the alleged affidavit of service is a forgery.
6. The plaintiff opposed the application through the affidavit of its counsel **Mr. Alphonse Mutinda** who avers that he has known the process server, **Bashir Mumbaha**, since the year 2000 and that he, on 13th May 2013, instructed the said process server to effect service of summons on the defendant. He states that the process server indeed effected service upon the defendant and swore the affidavit of service filed in this matter but that he (process server) opted to disown the affidavit of service after he was allegedly bribed by the defendant's counsel. It is the plaintiff's case that the instant application is an afterthought as defendant is truly indebted to it.
7. Parties filed written submissions to the application which I have considered.

Analysis and findings

8. The main issue for determination herein is whether the defendant has made out a case for the setting aside of the default judgment entered on 24th May 2013. The defendant's argument was that he was not served with the summons to enter appearance and that the default judgment was therefore irregular. The defendant attached the sworn affidavit of the said process server to his supporting affidavit. The said Mr. Bashir denies that having effected service of summons upon the defendant.
9. On its part, the plaintiff argued that the said Mr. Bashir had been bribed to disown his earlier affidavit of service.

10. I note that even though the plaintiff had expressed its intention to cross –examine the process server on the contents of his affidavit disowning the earlier affidavit of service, such cross examination was not pursued or undertaken so as to enable this court arrive at the truth regarding the issue of service of summons. This court is of the view that the scenario presented in this application is very disturbing and points towards the possible abuse of court by a court officer, who on one hand is alleged to have effected service of summons and on the other hand disowns such service. It is clear, from the circumstances of this case, that there is a party who is not being truthful on the issue of service of summons. I find that there is more than meets the eye in the process server’s action of swearing a second affidavit to disown an earlier affidavit of service. I am of the view that this is a matter that may require further interrogation by the body that governs the activities of process servers.

11. Be that as it may, a perusal of the affidavit of service sworn by Mr. Bashir Mumbaha on 29th May 2013 reveals that it is so detailed on how the service effected that it leaves no doubt in the mind of any reasonable person that the defendant was indeed served with the Summons to Enter Appearance in this case.

12. My findings on this issue of service of summons notwithstanding I note that the defendant did not avail a draft copy of his intended defence to plaintiff’s case to this court so as to justify the setting aside orders. Needless to say, the existence of a defence to a plaint is one of the key considerations to an application to set aside a default judgement. Courts have taken position that failure to annex a draft defence to an application to set aside a default judgment is fatal to such an application. In this regard, I am guided by the decision in **Harun Rashid Khator suing as the representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 Others** [2014] eKLR wherein Angote J. held, *inter alia*, that:

“Failure to annex a draft defence on an application to set aside a regular ex-parte judgment is fatal to such an application.”

13. In the present case, the defendant argued that the plaintiff did not serve him with the plaint, even after he filed the instant application, and that he was therefore not able to make a defence. I find the defendant’s argument to be misleading as the court record shows that the defendant has all along had access to the court file and has therefore been aware of the plaintiff’s case against him. My finding is that in the circumstances of this case, the least and the most prudent action that the defendant ought to have taken should have been to present a draft defence to this court in order to justify the application to set aside the judgment. I find it quite curious that the applicant was able to gain access to the court file and peruse the affidavit of service before getting the process server to recant, and/or disown the contents of the affidavit of service yet he did not bother to check the contents of the plaint.

14. I find that no credible reason has been advanced for the failure to file a draft defence and that without a defence, there would be no basis upon which this court can hold that there are trial issues that would warrant the granting orders to set aside default judgment. To my mind, such setting aside will be in vain.

15. For the above reasons, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent/plaintiff.

Dated, signed and delivered in open court at Nairobi this 19th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Luvai for Mutua for defendant/applicant

Miss Macheru for plaintiff/respondent

Court Assistant – Sylvia