REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.17 OF 2017

FIRST CAPITAL LTD.....1st DEFENDANT/APPELLANT

VERSUS

EUNICE NAISIAE KIREHU.....PLAINTIFF/1ST RESPONDENT

HARRISON KIHARA NGUNJIRI T/A

HARIKIAUCTIONEERS.....2NDDEFENDANT/2NDRESPONDENT

(Appeal from the Ruling and order of Hon. O. Towett SRM dated 28th April 2017)

J U D G M E N T

On 15th November 2016, the plaintiff/ 1st respondent filed a notice of motion brought under Orders 40 rule 1 &4 and 51 rule 1 of the CPC, section 63(e) of the CPA and the 'inherent powers of the court'. She sought orders, inter alia that the application be certified urgent and heard *ex-parte* in the first instance and a restraining order against the 1st Defendant/ appellant, its agents *et al* from 'attaching, and/or advertising for sale and/or auctioning and/or transferring and/or leasing and/or charging and/or interfering in any way with all that parcels of land known as L.R Aguthi Gatitu/1559 and Aguthi/Gatitu/3158 situated at Skuta Area Nyeri.

The basis for the application was found on its face, and the supporting affidavit sworn by Eunice Naisiae Kirehu the applicant/respondent.

The crux of the matter was that the 1st respondent/appellant First Capital Limited had instructed the 2nd and 3rd respondents auctioneers to sell the two properties to recover a loan totaling to Kshs. 7,768,005/- in the exercise of its statutory power of sale. It was alleged that the applicant had obtained two loan facilities; the first one on 4th September 2015 in the sum of Kshs. 1,500,000/- and a top up of Ksh. 500,000/- on L.R Aguthi/Gatitu/3158 and in early 2016 had applied for a further loan of Kshs. 1,800,000/- on L.R Aguthi/Gatitu/1559 which had not been disbursed by the time of the purported advertisement for sale.

The 1st applicant purported to exercise its statutory power of sale over LR Aguthi/Gatitu/1559 where no loan had been acquired.

The application was heard *ex-parte* and the learned magistrate issued temporary restraining orders as prayed.

The application was fixed for *inter- parte* hearing on 23rd November 2016. On that day Mr. Kimathi appeared for the applicant and submitted that the application and orders were served on 15th November 2016 but there was no appearance on the part of the respondents.

The learned magistrate extended the interim orders to 14th December 2016 when he would deliver his Ruling. He found that the application had been served and there being no appearance on the part of the respondents, he treated the same as unopposed and confirmed that interim orders:-

1. Restraining the defendants from selling the two properties pending the hearing and determination of the suit.
2. Setting aside the statutory notice contained in the letter dated 14th June 2016 and served on 19th June 2016, the notification of sale dated 27th September 2016, the notice of auction, for being illegal, irregular and unlawful.

On 31st January 2017, the 1st defendant /appellant filed notice of motion seeking the settling aside of the above orders on the basis that they had not been served while at the same time accusing the plaintiff/1st respondent of willful suppression of relevant facts and material non -disclosure.

Boniface Mulwa Nzinga, a director of the 1st defendant/appellant swore the supporting affidavit setting out the rival facts.

That the plaintiff/1st respondent had applied for and was granted two loans; 1.5 million and 500,000/- each at 20% and 15% respectively payable within 1 month from the date it was given. That the plaintiff had defaulted, and as at 14th December 2016 it was standing at Kshs. 13,875,125/-.

In her replying affidavit filed on 8th February 2017 the plaintiff/1st respondent refuted all the allegations and stated that the notice of motion dated 15th November 2016 together with the plaint and summons were indeed served on the 1st defendant/appellant's advocate on 17th November as evidenced by the process server's affidavit of service filed on 23rd November 2016 and sure enough a perusal of the said documents shows that they were received by the firm of Musinga & Co. Advocates on 17th November 2016.

In quick rejoinder in the supplementary affidavit filed on 14th February 2017, the 1st defendant/appellant pointed out that the firm of Musinga & Co. Advocates had no instructions to receive service for or no behalf of the 1st defendant/appellant as per the requirements of order 5 rule 8 of the CPR.

The learned magistrate considered all these. He was of the view that there was a proper affidavit of service on record that the firm of Musinga and Co. Advocates had been served and accepted service; that the fact that they did so without protest and did not refuse service is sufficient evidence that the 1st defendant/appellant was served. That by 8th December 2016 the 1st defendant/appellant was aware of the matter and the pending ruling of 14th December 2016 because they filed memo of appearance, statement of defence and notice of preliminary objection all dated 8th December 2016 but filed on 13th December 2016. That despite that knowledge they did nothing to arrest the impending ruling.

The learned magistrate found the application without merit and dismissed it stating that the issues would be best determined in the hearing of the main suit. He was satisfied that the grounds for an injunction as set out in **Giella -Vs-Cassman Brown** were satisfied by the plaintiff; that the allegations of non-disclosure of material facts would be dealt with in the main suit; the allegations of violation of the banking law by the 1st defendant/appellant would be dealt with in the trial and that in any event, the injunction was granted pending the hearing and determination of the suit.

He declined to set aside his orders.

It is in this background that this appeal is brought on the following grounds: -

1. The learned magistrate erred in law and in fact in refusing to set aside the *ex-parte* Injunction Orders in spite of the express admission made by the 1st Respondent confirming that it did not effect service of the suit papers and the Notice of Motion Application dated 15th November 2016 on the Appellant as by law required.

2. The learned Magistrate erred in law and in fact in failing to appreciate that the Appellant did not need to call the process server to controvert service of the plaint, the summons to enter appearance and the Notice of Motion Application dated 15th November 2016 on the Appellant when the process server had deponed that he did not serve the Appellant but served a third party, Lilian Musinga, Advocate who had no authority or instructions to accept service.

3. The Learned Magistrate erred in law and failed to appreciate the simple, clear and concise provisions and requirements of Order 5 Rule 3 which deal with service of process on a corporation and which require a process serve to serve summons on a corporation by serving the same on the Secretary, Director or other Principal Officer of the corporation or if the process server is unable to find any of the officers of the corporation aforesaid, by leaving it at the registered office of the corporation or by sending it by prepaid registered post to the registered postal address of the corporation.

4. The learned Magistrate erred in law and in fact in completely misapprehended and misapplied the provisions of Order 5 Rule 16 and arrived at a wrong conclusion.

5. The learned Magistrate erred in law in engaging in frolics of his own and proceeding to give unsolicited and unwarranted advise to the Appellant on how it ought to have conducted its suit and failed to determine the matter on the merits.

6. The Learned Magistrate erred in law in failing to appreciate that non-disclosure of material facts is a ground warranting the setting aside of an ex-parte Order and completely failed to appreciate the binding dicta laid out in the Court of Appeal decision of **Tini Beach Hotel Ltd-vs-Stamm.**

7. The learned Magistrate erred in law in failing to appreciate that though the grant of an Injunction is a discretionary and equitable relief, the same could only be granted upon certain conditions being satisfied. The Learned Magistrate erroneously arrogated to himself a wide unfettered discretion to grant an Injunction in total disregard to clear and evident violations of the law.

8. The learned Magistrate erred in law and in fact in failing to impartially and dispassionately determine the matter before him and exhibited a toxic bias against the Appellant.

9. The Learned Magistrate erred in law and in fact in taking into account extraneous conditions and at arriving at a decision incongruous with the law in total disregard of the evidence before him.

In my view the 9 grounds of appeal raise 2 issues for determination: -

i. Whether the appellant was served with the pleadings as required by the rules.
ii. Whether the orders granted were deserved.

Each party filed detailed submissions through their respective counsel citing several authorities.

I have read the submissions and the authorities cited. My concern is that on the 2nd issue the parties have delved into the merits of the suit. I doubt that those are issues to be determined at this stage.

On the 1st issue of service, the plaintiff in her plaint dated 15th November 2016 through the firm of LJA Advocates clearly indicates it was to be served on First Capital Limited through the plaintiff's advocates. Nowhere on the plaint does it indicate that the plaint is to be served on a firm of lawyers.

Order 5 rule 3 of the CPR speaks in plain terms on the mode of service upon 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;*
>
> *(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or*
>
> *(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or*
>
> *(iv) by sending it by registered post to the last known postal address of the corporation.*

The process server herein did not apply any of the modes set down therein.

The plaint contained only the Post Office Box address of the 1st defendant. The process server does not explain how he came to the conclusion that the physical address of the 1st defendant was at ***'Lyric House'*** as indicated in is affidavit of service yet the physical address of the 1st defendant is stated clearly in the loan agreement signed by the plaintiff and the 1st defendant as- **'Kimathi Chambers, 6th floor, Kimathi Street'** and which information was available to the plaintiff's counsel. There is no justification made for the process server's alleged search for the 1st defendant at ***'Lyric House'*.**

Order 5 rule 8 of the CPR is also speaks in plain language; r that where practical, service on the defendant shall be personal. The only exceptions here are- where the defendant has an agent empowered to accept service or he has an advocate ***'who has instructions to accept service, enter appearance to the summons…'*** (emphasis added).

Did the firm of Musinga and Co. Advocates have instructions as provided for above? Except for the plaintiff counsel's contention that they had, it is denied by the 1st defendant who avers that they only drew the loan agreement period. With due respect to counsel for the plaintiff the manner in which an advocate comes on record for a litigant is not a matter for conjecture. There must be a notice of appointment filed indicating that that advocate is on record for that purpose. As at the time pleadings were filed by the plaintiff there was no advocate on record and if the firm of Musinga & Co. Advocates were on record for the 1st defendant, the pleadings would have been expressly addressed to them.

Clearly there was no service on the 1st defendant/appellant and the orders granted ex-parte should not have been confirmed in the first place.

This now takes us back to the interim orders as issued. I think that the learned magistrate was in order to issue the interim orders.

What happens now?

In my view since the application was not canvassed *inter- partes* in the subordinate court. I would be jumping the gun by going to the 2nd issue as to whether the orders as granted were deserved. That is an issue that can to be determined at the *inter-partes* hearing.

In the meantime, is my considered view that the *status quo* as at 14th December 2016 to maintain. In light of the overriding objective of the CPA as set out in section **1A. of Act; that**

> *(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
>
> *(2) The Court shall, in the exercise of its powers under this Act or the*
>
> *interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
>
> *(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

The parties and the trial court ought to either to set the application for hearing inter-partes or to have the suit heard and determined once and for all. Taking into consideration the period this matter has taken in the system it would be prudent for the parties and the court to go straight to the issues through the full trial.

The appeal succeeds with costs to the appellant.

Dated, delivered and signed this at Nyeri this 21st day of September 2018.

Mumbua T. Matheka

Judge

In the presence of:

CA Albert

Ms Muriithi H/B for Masese for appellant

N/A for respondent