



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC.NO.856 OF 2009

CFC STANBIC BANK LTD.....PLAINTIFF

VERSUS

AMOS KIPCHUMBA TENAI.....DEFENDANT

RULING

1. The Notice of Motion of 30th July, 2016 seeks four substantive Orders being:-

- 3) That the ex parte judgement entered herein and all consequential proceedings and orders, including the decree and the execution proceedings be set aside.
- 4) That the Defendant be granted leave to defend the suit, and the attached draft defence be deemed as properly filed and served subject to payment of court fees therefor.
- 5) That the order of the Court made, and the consent order entered, on 23rd June 2016 be reviewed and/or set aside.

2. Through a Plaintiff presented on 20th November 2009, the Plaintiff filed suit against the Defendant for a sum of Kshs.3,434,874.00 plus interest thereon at 14.5.% until payment in full and costs of this suit. The debt is said to have accrued as a result of a Hire Purchase facility for Kshs.3,458,000/= said to have been granted to the Defendant by the Plaintiff sometime in the year 2007.

3. The Court Record shows that exparte judgment was entered against the Defendant on 20th November 2015 for having failed to Enter Appearance and/or to file Defence.

4. That record further shows that the matter came up for Notice to Show Cause on 23rd June 2016 when both the Defendant (in person) and Counsel for the Plaintiff were present. The proceedings of that day are the subject of argument herein but at this stage it would suffice to say that a consent in the following terms was recorded:-

“1. By consent the judgement debtor to pay agreed deposit of Kshs.300,000/= on or before 31.7.2016.

2. That the judgement debtor shall and or will pay Kshs.300,000/= in instalments until payment in full of the entire sum on the Notice to Show Cause being Kshs.3,708,367.02 with effect from 31st August 2016.

3. In default of payment of the monthly instalments warrant of arrest to issue and N.T.S.C to be allowed.

4. Mention on 1.8.2016 to confirm payment of the 1st instalment”.

5. As would be clear from the Prayers in the Motion before Court, the Motion is predicated on two major Grounds:-

(i) That the Defendant was never served with Summons to Enter Appearance and so the Exparte Judgement entered herein should be set aside as a matter of right.

(ii) The Consent order of 23rd June 2016 was obtained by Duress and Coercion and without the Defendant having knowledge of the basic facts.

6. The contention by the Plaintiff is that the Summons to Enter Appearance, Complaint and Verifying Affidavit were served upon the Defendant's wife one Eunice Tenai on 12th March 2010 after she had talked to the Defendant and accepted to receive Summons on his behalf. That indeed she appended her signature at the back of the original summons. This contention is found in the Affidavit of Service sworn by Christine N. Macharia.

7. Eunice Jemutai Komen, wife to the Defendant, swore an Affidavit on 30th July, 2016 in support of her husband's plea. In that Affidavit she denied the alleged service and receipt of Summons.

8. Now on the question of service of Summons, this Court must accept, as correct, the position taken by the Defendant that even if service was effected on the Defendant's wife on 12th March 2010, it would still be improper service. As correctly pointed out by the Defence Counsel, the Affidavit of Service by Christine Macharia reveals that the service upon Mrs. Tenai was made at the first attempt of service. This would be contrary to the provisions of Order 5, Rule 8 (1) and 12 read together. These provide:-

8. “(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.

12. Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him”. (My emphasis)

9. Clearly, from these provisions, service on the wife of the Defendant either as the agent of the Defendant or as an adult family member residing with him could only be properly effected after a reasonable number of attempts had been made to serve the Defendant personally.

10. Upto there, the Exparte Judgement would be for setting aside *ex debito justitiae* as a matter of right. Hear what the Court of Appeal in **JAMES KANYITTA NDERITU & ANOTHER V. MARIOS PHILOTAS GHILAS** [2016]eKLR recently restated about an irregular default judgement

“In a regular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgement is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgement is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken

against a person is fundamental and permeates our entire justice system”.

11. However, I must still consider whether the subsequent events in the Proceedings compromises the Defendants right to insist that Exparte judgment be set aside. The argument by the Plaintiff is that the terms of the Consent Order of 23rd June 2016 should not be set aside or reviewed and that the Defendant is bound by them.

12. Let me set out the terms of the consent, again:-

“1. By consent the judgement debtor to pay agreed deposit of Kshs.300,000/= on or before 31.7.2016.

2. That the judgement debtor shall and or will pay Kshs.300,000/= in instalments until payment in full of the entire sum on the Notice to Show Cause being Kshs.3,708,367.02 with effect from 31st August 2016.

3. In default of payment of the monthly instalments warrant of arrest to issue and N.T.S.C to be allowed.

4. Mention on 1.8.2016 to confirm payment of the 1st instalment”.

The consent sets out the terms upon which the Defendant would pay the judgement amount.

13. Even without considering the Defendants arguments that the Consent was obtained by coercion, duress or in ignorance of material facts, I would still reach a result that the Consent must be set aside. The entire Consent was founded on a supposed existence of a valid judgment. The Consent itself was not the Judgement in favour of the Plaintiff. It was made in furtherance of the existing Exparte Judgment. In other words it was entered in implementation of the Exparte Judgement. But this Court having found that the Exparte Judgement was irregular then what is built on it must necessarily go. The entire substratum of the Consent has vanished. And on reaching this result I need to distinguish the situation here with a situation where, notwithstanding irregular service, a Defendant appears and enters a Consent Judgement in favour of the Plaintiff. In the latter situation the Defendant cannot resile from the consent. Here, the Consent entered was not the incident (call it entry) of the Judgement but was a consent to settle what has now been found to be an irregular Judgement.

14. For the reasons given, I allow the Notice of Motion of 30th July 2016 with costs. The draft Defence attached to the Motion shall be deemed as duly filed and served upon payment of the requisite court fees. Payment of the fees to be made and proof of such payment to be served upon the Defendant within 14 days hereof.

Dated, Signed and Delivered in Court at Nairobi this 23rd day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mugun for Plaintiff

Mathenge h/b for Defendant

Alex - Court Clerk