



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 439 OF 2011

K-REP BANK LTD.....PLAINTIFF/RESPONDENT

VERSUS

MWAJUMA HAMISI ALI.....DEFENDANT/APPLICANT

RULING

1. On 3rd March 2014 the Court entered judgement against the defendant, after she had failed to Enter Appearance or File a Defence.
2. Thereafter, the plaintiff extracted a Decree on 17th October 2014.
3. By an application dated 25th January 2015, the defendant, MWAJUMA HAMISI ALI, has asked the court for an order to stay the execution of the Decree.
4. The defendant has also asked the court to set aside the judgement, so that she may thereafter have an opportunity to defend herself.
5. It is the defendant's case that she was never served with the Plaint or Summons to Enter Appearance. Therefore, as far as the defendant was concerned, the judgement against her was irregular.
6. Secondly, the defendant asserts that she has a meritorious defence against the plaintiff's claim.
7. Thirdly, the defendant accuses the plaintiff of a deliberate design to defraud her.
8. But the plaintiff insists that the defendant had been duly served with the plaint and also with Summons to Enter Appearance.
9. Secondly, the plaintiff categorically denies any attempt to defraud the defendant. It insists that the plaintiff was granted a loan, which she used to purchase motor vehicles.
10. From the Affidavit of Service sworn by JACKSON MITAU NDAMBUKI on 20th July 2015, it is clear that the plaintiff was well aware that the defendant was resident in Saudi Arabia.
11. Prior to that, the plaintiff had sought leave to serve the defendant by way of substituted service. In an affidavit sworn on 29th May 2013, HIRAM KAGO Advocate deponed that it was not possible to serve the defendant in the ordinary manner. The said affidavit was sworn in support of the application for leave to

effect substituted service.

12. On 8th November 2013 Mabeya J. granted leave to the plaintiff to serve the defendant through an advertisement in the “*Daily Nation*” newspaper.

13. On 25th February 2014 the plaintiff filed an affidavit of service, showing that the defendant was served through an advertisement in the “*Daily Nation*” newspaper, on 19th November 2013.

14. As the said service was effected pursuant to an order of the court, it is proper and valid.

15. However, in the light of the fact that the defendant was actually residing in Saudi Arabia at the material time, the Court cannot ignore the fact that, in all probability, she did not get to know about the publication in the “*Daily Nation*” newspaper of 19th November 2013.

16. In my considered view, there is no contradiction between the finding that the substituted service was valid, and the fact that the defendant did not get to know about the case at the material time.

17. As its name indicates, “*substituted Service*” is not literal service upon the person upon whom the pleadings or other Notice is being served. It is an alternative to the normal or ordinary mode of service.

18. When substituted service is effected, there is a legal presumption that the person has been duly served. Therefore, after a defendant has been served through that medium, the court can lawfully enter judgement against him, if the said defendant fails to Enter Appearance within the stipulated time. That is why the judgement herein is deemed lawful.

19. If the judgement was not lawful, it would have been set aside forthwith. The defendant would not have needed to justify the setting aside of an unlawful judgement. Such a judgement must be set aside as a matter of course.

20. As the judgement is lawful, the defendant must now seek to demonstrate to the court that there was a good reason to warrant setting it aside.

21. The defendant needs to show that she has a genuine and arguable defence.

22. As was held in the case of BLUE SHIELD INSURANCE COMPANY LIMITED Vs JOSEPH MBOYA OGUTU [2009] e KLR, the defendant does not have to show that the Defence would necessarily be successful. It is sufficient that the proposed defence raises a prima facie defence, in the nature of a triable issue.

23. In this case the plaintiff had lodged a claim for Kshs. 10,131,217.95. It was the plaintiff’s case that the defendant had applied for a loan of Kshs. 7,680,000/- which she was to use to finance the purchase of motor vehicles.

24. The security for the loan was to be the joint registration of the vehicles, in the names of the plaintiff and the defendant.

25. After the plaintiff advanced the loan, the same was allegedly used to buy vehicles, which were registered in the joint names of the plaintiff and the defendant.

26. Thereafter, the defendant is said to have defaulted, leaving an outstanding balance of Kshs. 10,131,217.95.

27. However, the defendant denies ever having sought or obtained a loan of Kshs. 7,680,000/-.

28. She insists that the only loan which she applied for was of Kshs. 1,930,000/-, which was used to

purchase one Nissan Bus from CMC Motors Group Limited.

29. The defendant admits defaulting, and that the plaintiff repossessed the bus, which was then sold-off to recover the outstanding amount.

30. Having sold the bus, the plaintiff ought to have recovered the money which the defendant owed him; that is the considered view of the defendant.

31. When determining an application for setting aside a judgement which had been granted in default of Appearance, the Court has an unfettered discretion.

32. The primary duty of the court, in such circumstances, is to ensure that justice is done to the parties.

33. In the case of *SHAH Vs MBOGO & ANOTHER* [1967] E.A. 470 the Court of Appeal for Eastern Africa held thus;

“...applying the principle that the court’s discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

34. According to the plaintiff, there has been inordinate delay in the bringing the current application, because on 28th July 2015 the defendant’s advocate appeared in court, and requested that he be served with all the relevant documents.

35. This court was told that that fact would be attested to by the court records.

36. However, the court records show that on 28th July 2015, the defendant was not represented by any advocate. Indeed, Ms Ndhiwa, the learned advocate for the plaintiff, told the court as follows;

“There is return of service. Service was not conducted and we undertake to do the same if given more time; About a month or so”.

37. At that stage, the Notice To Show Cause was adjourned to 21st September 2015, and the court directed the plaintiff to effect service.

38. When the matter was next in court, on 21st September 2015, the court noted that the Judgement-Debtor had still not been served with the Notice to Show Cause.

39. In the circumstances, the plaintiff’s contention that the defendant became aware of the suit on 28th July 2015, is not borne out by the available evidence.

40. There is no merit in the plaintiff’s contention that the current application is an after-thought, which was calculated to further delay the conclusion of the case.

41. In the final analysis, justice demands that the defendant be accorded an opportunity to defend herself. Therefore, I now set aside the *ex parte* judgement and all consequential orders and processes which sprung from it.

42. However, as the *ex parte* judgement was lawful, in the first instance, I cannot blame the plaintiff for taking further action after the court had entered judgement. Therefore, although the application to set aside the judgement is successful, I order that each party bears her own costs of the application dated 25th January 2016.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Nthiwa for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Collins Odhiambo – Court clerk.