



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL SUIT NO. 52 OF 2011

BETWEEN

SOKHI INTERNATIONAL (K) LTD.....1ST PLAINTIFF

VIJAY KUMAR SINGH.....2ND PLAINTIFF

LABH SINGH SOKHI.....3RD PLAINTIFF

RAJEEV PARMA.....4TH PLAINTIFF

RAJU NARENDRANATHAN VETILYATIL.....5TH PLAINTIFF

ASHISH KUMAR SAMANTHA.....6TH PLAINTIFF

CHANDER BHAN SINGH.....7TH PLAINTIFF

MUMTAZ MUGHAL.....8TH PLAINTIFF

AND

EQUATORIAL COMMERCIAL BANK.....1ST DEFENDANT

KERETO MARIMA.....2ND DEFENDANT

IAN SMALL.....3RD DEFENDANT

AND

COUNTERCLAIM

BETWEEN

EQUITORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

AND

VIJAY KUMAR SINGH.....1ST DEFENDANT

LABH KUMAR SINGH.....2ND DEFENDANT

HARPAL SINGH SOKHI.....3RD DEFENDANT

RULING

1. The applicant before the court is the 3rd defendant to the Counterclaim, Harpal Singh Sokhi. In his application dated 7th July 2017 made under **sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 45 rules 1(1)(a), (2)** and 5 of the **Civil Procedure Rules**, he seeks to set aside the judgment entered against him on the ground that his advocate on record was not served with court process.

2. The application was opposed by through the Replying Affidavits of Grace Maina and Michi Kirimi sworn on 18th August 2017 and 13th September 2017. I have considered the application and the responses filed on behalf of the defendants. In my view, the issue is one that can be resolved by perusal of the court record to determine whether the advocate for the applicant was served. If not, it follows that the judgment must be set aside *ex-debito justitiae*.

3. According to the record, after the Defence and Counterclaim were filed, the applicant's advocates, *N. O. Sumba & Company*, filed a Notice of Appointment dated 19th August 2011 representing him on record. The firm also filed the Reply to Defence and Defence to Counterclaim on behalf of the plaintiff and the defendants to the counterclaim.

4. Thereafter the firm of *Mutua Mboya & Nzissi Advocates* filed a Notice of Change of Advocates dated 27th January 2014 taking over the conduct of the matter from *N. O. Sumba & Company Advocates* for the plaintiffs. A further Notice of Change of Advocates dated 10th March 2017 was filed by *Omondi Abande & Company Advocates* acting for the plaintiffs.

5. After the firm of *Omondi Abande & Company Advocates* came on record, the issues for trial were settled and the matter proceeded for hearing. I delivered judgment in favour of the 1st defendant on 18th May 2017 on the following terms:

(a) *The Plaintiffs claim against the defendants is dismissed with costs to the defendants.*

(b) *The counterclaim is allowed and judgment is entered for the 1st defendant against the 2nd and 3rd plaintiffs and Harpal Singh Sokhi jointly and severally for Kshs. 95,793,560.40.*

(c) *The 2nd and 3rd plaintiffs and Harpal Singh Sokhi shall pay the costs of the counterclaim.*

6. From the facts I have outlined, it is clear that at all material times *N. O. Sumba & Company Advocates* were acting for the applicant as no notice of change was ever filed after the initial notice of appointment was filed by the said firm. There is also no evidence that the firm was served with a hearing notice or other process to notify and enable them and their client attend court for the hearing of the matter.

7. Despite strenuous opposition by counsel for the defendants, this is case where the 3rd defendant to the counterclaim was not served with process. Since neither he nor his advocate was served, the applicant is entitled to have the judgment against him set aside *ex-debito justitiae*.

8. The remaining question is whether I should set aside the entire judgment since all the other parties other than the applicant were represented and actively participated in the matter. The answer depends on the nature of the case. The case by the 1st defendant is that it advanced the 1st plaintiff, Sokhi International (K) Limited, a credit facility of Kshs. 15,000,000/- secured by a debenture over its assets and stock, a charge over its property known as KISUMU BLOCK 2/107 in favour of the Bank and personal guarantees by Harpal Singh Sokhi, Vijay Kumar Sokhi and Labh Singh Sokhi. The applicant, in its defence, states that the purported guarantee relied is a forgery. In the alternative, he contends that

liability under it is limited to a maximum amount. All these transactions are indivisible and connected and since judgment against them was joint and several, it is in the interests of justice that the entire judgment be set aside to enable the court assess liability against each party.

9. Although costs follow the event, I decline to award the applicant any costs as it is clear that he was present at the hearing and he knew of the matter and that his advocates were tardy in following up the case.

10. I therefore set aside the entire judgment but with no order as to costs.

DATED and DELIVERED at KISUMU this 30th day of October 2017.

D.S. MAJANJA

JUDGE

Mr Bwire instructed by John Bwire & Associates Advocates for Applicant/3rd Defendant to the Counterclaim.

Mr Kiarie instructed by Omwanza, Nchogu, Nyasimi and Company Advocates for the plaintiffs.

Mr Makori instructed by Hamilton Harrison and Mathews Advocates for the defendants.