



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 228 OF 2014

MASOLE ENTERPRISES LIMITED.....1ST PLAINTIFF
BAIA ENTERPRISES LIMITED.....2ND PLAINTIFF
GILERA LIMITED.....3RD PLAINTIFF
KOIT DEVELOPERS LIMITED.....4TH PLAINTIFF
SAMAN DEVELOPERS LIMITED.....5TH PLAINTIFF
KENETE ENTERPRISES LIMITED.....6TH PLAINTIFF
MARIMO ENTERPRISES LIMITED.....7TH PLAINTIFF
LISALA ENTERPRISES LIMITED.....8TH PLAINTIFF

VERSUS

SHAKHALAGA KHWA JIRONGO.....1ST DEFENDANT
BETHLEHEM TRADING COMPANY LIMITED.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **16 October 2017** was filed herein under Certificate of Urgency by the 1st Defendant, **Shakhalaga Khwa Jirongo**, under **Order 10 Rule 11** of the **Civil Procedure Rules** and the Inherent Jurisdiction of the Court for the following orders:

- [a] That the application be certified urgent and be heard *ex- parte* in the first instance;
- [b] That pending the hearing and determination of the application, an Order be issued *ex-parte* in the first instance staying the execution of the Decree dated **28 July 2014**;
- [c] That the Court be pleased to set aside the interlocutory judgment entered herein against the 1st

Defendant on **28 July 2014** and grant the 1st Defendant unconditional leave to defend this suit;

[d] That the Court be pleased to set aside the Decree dated **28 July 2014** and all the consequential proceedings;

[d] The Costs of the application be provided for.

[2] The application, which is supported by the affidavit annexed thereto, sworn by the 1st Defendant on **16 October 2017**, was premised on the following grounds:

[a] that summons and Plaint in this suit have not been served upon the 1st Defendant;

[b] The Plaintiffs concealed the fact that there is a previous suit between the parties, being, **Milimani Commercial High Court Civil Case No. 482 of 2006** in which the Court stayed the suit;

[c] The Plaintiffs produced a fake and forged agreement dated **12 September 2013** as the only evidence in support of their claim against the 1st Defendant;

[d] Notice of Entry of Judgment was never served on the 1st Defendant;

[e] The firm of **Rachier & Amollo Advocates** who extracted the Decree, Warrants of Arrest, Notice of Entry of Judgment and all the consequential proceedings after entry of judgment acted unlawfully as they are not on record for the Plaintiffs;

[f] The Affidavits of Service herein are false and the purported signatures of the 1st Defendant are forgeries;

[g] The suit is in any event irregular and liable to be set aside as the alleged Agreement which is the sole basis of the suit prescribed arbitration as the only mode of dispute resolution hereunder;

[h] The 1st Defendant has a solid incontrovertible defence against the Plaintiff's claim;

[i] The 1st Defendant is not a director of the 2nd Defendant as alleged in the Plaint.

[3] In his Supporting Affidavit, the 1st Defendant explained the circumstances under which he got to learn of the existence of this case, namely, that on the afternoon of **9 October 2017**, he received a telephone call from a news reporter who sought to know whether he was aware that he had been declared bankrupt by the High Court on **29 September 2017**. He thereafter got to learn from the trending news that the case pertained to companies associated with one **Sammy Boit Kogo**; and that it was being reported that he had failed to honour an agreement to pay **Kshs. 700,000,000/=** to his companies in relation to securities that were allegedly sold on his account by **National Bank of Kenya Limited**. The only case he could recall was an old case **HCCC No. 482 of 2006: Sango Trading Company Limited and 7 Others vs. Cyrus Jirongo, Bethlehem Trading Company E.A. Limited and National Bank of Kenya Limited**, which had been instituted by **Mr. Kogo's** companies for the recovery of **Kshs. 205 million** on an alleged breach of contract to repay a loan facility guaranteed by them on behalf of **Bethlehem Trading Company E.A. Limited**, but which had stalled.

[4] The 1st Defendant further averred that upon perusal of the **Insolvency Cause No. 3 of 2017** by his Advocates, **Wagara, Koyoko & Company Advocates**, it emerged that this suit, which was the foundation for the Bankruptcy proceedings, had been filed against him in **2014** on the basis of a purported agreement dated **12 September 2013** by which he allegedly agreed to compensate the Plaintiffs by paying to them **Kshs. 700,000,000** for the loss of their securities on account of his failure to repay a bank loan. The 1st Defendant denied having signed any such agreement and contended that his signature thereon was

a forgery. He similarly denied having been served with Summons to Enter Appearance, or Complaint herein; and further contended that the Affidavits of Service were similarly forged and accompanied by forged signatures that were purported to be his.

[5] The 1st Defendant denied having borrowed any money or having been granted any facilities on the security of the Plaintiff's properties as alleged, or at all. He similarly denied that he is a director or shareholder of the 2nd Defendant, having ceased to be a director on **25 May 1994**, long before the alleged transactions; and therefore that there was no plausible reason for him to be responsible for its alleged debts. He added that had there been any agreement or settlement between him and the Petitioners, the same would have been recorded as a consent in **HCCC No. 482 of 2006** rather than as a fresh agreement.

[6] Lastly, the 1st Defendant faulted the Decree on the ground that it was extracted by **Rachier & Amollo Advocates** who were not on record at the time; and consequently, the Warrants of Attachment and the subsequent Statutory Notice issued in the Insolvency Petition are null and void. He accordingly prayed that the Interlocutory Judgment entered herein against him be set aside *ex debito justitiae* to enable a hearing on merits on the basis of the draft Defence, which he exhibited herein at pages 131-133 of his application. The 1st Defendant also exhibited various other documents in support of his application, all marked **Annexure "SKJ1"**.

[7] The application was opposed by the Plaintiffs and a Replying Affidavit to that effect sworn by **Sammy Boit arap Kogo**, was filed herein on **18 October 2017** by the law firm of **Ligunya Sande & Associates**. Their contention was that the Judgment that was entered herein on **28 July 2014** was proper and regular and should not be disturbed. The Plaintiffs averred that after this suit was filed on **30 May 2014**, the Defendants were duly served with the Complaint together with the Summons to Enter Appearance; and that having failed to enter appearance or file a Defence, the Plaintiffs were entitled to request for default judgment as they did. Copies of the Affidavit of Service as well as the Request for Judgment were exhibited herein and marked **Annexures SBK-3**. It was further averred by the Plaintiffs that subsequent to the entry of the default judgment, a Notice of Entry of Judgment dated **4 August 2014 (Annexure SBK-4)** was duly served on the 1st Defendant; and that it was perfectly in order for the Plaintiffs to move to the execution stage. According to the Plaintiffs, therefore, the Judgment was not only proper and regular, but was also obtained in strict compliance with the law.

[8] It was further averred by **Mr. Kogo** that **High Court Civil Suit No. 482 of 2006** has no relevance or co-relation to this suit as the two are distinct both in terms of the subject matter as well as the parties. It was averred that whereas **HCCC No. 482 of 2006** was based on alleged collusion and fraud between the bank and the Chargors, the current case sought only the enforcement of a binding Agreement signed on **12 September 2013**; and that, in any event, **HCCC No. 482 of 2006** abated, a fact admitted by the 1st Defendant. According to the Plaintiffs, the Agreement dated **12 September 2013** is effective and binding in law and that the Judgment and Decree based thereon are sound and enforceable. **Mr. Kogo** denied the allegations of forgery levelled against **Mr. A.D.O. Rachier, Advocate**, and averred that he was personally present and witnessed the signing of the Agreement of **12 September 2013** in the office of **Mr. Rachier**. In this regard, **Mr. Kogo** also relied on two affidavits sworn by **Mr. Rachier** and his partner, **Mr. Olalo**, which affidavits have been annexed to the Supporting Affidavit as **Annexures SBK-7** and **SBK-8**. He added that there was no way by which the Agreement of **12 September 2013** could have been recorded as a Consent in **HCCC No. 482 of 2006**, which, as was admitted by the 1st Defendant, had been dismissed by **Okwengu, J.** (as she then was) on **9 July 2007**.

[9] In response to the allegations of forgery in the various Affidavits of Service that were filed herein, it was the averment of **Mr. Kogo** that, the 1st Defendant not being a document examiner, cannot purport to speak with authority that the various signatures of the Process Server, **Mr. Hezron Odongo**, are forgeries, granted that it is permissible for a person to have more than one signature; and that what is important is that the signatures be acknowledged. He added that the 1st Defendant is prone to denying service even when duly served and provided, as an example, the admission in Paragraph 17 of the 1st Defendant's Supporting Affidavit that he has a secretary called **Phyllis**, but still denied service of summons herein where the said **Phyllis** was the one who ushered in the Process Server to his office. As to

the error in the affidavit of **Hezron Odongo, Mr. Kogo** averred that it is merely a copy paste error which did not detract from the fact of service and evidence of attempted service.

[10] The Plaintiffs also took issue with the fact that the 1st Defendant, while challenging the Affidavits of Service, did not seek to have the deponents thereof cross-examined on the contents of the affidavits. Further, it was averred that, whereas in Paragraph 16 of the Supporting Affidavit, it has been averred that the Process server could not have served the 1st Defendant at Pension Towers as he had moved out, the documents exhibited in support of that averment only show that he was in rental default, and had been served with notice to that effect; and that, in any event, the documents are in connection with companies known as **Dale Investments Ltd** and **Kuza Farms & Allied Ltd** which appear to have no relation with the initial lease.

[11] Thus, it was averred by **Mr. Kogo** that for all the allegations of fraud and forgery made by the 1st Defendant, it was he and his Advocate who are fraudulent and out to mislead the Court; and the following particular instances were singled out as clear examples of this intent at Paragraph 53 of the Replying Affidavit:

[a] The letters annexed in pages 94 to 97 of the application are meant to make it seem as though they engaged with **Rachier & Amollo Advocates** over the Agreement of **12 September 2013**;

[b] The letters are all dated between **November 2016** and **January 2017**, long after the Agreement in quo was signed;

[c] The letters refer to a completely unrelated agreement, involving a company called **Soy Developers** over a property in **Upperhill**, and not the current agreement;

[d] The letters show a very similar modus operandi, wherein the 1st Defendant agreed and signed an agreement to try to compromise a debt emanating from his fraudulent deals despite ongoing court processes.

[d] The transcripts of the SMS communication relied on are not only blurred and faint, but do not indicate the pertinent telephone numbers.

Accordingly, the Plaintiffs urged the Court to find, taking the case and the facts in totality, that there is no basis laid to support the prayer for the setting aside of or vacating the default judgment that was entered herein on **28 July 2014**.

[12] The application was urged on **18 October 2017** by Counsel for the 1st Defendant, **Mr. Kiplagat** and **Mr. Koyyoko**. They raised two jurisdictional issues to be determined *in limine*, the first of which has to do with the propriety of the firm of **Rachier & Amollo Advocates** acting herein for the Plaintiffs when no Notice of Change has been filed by them as required by **Order 9 Rule 5** of the **Civil Procedure Rules**. Counsel relied on the case of **King Woollen Mills Ltd vs. Kaplan & Stratton Advocates [1993] eKLR** in support of their argument, and to urge the Court to the finding that all the proceedings and processes undertaken herein the by the firm of **Rachier and Amollo Advocates** after the entry of Judgment are null and void, including the **Insolvency Petition No. 3 of 2017**.

[13] The second jurisdictional issue raised is that this suit is *res judicata* because the basis upon which it has been framed relates to a previous suit between the parties, being **HCCC No. 482 of 2006**, in which the same relief was sought on account of the same subject matter. It was further submitted that the Plaintiffs' failure to disclose the existence of **HCCC No. 482 of 2006** amounts to material non-disclosure and goes to show that the Judgment of **28 July 2014** and the Decree that ensued therefrom, including the Warrants of Attachment and Sale in execution of the Decree, are all irregular in themselves. It was further the argument of **Mr. Kiplagat** that no warrants could have issued in the absence of a Certificate of Costs, in view of the provisions of **Section 94** of the Civil Procedure Act; or without compliance with **Order 22 Rule 13** of the **Civil Procedure Rules** as regards the amount of costs and interest.

[14] A key plank of the submissions of **Mr. Kiplagat** was in connection with the Agreement dated **12 September 2013**; which formed the basis of this suit and the Insolvency Petition aforementioned. His argument was that, the 1st Defendant, having defended the first suit, could not have failed to defend this suit, given that, in their view, the subject matter is the same. He added that, in any case, no consideration was provided by the 1st Defendant to validate the said Agreement; and that a contract with no consideration is no contract. In addition, it was pointed out by Counsel that, since the said Agreement had an Arbitration Clause, the Plaintiff's ought to have referred the dispute in connection therewith to arbitration instead of instituting this suit.

[15] On behalf of the Plaintiffs, their Counsel, **Mrs. Ligunya**, submitted that no good cause has been shown to warrant the issuance of the prayers sought herein by the 1st Defendant. She was resolute that this suit was filed by their firm, **M/s Ligunya Sande & Associates**, upon instruction by the Plaintiffs; and that their firm has no links whatsoever with the firm of **Rachier & Amollo Advocates**. She added that it was their firm that was on record as at the time that Judgment herein was passed and Decree issued, and therefore that the suit is properly before the Court.

[16] On the 1st Defendant's plea of *res judicata*, it was the submission of **Mrs. Ligunya** that, the 1st Defendant having conceded in Paragraphs 7 and 8 of his Supporting Affidavit that the suit was dismissed in its infancy without a merit hearing, cannot rely on **Section 7** of the **Civil Procedure Rules** to defeat the Plaintiff's claim. Moreover, she argued, this suit cannot be said to be *res judicata* because it is premised on an Agreement that was made between the parties well after the dismissal of **HCCC No. 482 of 2006**; and that this is so notwithstanding that the parties may be the same. She added that, it is incongruent for the 1st Defendant to seek leave to defend on the ground of *res judicata*; and that he ought instead to have asked for the striking out of the suit, given his contention that the suit is *res judicata*.

[17] On the merits of the application, **Mrs. Ligunya** submitted that the prayer for stay of execution is idle in itself on two levels. Firstly, she contended that since execution proceedings have not been initiated herein, there is nothing to stay; and secondly that a Bankruptcy Order having been given on the basis of the **Insolvency Petition No. 3 of 2017**, no execution can ensue in this matter. She relied on the Affidavits of Service annexed to the Plaintiffs' Replying Affidavit to reiterate their contention that the Defendants were duly served with Plaint and Summons to Enter Appearance and submitted that the Court cannot set aside a judgment that was otherwise regularly entered on the basis of an allegation that the address mentioned in the Affidavit of Service was not his address for service, or that the people named therein were not his employees. In her submission, if there was doubt as to service then the 1st Defendant ought to have caused the Process Servers to be cross-examined on the veracity of their affidavits.

[18] With regard to the allegations of fraud, it was the submission of **Mrs. Ligunya** that, given the seriousness thereof, the 1st Defendant ought to have provided sufficient proof, as such allegations cannot be easily made or treated lightly. In her submission, the 1st Defendant, other than merely making the allegations, provided no proof at all to back up those allegations. On their part, the Plaintiffs filed rebuttal affidavits, sworn by **Mr. Ambrose Rachier** (marked **SKB-7**) and **Mr. Francis Olalo** (marked **SKB-8**). Counsel accordingly relied on the Replying Affidavit and all the documents annexed thereto in urging the Court to dismiss the application.

[19] The Court has carefully considered the application, the affidavits filed in respect thereof and the submissions made herein by Learned Counsel for the parties, in the light of the proceedings herein. The court record does show that this suit was instituted by the Plaintiffs vide the Plaint dated **27 May 2014**. That Plaint was prepared by the firm of **Ligunya Sande & Associates**, praying for judgment against the Defendants for **Kshs. 700,000,000/=** together with interest at commercial rates from **18 March 2014** till payment in full, as well as costs of the suit. The Plaintiffs' cause of action was that, sometime in the year **1995**, they created charges over certain ones of their properties at the behest of the Defendants, so as to secure various facilities from the **National Bank of Kenya Limited** (the Bank) to fund an agreed joint venture between the parties. It was averred in the Plaint that the parties had a clear understanding that the Defendants would repay the money owing to the Bank and procure the discharge of the Charges created over the Plaintiff's properties; but that the Defendants defaulted and the Plaintiffs learnt from the Bank,

after the fact, that all the charged properties had been sold by the Bank through public auction on **22 May 2009**.

[20] The Complaint further shows that it was after the realization of the securities by the Bank that the Defendants, vide the Agreement dated **12 September 2013**, agreed to compensate the Plaintiffs by paying them the current market value of the said properties, all measuring approximately 100 acres at the rate of **Kshs. 7,000,000** per acre within a period of 180 days. According to the Plaintiffs, the Defendants failed to honour their Agreement and this is primarily the reason why this suit was instituted.

[21] The court record further shows that, on the basis of an Affidavit of Service sworn by **Hezron Ochieng Odongo** on **10 June 2014**, a Request for Judgment was submitted pursuant to **Order 10 Rule 4** of the **Civil Procedure Rules**; and that thereupon, the impugned default Judgment of **28 July 2014** was entered by the Deputy Registrar and a Decree issued on even date. There is on the file a Notice of Entry of Judgment dated **4 August 2014** that was issued by the firm of **Rachier & Amollo Advocates** together with an Affidavit of Service, sworn by **David Manyonge** on **27 October 2015** which show that the Notice was duly served on the Defendants on **22 October 2015**.

[22] Accordingly, an application for execution was made by the firm of **Rachier & Amollo Advocates** for the issuance of Warrants of Attachment and Sale of the movable properties belonging to the Defendants; and the same were issued on **24 March 2016** to **Kiriiyu Merchants, Auctioneers**. The warrants were however returned unexecuted on **23 September 2016**, on the grounds that they had expired before the Auctioneers could trace the attachable assets of the Judgment Debtors. Fresh Warrants of Attachment and Sale were thereafter issued to the same Auctioneers, dated **28 September 2016**, which were similarly returned unexecuted on **9 March 2017**, for the same reasons.

[23] What followed was an application for execution by way of Notice to Show Cause why the Judgment Debtors should not be committed to civil jail for failing to satisfy the decretal amount. The application was filed on **14 March 2017**, and Notices to Show Cause issued dated **21 March 2017** to the two Defendants. There is on record an Affidavit of Service sworn by **Herizon Ochieng Odongo** confirming that the Notices to Show Cause were duly served on the Defendants. On the basis of that affidavit, the Deputy Registrar granted orders for the arrest of the 1st Defendant as well as the directors of the 2nd Defendant, **Mr. Jotham Khisa Nyukuri** and **Joram Shivachi**; and the Warrants of Arrest were issued on **12 May 2017**. As far as the court record is concerned, those warrants are still pending execution.

[24] From the foregoing account, it is manifest that by **15 October 2015** when the firm of **Rachier & Amollo Advocates** purported to file the Notice of Entry of Judgment dated **4 August 2014**, the firm of **Ligunya & Sande Associates** were still on record for the Plaintiffs, for **Order 9 Rule 9** of the **Civil Procedure Rules** is explicit that:

"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court--

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

[25] There is nothing on the court record to show that an application was made, as envisaged under **Rule 9** above, for an order permitting the firm of **Rachier & Amollo Advocates** to come on record for the Plaintiffs, or that such an order was ever made herein. Similarly, there is no indication that a Consent was filed between the firms of **Rachier & Amollo Advocates** and **Ligunya Sande & Associates**, endorsing the coming on board of the firm of **Rachier & Amollo Advocates**. The implication thereof is manifest, namely, that the firm of **Rachier & Amollo Advocates** irregularly took up the conduct of this suit between **15 October 2015** and **17 October 2017**. (see **Antony Mutura Njau vs Simon Njau & Another [2007] eKLR**)

[26] Accordingly, the firm of **Ligunya & Sande Associates** is still properly on record for the Plaintiffs and it was well within bounds for **Mrs. Ligunya** to represent the Plaintiffs in connection with the instant application. Thus, neither the Request for Judgment dated **27 June 2014** nor the default Judgment nor Decree dated **28 July 2014** can be faulted on account of the coming on record of **Rachier & Amollo Advocates**, granted that these were obtained by the firm of **Ligunya & Sande Associates** before the intervention by **Rachier & Amollo Advocates** as aforesated. The jurisdictional point taken in this regard is therefore untenable in my view.

[27] The second jurisdiction point that was raised by the 1st Defendant, is that of *res judicata*, in respect of which **Section 7 of the Civil Procedure Act** provides that:

“No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court.”

[28] The applicable principles were well summarized in **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR** thus:

[a] The matter in issue is identical in both suits.

[b] That the parties in the suit are substantially the same.

[c] There is concurrence of jurisdiction of the Court.

[d] That the subject matter is the same; and finally,

[e] That there is a final determination as far as the previous decision is concerned.

[29] According to the 1st Defendant, this suit is based on a the same cause of action as **HCCC No. 482 of 2006**, in which the same relief was sought on account of the same subject matter between the same parties. Quite a number of documents, lifted from **HCCC No. 482 of 2006** by the 1st Defendant were annexed to his Supporting Affidavit, and these can be seen at pages 6 to 61. A copy of the Amended Plaintiff at pages 40 to 44 of the Supporting Affidavit shows that the suit was filed by 9 companies, namely: **Sango Trading Company Ltd, Masole Ltd, Saman Developers Ltd, Baia Enterprises Ltd, Marino Enterprises Ltd, Gilera Ltd, Koit Developers Ltd, Kenete Ltd and Linsala Enterprises. The Defendants were Cyrus Jirongo, Bethlehem Trading Company (E.A) Ltd and National Bank of Kenya Ltd.**

[30] The Amended Plaintiff further shows that the cause of action in **HCCC No. 482 of 2006** was that, in or about the year **1994**, the 1st Defendant therein, **Cyrus Jirongo**, on behalf of the 2nd Defendant, **Bethlehem Trading Company (E.A.) Ltd**, approached the Managing Director of **Sango Trading Co. Ltd** to secure Guarantees for the issuance of Letters of Credit in favour of the 2nd Defendant; that pursuant to the said request, **Sango Trading Co. Ltd** entered into a written agreement with the 2nd Defendant whereby the parties could import sugar from France in a joint venture upon **Sango Trading Co. Ltd** procuring guarantees in favour of the **National Bank of Kenya Ltd** as security for the Letters of Credit.

[31] It was further averred in the Amended Plaintiff that **Sango Trading Co. Ltd** did procure guarantees as agreed, which guarantees were provided by the other Plaintiffs in that suit, as named hereinabove; and that the guarantees comprised Charges and/or Mortgages in respect of various commercial properties owned by the said Plaintiffs and that the **National Bank of Kenya Ltd** did issue Letters of Credit as agreed in the sum of **Kshs. 205,000,000**, being the consideration for the consignment of 100,000 metric tons of white refined sugar. It was contended that, notwithstanding that the Plaintiffs met their part of the agreement, the 1st and 2nd Defendants did not; and as a consequence the Plaintiffs suffered special and

general damages for the reason that the importation, on the basis of the Joint Venture Agreement, did not materialize. Instead the securities were used, without the express knowledge or consent of the Plaintiffs, to secure borrowing by the 1st and 2nd Defendants from **National Bank of Kenya Ltd**. Accordingly, the Plaintiffs claimed:

[a] Kshs. 205 million together with interest at court rates from the date of filing HCCC No. 482 of 2006 until payment in full;

[b] Exemplary and/or punitive damages against the three Defendants therein;

[c] Costs of the suit;

[d] Interest on [b] and [c] above at court rates;

[e] Any other relief or orders that the court would deem fit to grant.

[32] In their Defence filed in **HCCC No. 482 of 2006** dated **21 September 2006**, the 1st and 2nd Defendants (**Cyrus Jirongo** and **Bethlehem Trading (E.A.) Ltd**) averred, inter alia, that the Plaintiffs therein acquiesced to and sanctioned the utilization of their securities to secure the 2nd Defendant's drawings and therefore the 2nd Defendant was not liable to the Plaintiffs in damages for breach of contract. In addition the Defendants pleaded the defence of limitation.

[33] It is manifest then that not only was the cause of action in **HCCC No. 482 of 2006** different from the cause of action herein, but also, that not all the parties thereto are parties in this suit. For instance, **Sango Trading Co. Ltd**, which was a key player in the Joint Venture Agreement dated **1 November 1994** that was the subject matter of **HCCC No. 482 of 2006**, is not a party to this suit. Secondly, it is evident from the Plaintiffs herein that its subject matter is the Agreement dated **12 September 2013**, which agreement was in respect of the sale of the charged properties, and which sale is said to have taken place by public auction on **22 May 2009**, long after the accrual of the cause of action in **HCCC No. 482 of 2006**, and after the dismissal of that case. Lastly, the parties are in agreement that **HCCC No. 482 of 2006** was dismissed upon failure by the Plaintiffs therein to provide security for costs for the 3rd Defendant (**National Bank of Kenya Ltd**) in terms of the Ruling of the Court, dated **30 November 2006**.

[34] To the extent therefore that this suit is not seeking the revival of the cause of action in **HCCC No. 482 of 2006** for **Kshs.205,000,000** on the basis of the Joint Venture Agreement aforementioned, it cannot be validly argued that the instant suit is *res judicata*. In any event, such a revival would have been impossible without **Sango Trading Company Ltd** and **National Bank of Kenya Ltd**, who obviously are not parties to this suit. Also, it would be impracticable for the substance of the Agreement dated **12 September 2013** to be embodied as a Consent Order in **HCCC No. 482 of 2006**, as proposed by the 1st Defendant at paragraph 20 of the Supporting Affidavit, for the simple reason that the sale of the subject properties did not occur until **22 May 2009**; and secondly, that suit had already been dismissed by **Okwengu, J.** on **9 July 2007**.

[35] As for the contention by the 1st Defendant that the Plaintiffs' failure to disclose the existence of **HCCC No. 482 of 2006** amounts to material non-disclosure, **Mr. Kiplagat** cited Paragraph 19 of the Plaintiffs' Affidavit and Paragraph 3 of the Verifying Affidavit filed with the Plaintiffs, in which the Plaintiff stated that:

"There is no other suit pending and there have been no previous proceedings in any court between the Plaintiffs and the Defendants over this same subject matter and the cause of action relates to the Plaintiffs named in this suit."

[36] According to **Mr. Kiplagat**, the Plaintiffs were obliged to disclose the existence of **HCCC No. 482 of 2006** in the instant suit. I however have no hesitation in rejecting that argument given the clear provisions of **Order 4 Rule 1(1)(f)** of the **Civil Procedure Rules**. It provides that:

"The **Plaint** shall contain the following particulars:

...

(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint." (emphasis supplied)

[37] First and foremost, **HCCC No. 482 of 2006** having been dismissed, it cannot be a pending suit for the purposes of Rule 4(1)(f) aforementioned. Secondly, having found that the subject matter of this suit is different from that which was the subject of **HCCC No. 482 of 2006**, the Plaintiffs cannot be accused of material non-disclosure for failure to disclose it in the **Plaint**. In any event, the parties in the two suits are not the same. In the same vein, the arguments of **Mr. Kiplagat** that no warrants could have issued in the absence of a Certificate of Costs, in view of the provisions of **Section 94** of the Civil Procedure Act; or without compliance with **Order 22 Rule 13** of the **Civil Procedure Rules** as regards the amount of costs and interest, lack traction, the Court having found that the proceedings and processes undertaken herein by the firm of **Rachier & Amollo Advocates** are null and void.

[38] Having disposed of the preliminary issues, the only question remaining is whether justification has been made for the setting aside of the default judgment that was recorded herein on **28 July 2014**. The 1st Defendants' application was filed **Order 10 Rule 11** of the **Civil Procedure Rules**, which provides that:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

[39] Whereas the aforestated provision confers on the Court unfettered discretion to set aside or vary any default judgment upon such terms as are just on the basis of the evidence placed before the Court. In **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** this principle was expressed thus:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

[40] Accordingly, a distinction has to be drawn between a regular judgment and an irregular judgment, as was done in the case of **Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another, HCCC No. 241 of 1998 (UR)**, by **Njagi, J.** (as he then was) thus:

"A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the exparte judgment entered in default is regular. But where exparte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."

[41] As has been pointed out in paragraph 20 herein above, the court record, on the face of it, shows that, on the basis of an Affidavit of Service sworn by **Hezron Ochieng Odongo** on **10 June 2014**, a Request for Judgment was filed by the Plaintiffs pursuant to **Order 10 Rule 4** of the **Civil Procedure Rules**; and that thereupon, the default Judgment of **28 July 2014** was entered by the Deputy Registrar, and a Decree issued on even date. That Affidavit of Service is to the effect that the **Plaint** dated **27 May 2014** together with its Verifying Affidavit and Summons to Enter Appearance dated **4 June 2014** were duly served on the 1st Defendant and Bethlehem Trading Company Ltd on the **9 June 2014**. It was deposed by the Process Server that service was effected on the 1st Defendant at Pension Towers, and that he had been ushered into the 1st Defendant's office by his Secretary, who introduced herself as **Phyllis**. He added that

the 1st Defendant accepted service, not only on his own behalf, but also on behalf of the 2nd Defendant; and that he signed and stamped the back pages of the documents, which were annexed to the Affidavit of Service. Those annexures are indeed signed, dated and duly stamped. Accordingly, the Deputy Registrar had no reason not to act on the same at the instance of the Plaintiffs. In other words, this was a judgment that was regularly entered after the Court was satisfied that the Defendants had been served with process but had failed to respond to the Summons to Enter Appearance.

[42] In a bid to discredit the Judgment, the 1st Defendant alleged that Agreement dated **12 September 2013** which is said to have signed in the presence of **Mr. Ambrose Rachier**, is a forgery. He also claimed that the Affidavit of Service of the Process Server, **Hezron Ochieng Odongo** is fraudulent and unusual; and that his signature has been forged, notwithstanding that the signatures on the back of the documents that he was served with were, from a cursory glance, similar to his acknowledged signature on Page 7 of his Supporting Affidavit. He also boldly asserted in Paragraph 22 that the Decree of the Court dated **28 July 2014**, signed under seal after due process, is itself a fraudulent Decree. Yet, while making all these allegations of forgery and fraud, no tangible evidence was availed in support thereof. No attempt was made to have either **Mr. Rachier** before whom the Agreement dated **12 September 2013** was signed, or the Process Server who served him with the Complaint and Summons to Enter Appearance. This is notwithstanding that **Mr. Rachier** availed himself for such cross-examination.

[43] Additionally, whereas the 1st Defendant averred that he is neither a director nor a shareholder of the 2nd Defendant, and produced the returns at pages 121 to 125 of **Exhibit "SJK1"** in support of that contention, it is noteworthy that the said documents also confirm that the 1st Defendant was once a director and shareholder of the 2nd Defendant until his resignation on **25 May 1994**. It would be best known to him why he would continue to pose as such a director. Hence, All these factors, coupled with the admission by the 1st Defendant at Paragraph 17 of the Supporting Affidavit that he did have a secretary named **Phyllis**, leads me to the conclusion that the Defendants were indeed served with the Complaint and Summons to Enter Appearance in accordance with **Order 5 Rule 1** of the **Civil Procedure Rules**, and therefore that the Judgment and Decree issued herein on **28 July 2014** were regularly issued.

[44] It is now trite that a regular judgment can only be set aside if there is a defence on merit. In **Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs Augustine Kubende [1986] eKLR**, the Court of Appeal restated the applicable principles thus:

“The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence...obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

[45] In his Supporting Affidavit and the draft Defence annexed thereto, the 1st Defendant did set out grounds in support of his application for the setting aside of the Judgment and Decree entered herein. Notable among these is the contention that the Agreement dated **12 September 2013** is a forgery; and that in any event it is void for want of consideration. Additionally, it was contended that the Plaintiffs cause of action is barred by the **Limitation of Actions Act, Chapter 22 of the Laws of Kenya**. Clearly therefore, these are valid triable issues to warrant reopening the matter for. As was aptly put by **Apaloo, J.A.** in the **Philip Chemwolo Case** (supra):

“... the broad equity approach ... is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists

for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

[46] It has often been stated that a defence on merits is not necessarily one that must succeed. In Patel V East Africa Cargo Handling Services Ltd (supra) Duffus, P. expressed himself thus in this regard:

"...defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it "a triable issue", that is, an issue which raises a prima facie defence and which should go to trial for adjudication"

[47] In the result, I would allow the 1st Defendant's Notice of Motion dated 16 October 2017 and grant orders as follows:

[a] That the default judgment entered herein against the 1st Defendant on 28 July 2014 be and is hereby set aside, thereby giving the 1st Defendant leave to defend this suit;

[b] That the Decree dated 28 July 2014 and all its consequential orders herein be and are hereby set aside;

[c] The 1st Defendant is hereby condemned to bear the costs of the application; including thrown away costs.

[d] The 1st Defendant's Defence be filed and served within 14 days from the date hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF OCTOBER 2017

OLGA SEWE

JUDGE