



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 390 OF 2014

APPI DECORATORS LTD & ANOTHER PLAINTIFF

VERSUS

YAMINI BUILDERS LIMITED DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is dated and filed herein on 10th September 2015 by the Defendant. The application seeks to secure the following orders;-
 1. The Application be certified urgent and the Honourable Court be pleased to hear the application ex parte in the first instance due to urgency.
 2. There be stay of execution of the ex parte judgment herein and consequential decree issued on 17th December 2014 and all other consequential orders given thereon.
 3. The Defendant be granted leave to file pleadings out of time.
 4. Costs of this application be in the cause.
2. The application is premised on the grounds set up therein and is supported by affidavit of JOSHNABEN KERAI sworn on 10th September 2015, and a supplementary affidavit of the same person sworn on 23rd September 2015.
3. The applicants case is that the decree herein issued on 17th December 2014 should be set aside on the grounds that the defendant was never served with summons to Enter Appearance or with other court documents, and so the judgement in default was irregular and improperly obtained. The applicant's case is that there is a good defence to the suit as per the attached draft defence, and if the said judgment is not set aside the defendant will suffer prejudice which may not be compensated by damages. In any event, it is the defendant's case that the plaintiff stands to suffer no prejudice should the said judgment be set aside.
4. The plaintiff/Respondent has opposed the application vide a replying affidavit sworn by MUKESH KUMAR THAKORBHAI AMIN on 18th September 2015.
5. The application is opposed by the Plaintiff/Respondent on the main ground that the summons hereby were properly served leading to a regular entry of judgement which should be allowed to stand.
6. With the leave of court parties filed submission to the application, I have considered the submission of the parties, and I raise the following three issues for determination.

- i. Whether the application has sought the setting aside of the Ex-parte judgement.
 - ii. Whether summons were served on the defendant as per the law.
 - iii. Whether the defendants draft defence raises triable issues.
7. As for the first issue, it is the respondents contention that the application has failed to specifically seek for order to “set aside” the default judgment. I have perused the application, and indeed there are no prayers for the setting aside of the judgement. The Respondent submitted that without the word “set aside” the application is faulty and cannot be granted since staying the decree without setting it aside will not be helpful to the suit. In response, the applicant submitted that the said omission was a typographical error, and that the application has cited order 10 rule 11 where the setting aside provision is grounded, and that indeed, the grounds upon which the application is made have specified that the orders of “setting aside” is being sought.
 8. I have carefully considered those submissions. In my view, the application before the court clearly seeks orders of stay of execution and of setting aside the ex-parte judgment. The missing words are merely typographical. Order 10 rule 11 under which the setting aside is provided has been cited by the applicant, and the prayer is also supported by the grounds stated in the application and by the supporting affidavit. It would be superfluous, in light of section 1A, 1B and 3 A of the Civil Procedure Act, and Article 159 (2) (b) of the Constitution to sacrifice that application on a technical platter. It is therefore the finding of this court that the application has sought the setting aside of the Ex-parte judgement and that this court must determine the application on its merit.
 9. The second issue is on to whether summons herein were served on the defendant as by law required. The law on service of process is contained at order 5 rule 3, which states as follows:

“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 officers 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
 - ii. 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”.

10. In any application seeking the setting aside of default judgment, an inquiry into whether there was service of summon is always of utmost importance. If the court finds that there was no proper service of the process, the court stops at that point, and allows the application without due regard to other issues such as whether or not there is a meritable defence. The service of summons is so paramount as it is the process through which the defendant gets to know about the suit that has been filed against him or her. It is a constitutional issue as it affects the right of the defendant to defend the suit. I have considered Order 5 rule 3. Under that order service herein, given that the defendant is a corporation, is to be firstly effected upon the Secretary, Director or other principal officer of the corporation before effecting service vide alternative modes provided under the said order. In this particular case, the process server did not make any attempts to serve the summons as required under order 5 rule 3 (a). Instead, he opted to effect service vide a registered post because he was told by the plaintiff’s advocate that the only convenient media of service in the case was registered post given that when the plaintiff had earlier attempted to serve a Demand Notice, this was not possible as the defendant is said to have instructed its security officer not to allow the process server into the compound.

(See paragraph 3 of the affidavit of service by George Muriithi filed herein on 20th November 2015).

11. In my view, that alleged service was faulty. It could probably be used to effect the service of another Demand Notice, but not the summons in this suit. The plaintiff had no discretion on the mode of service to use before exercising the option under order 5 rule 3 (a). It is the finding of this court that the process of service of summons herein was not proper and so there was no valid process in this matter. If, therefore, there was no valued service of summons, it does not matter the quality of the defence to be put forth by the defendant. The ex-parte judgment must be set aside without further arguments, and so there is no need for this court to determine issue number (iii) raised herein.

12. Arising from the foregoing the court makes the following orders.

- a. The ex-parte judgement entered herein on 17th December 2014 is hereby set aside and all consequential orders pursuant thereto are made a nullity.
- b. The defendant is granted the leave to defend the suit, and the draft defence attached to this application is hereby deemed filed subject to payment of relevant filing fees.
- c. The costs of this application shall be in the cause.
- d. Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 22ND DAY OF JANUARY 2016.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mahan for the Plaintiff

Ilaco hb Rono Defendant

Teresia – Court Clerk