



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 467 OF 2013

EASTLEIGH MATTRESS LIMITED.....PLAINTIFF

VERSUS

STANLEY CHEGE MBUTHIA.....1ST DEFENDANT/APPLICANT

JOSEPH MBUGUA MWAURA2ND DEFENDANT

JOHN KARIUKI MWANGI.....3RD DEFENDANT

RULING

1. Before the Court is the 1st defendant's Notice of Motion brought pursuant to the provisions of Order 51 Rules 1 & 15 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act. The applicant seeks for an order setting aside the judgment entered against him on 3rd April 2014 and that costs be in the cause.
2. The grounds upon which the application was based were contained in the face of the application. On 23rd June, 2015, the court directed that the applicant file and serve his supporting affidavit to the application. The 1st Defendant subsequently filed his supporting affidavit on 2nd October, 2015. It is of note that the said affidavit was sworn on 1st October, 2015.
3. In it the applicant averred that he was neither served with summons nor pleadings, and that it would be in the interest of justice for the application to be allowed, as he has a good defence against the Plaintiff's claim. According to the 1st Defendant, the judgment amount of Kshs. 104,918,059.91/= was inordinately high and he could not come up with the said amount on such short notice.
4. That therefore, it was in the interest of justice for the court to have the same stayed for the matter to be canvassed by the Honourable Court on merit. The Deponent further reiterated that there was a criminal matter pending in court dealing with allegations raised in the instant suit. That the same was still pending and ongoing and the Defendants were yet to be found guilty of any crime. In view of the foregoing, the applicant urged the court to allow him put his defence.
5. In the submissions filed in support of the application, the applicant reiterated that he was not properly served with the Plaint, or the summons to enter appearance in relation to the suit. That thereby, this Court

has wide and unfettered discretion in setting aside an interlocutory judgement.

6. It was also argued that the plaintiff will not suffer any irreparable damage or loss if the said judgement is stayed or set aside. That in any event, the Parties shall have been given an opportunity to prosecute the suit on merit.

7. The application was opposed by the Plaintiff who filed the Replying Affidavit of Joseph KamauChege, sworn on 28th January, 2015. It was contended that that the 1st Defendant was duly served with summons and pleadings as evidenced in the affidavit of service sworn on 20th February 2014 by Robert Mutuku.

8. It was further deposed to that the 3rd Defendant refused to accept service of summons and pleadings which were tendered in the precincts of the Court on 20th January 2014 to the 3rd Defendant who was in the company of his advocate. At the time, the 1st Defendant had attended the hearing of Criminal Case No 680 of 2013.

9. The Plaintiff also averred that the process server had attempted to serve the said court process to the 1st Defendant in his residence located at Rwathia, Kangema division Muranga County. It was the Plaintiff's assertion that the fact that the judgment amount is high or that there's is the existence of a criminal case, cannot be grounds for this court to set aside a judgment entered lawfully.

10. It was also pointed out by the Deponent that the applicant had not attached any defence to its application, in order for the court to determine whether the same raised any triable issues. In the circumstances, the Plaintiff urged the court to dismiss the application.

11. In the written submissions filed on behalf of the Plaintiff on 25th April, 2015, it was argued that the all the defendants in this case had attended Court on 20th January 2015 for the hearing of Criminal Case No 680 of 2013. It was while there that the process server attempted to serve the parties with the summons and pleadings, but they refused service thereof.

12. By his submissions, it was contended that it would be deemed that the Defendants, including the 1st Defendant having refused to accept service, could not aver that they were not properly served. The case of **EcoBank Kenya Limited –vs- A&A Cereals (2013) eKLR** was cited in support of this position.

13. It was further submitted that no defence had been annexed to help the court determine whether or not the 1st Defendant had a raised any triable issues. That therefore the Court's discretion should not be exercised in favour of the applicant. It was reiterated that the discretion of the Court should be exercised to avoid unnecessary hardship or inadvertence, but not on a party who is seeking to evade, delay or obscure the course of justice.

14. According to the Plaintiff, allowing the application would occasion irreparable loss and prejudice to the Plaintiff who in any case obtained a regular judgment as held in the case of **Alphax Technologies Limited –vs- Jacob Otieno (2005) eKLR**. The Plaintiff further argued that it would suffer irreparable damage and loss if the application is allowed and judgement set aside, since the sole intention of the 1st Defendant was to delay the expeditious and just disposal of the instant suit.

15. I have considered the application, the affidavits thereto and the arguments by the respective parties. There issues for determination herein are threefold. They are whether the summons together with the plaint were served on the 1st Defendant; whether the applicant raises a defence with any triable issues and whether the Plaintiff will suffer any prejudice should the court decide to exercise its discretion and set aside the interlocutory judgement entered in favour of the Plaintiff. I propose to deal with these issues as hereunder.

16. With regard to the issue of service, I note that the Defendants are the accused persons in Criminal Case No. 680 of 2013. I also note arguments have been put forth by the Plaintiff that the Defendants that attended Court on 20th January 2014 for the hearing thereof.

17. Further, I have seen the averments of the affidavit of service of the process server, Mr. Robert Khamisi Mutuku, averred at paragraphs 10,11, 12 and 13 of the affidavit of service dated 20th February 2014 that he had attempted to effect service upon the Defendants and their advocates but they all refused to accept the service.

18. It was contended that the Mr. Obuodha advocate who was representing the 1st Defendant in the criminal case declined service of the court process since he asserted that he had no instructions to accept service of the documents in the instant suit. These statements were corroborated by the dispositions of Joseph Kamau Chege in his replying affidavit where he stated that he had witnessed the said process server attempting to serve the defendants and their advocate.

19. In his affidavit, the said deponent contended that he had attended the criminal case against the defendants since he was a witness. It is of note that the said process server in paragraph 4, had attempted to effect service of court process in the applicant's residence in Rwathia, Kangema division in Muranga County, but nobody was present in the said residence.

20. Having considered the various facts of this case, I am inclined to agree with **Gikonyo J** in his ruling of 23rd June, 2015 paragraph 14 and 15 , where he stated as follows;

“[14] I note that the advocate for the Plaintiff averred that, on 20th January 201 he called upon the process server to serve upon the Defendants in Court. He was aware that the Defendants were to attend the hearing of Criminal Case No 680 of 2013 in which they were the accused. He averred in his affidavit sworn on 26th January 2015, that he had identified the Defendants including the 3rd Defendant, to the process server. He also deposed that all the Defendants refused to accept service. The advocates representing the Defendants also refused to accept service on their clients’ behalf stating that they had no instruction to accept service. I find persuasion from the decision of Kamau J in the case of HCCC NO 32 OF 2013 ATLAS COPCO CUSTOMER FINANCE CO LTD vs.POTARISE ENTERPRISES LTD, when the judge stated inter alia;

“It must be noted that failure to acknowledge receipt of court process is not sufficient proof that service was not effected and as was rightly pointed out by the Plaintiff, it is a common occurrence amongst debtors. On the other hand, a debtor may not have acknowledged receipt of court process because such process may not have been served upon him. These are the two (2) sides to the coin.”

[15] Despite the discrepancies in some averments in the affidavit of service, the service of summons and pleadings upon the 3rd Defendant is not controverted. And as such, the interlocutory judgment entered against him is proper and regular.”

21. Likewise in this case, the 1st Defendant has not controverted the attempt by the process server to serve him personally or through his advocate during the hearing of criminal case number 680 of 2013 on 20th January, 2014. Refusal to acknowledge receipt of court process is not proof that no service was effected. As such, it is my finding that the interlocutory judgement herein was entered regularly.

22. Be that as it may, where the court finds that the interlocutory judgment to be regular, the court has unfettered discretion to set aside the said judgment where it is shown that a bona fide triable issue exists. The triable issue is derived from the draft defence annexed or the entire papers filed by the Defendant. This was held in the case of **Patel –vs- EA Cargo Handling Services Ltd (1974) E.A at 76** where it was stated that ;-

“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 it by the rules. I agree that where it is a regular judgment as is the case here the court will not normally set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, 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.”

23. I note that in this case, no defence has been annexed to the 1st Defendant’s application. However, I have combed through the 1st Defendant’s supporting affidavit. All that has been stated in the applicant’s supporting affidavit is that the amount entered in respect of the interlocutory judgement is egregious and inordinately high.

24. Indeed, over Kshs 104, 000,000/- is claimed by the Plaintiff. That figure amount is no mean feat. The 1st Defendant pointed out that the criminal case number 680 of 2013 has a direct impact on the instant suit, since the same deals with the allegations raised in the instant suit. I have looked at the Plaintiff filed by the Plaintiff on 30th October, 2013.

25. The same contains allegations that the Plaintiff suffered loss and damage amounting to Kshs. 104, 918,059.91/=. Some of these allegations have a criminal bearing and will have to be proved in criminal court.

26. While noting that the existence of a criminal case does not bar this civil proceedings, it is my finding that whether this loss is attributable to the 1st Defendant is another question all together and is in my view, a question for trial. As such I find that there is indeed a bona fide issue for trial.

27. Indeed, I am also aware that setting aside a regular judgment may prejudice the Plaintiff by setting back its progress in the suit. But, on the other hand, the Court has to consider all the circumstances of the case and the interests of justice to all parties. The discretion of the Court here is meant to avoid injustice.

28. Dismissing the 1st Defendant’s application will not serve the interest of justice in this case. Additionally, setting aside of the judgment will be worthwhile to both parties to the case, as the same will be determined on merit rather than on the basis of interlocutory judgment obtained ex parte.

29. In sum, as guided by Article 159(2) of the Constitution, section 1A, 1B and 3A of the Civil Procedure Act, and Order 10 Rule 11 of the Civil Procedure Rules, the court hereby sets aside the interlocutory judgment entered into herein against the 1st Defendant with all consequential orders.

30. The 1st Defendant will, however, pay costs to the Plaintiff assessed at Kshs. 30,000/= to be paid within 14 days of this ruling. Further, I order that the 1st Defendant will file and serve its defence within 7 days of this ruling.

It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF MAY, 2016.

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C. KARIUKI

JUDGE

READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF MAY, 2016.

O. SEWE

JUDGE