REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCC 1050 OF 2002

METLEX INTERNATIONAL LTD……………………….PLAINTIFF

VS

SOKHI INTERNATIONAL LTD………………… 1ST DEFENDANT

INDER SOKHI ……………………………...……2ND DEFENDANT

RULING

Setting aside ex parte

[1] The 2nd Defendant is the Applicant. He has applied through the Motion dated 21st July 2014 that the ex-parte judgment entered into by the court on 17th February 2011 and all consequential orders to be set aside and this suit be set down for hearing inter-parties. The application is supported by the Supporting Affidavit of the Applicant's Advocate Mr. Francis Mutua and the grounds in support of the Application set out on the face of the application. The major grounds include:-

i. The Defendants herein filed their Defence on 8th October, 2002.
ii. The 1st Defendant herein was on 20th November 2008 placed under Receivership and remains under Receivership to date. The Receivers and Managers have never been joined as parties in this matter.
iii. The Plaintiff on 12th March 2010 set down this suit for hearing for 26th October 2010 but failed to serve any Hearing Notice on Defendants Advocates on record.
iv. Failure by the Applicant to attend court on 26th October 2010 was not deliberate as he had no notice of the hearing of the case.

[2] The Applicant attacked the averments in the Replying Affidavit sworn and filed on 23rd September 2014, by Mr. Austin Ayisi Advocate. They particularly highlighted that the said Replying Affidavit the said Advocate confirms that:- the suit was set down for hearing on 26th October 2010 by the Plaintiff; the suit was heard ex-parte; and Judgment was entered into jointly and severally against all the Defendants. But they noted that the deponent, Mr. Ayisi does not deny that; the 1st Defendant was placed under receivership on 20th November 2008; the Receiver Managers were not made parties to the suit, and no Hearing Notice was served upon them for the heating scheduled for 26th October, 2010 when the suit herein was heard; and that the Defendant's Advocate were not served with a Hearing Notice. They took issue with the following averments

by Mr. Ayisi that:-

"The legal clerk (who served the Hearing Notice) cannot verify the correctness of the name of the person served at the time of service but confirms service of the Hearing Notice"

And that:-

"Issues around the receivership of the 1st Defendant which are being brought so late in the day cannot be visited against the 2nd Defendant who has a decree against him and has failed to honour the same".

[3] They cited the law and emphatically stated that it was unlawful and unprofessional on the part of the Plaintiff's Advocates to refuse and/or fail to join the Receiver Managers before proceeding with the hearing of the suit. It was also wrong to proceed without informing the court that the 1st Defendant had since the filing of the suit been placed under Receivership. The 1st Defendant, just like a dead person, did not have capacity to be a party in this suit. The judgment is irregular and unlawful. These reasons are sufficient basis to set aside the judgment "ex-debito justitiae". The purported service of hearing notice herein is no service as it does not confirm who in particular was served. There is also no official stamp by Defendant's Advocates acknowledging receipt. All subsequent documents which were served have receiving stamp except the Hearing Notice, which shows there was no service. They relied on the case of ***Ramco Ltd Vs. Mistry Jadva Parbat & Co. Ltd. HCC No.171 of 2001*** that there was no service of hearing notice and so the judgment herein is irregular and unlawful and it should be set aside ex debito justitiae. Also the case of ***Kanji Naran vs. Velji Ramji (1954) EACA*** supports the above view. The Applicant insisted it has a right to be heard and this judgment takes that right away. He has shown good faith by paying the total sum in the consent judgment entered into on 2nd February, 2003 for Kshs.3,310,000/= plus costs and interest. The Applicant prayed for their application to be allowed.

THE DETERMINATION

[5] The Applicant has based his application on two grounds. The first one; that there was no service of the hearing notice herein. And the second; the 1st Defendant was under receivership as at the time the judgment was entered into. These things make the judgment entered against the Defendants irregular and unlawful which should be set aside ex debito justitiae. This principle is set out well in the case of ***Ramco Ltd Vs. Mistry Jadva Parbat & Co. Ltd. HCC No.171 of 2001*** where the court held:-

"If there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside ex debito justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty".

[6] Was there service or proper service of the Hearing Notice herein? The person who served the impugned hearing notice, Mr. Patrick M. Mutuma filed an affidavit of service sworn on 16th February, 2010 in which he averred that he served the hearing notice upon the Defendant's advocates' office by tendering a copy on a Mr. Eric, a legal clerk with the said firm of advocates. This affidavit of service was the subject of intense attack by the Applicant and his counsel. In the affidavit in opposition of the application, the deponent, Mr. Francis Mutua advocate at paragraph 10 made a request to the court to order the process server herein to go to the advocate's office and point out the Mr. Eric or produce him in court. Such request should be made in a more serious and formal way and the advocate should have applied for cross-examination of the process server

if he feels that the averments in the affidavit of service are false. An affidavit of service is an accountability document of court process and should be impugned on serious grounds. Despite the bare denial by the Defendants' advocates that there is not any Mr. Eric in his office, there is nothing tangible that he has offered this court on which service of the hearing notice herein would be impeached. Failure for the advocates to affix their stamp on the notice is not proof that service was not done because it is not uncommon for advocates' clerks to decline or to omit to affix the office stamps on court process. The process server in this case simply stated the manner in which he served the process and that is sufficient unless proved otherwise. I find that the service on the defendants' advocate was proper and the court was so satisfied when it ordered the trial to proceed. There are, however, two other thing which I should discuss here; the conduct of the defendants and the question of receivership of the 1st Defendant. First, the conduct of the defendants is such that it does not meet the approval of the court at all. They have filed numerous applications against execution herein but one is able to see the intention is to delay this matter rather than seeking a vindication by court. At some time, the 2nd Defendant had disguised himself as a different person and had even applied as an objector to execution until the Respondent asked the court to verify his identity and the court found that the objector and the 2nd Defendant is one and the same person. That is not all; the fact of appointment of receiver managers for the 2nd Defendant is a matter which the 2nd Defendant should take up with the court in a more acceptable way and obtain the necessary orders on the parties to the suit, if they believe such appointment of receiver manager affects the status of the company. The receiver managers have not applied in court to be substituted for the 1st Defendant. There is even no material before the court except some newspaper cutting which sets out the nature of the receivership, whether it was under some debenture or mortgage or under a winding-up order. Therefore, in the absence of sufficient material, the court cannot make any meaningful finding on or apply the applicable law in the matter. A court of law should never speculate; it acts on evidence. The less I say about the issue the better. But, I wonder how, on the one hand, the 1st defendant would contest the execution as the 1st defendant, while, on the other hand, it is saying that there is no 1st defendant as per the law. I thought, if a party is not a party in law, then such ''party'' cannot commence any proceedings in court before proper substitution is done. The 1st Defendant gave a superb analogy of a dead person; if that is the effect of receivership herein, the analogy renders support to the approach taken by the court. In light thereof, the overall impression the court makes of the entire application is that it has no merit and is made mala fides only to delay the case. The hearing notice was served accordingly and there is no irregularity which makes the proceedings herein and the judgment thereof unlawful as to be a candidate for setting aside *ex debito justitiae.* The upshot is that I dismiss the Motion dated 21st July 2014 with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at NAIROBI this 23rd day of February 2015

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F. GIKONYO

JUDGE