REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 467 OF 2013

EASTLEIGH MATTRESS LIMITED…..……..PLAINTIFF/RESPONDENT

VERSUS

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

JOSEPH MBUGUA MWAURA.…….2ND DEFENDANT/RESPONDENT

JOHN KARIUKI MWANGI…....……..3RD DEFENDANT/RESPONDENT

RULING

[1] There are two applications before the Court for determination. The first application is dated 27th February 2015 and was filed by the 1st Defendant herein. The second application is made by the 3rd Defendant and is dated 27th October 2014. I will deal with each application as ‘’First application’’ and ‘’Second application’’.

The First Application

[2] The first application is expressed to be 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 1st Defendant seeks the following prayers inter alia;

1. **An order for stay execution of judgment entered against the Applicant herein on 3rd April 2014 pending the hearing and determination of this application.**
2. **An order setting aside the judgment entered against the Applicant herein on 3rd April 2014.**
3. **An order that costs be in the cause.**

[3] The application was predicated upon three major grounds namely; 1) that the 1st Defendant had neither been properly served with the summons to enter appearance and the Plaint and was therefore not aware of the proceedings against him; 2) that the judgment amount of Kshs 104,918,059.91 was too high; and 3) that it would be in the interest of justice for the application to be allowed. The application was not supported by any affidavit.

[4] The Plaintiff opposed the application and filed its Replying Affidavit sworn on 8th April 2015. It was averred that the application was defective and offended the provisions of the Civil Procedure Rules as it did not have an accompanying supporting affidavit. Further, it was deposed that the 1st Defendant had not

shown justifiable cause as to why the Court should exercise any discretion in its favour and set aside the judgment entered against the 1st Defendant on 3rd April 2014, because the 1st Defendant was duly served with the summons and pleadings on 20th January 2014 but refused to accept service.

DETERMINATION OF FIRST APPLICATION

[5] On 4th February 2015, the 1st Defendant had sought leave to amend his application dated 9th October 2014. In granting the leave sought, the Court directed as follows;

> **"I refuse any interim orders because of the defect in the application dated 9/10/14. However, I grant leave to the Applicant to amend the said application. Interim orders on the application dated 27/10/14 are extended."**

After leave was granted, the 1st Defendant filed an Amended Notice of Motion dated 27th February 2015, without any supporting affidavit. Whereas a notice of motion may be determined on the ground on the application, where the application is grounded on evidence or facts which will require an affidavit to prove or verify, such affidavit must be provided. See Order 51 rule 4 of the Civil Procedure Rules. The 1st Defendant has alleged facts which can only be verified through a supporting affidavit. Where such affidavit is absent, the application is said to have no foot on which to stand. The temptation here may be to strike out the application or determine it on the scarce material revealed in the grounds stated on the application. But in the new constitutional dispensation, a court of law should not act with such impulse; it should consult the Constitution and serve the interest of justice, and may allow the defaulting party to provide an affidavit in support of the application. See the case of ***APIDI vs. SHABIR& ANOTHER (2003) eKLR***, where Muchemi, J found that after a supporting affidavit was struck out, the application remained an empty shell with no support and whose chances of success would be nil. And the remedy of the lacuna noted by Muchemi J in the decision by Waweru J said where he allowed the Applicant to file and serve its supporting affidavit, in ***KAMUA MUHIA vs. AGRICULTURAL FINANCE CORPORATION (2015) eKLR***for he viewed lack ofa supporting affidavit to an application as a defect that could be rectified by allowing the defaulting party to file an affidavit. The learned judge said this, that;

> **"All the same, as the application is based upon certain alleged facts, those alleged facts must be certified by affidavit. In the interests of justice therefore, I will direct that the Applicant do serve and file a supporting affidavit within 14 days of today. The Respondent at liberty to file and serve a replying affidavit within 14 days of service of the supporting affidavit."**

[6] In light of what I have said above, it seem the most prudent thing to do in this case is for the court to fall back to Article 159 of the Constitution, its inherent jurisdiction under Section 3A of the Civil Procedure Act and the overriding objective in Sections 1A and 1B of the said Act; serve the interests of justice and allow the 1st Defendant to file and serve its supporting affidavit within 14 days of today. On such service, the Respondents shall file their respective replying affidavits within 14 days thereof. It is so ordered. A ruling on the application will be made on a date to be appointed by the court, and of course upon compliance by the parties of the orders I have issued.

The Second Application

[7] The second application by the 3rd Defendant is dated 27th October 2014. It was expressed to be brought under Order 10 Rules 10 & 11 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application sough the following orders;

1. **An order for stay of execution of the preliminary decree issued herein on 25th March 2014.**
2. **THAT the honourable Court be pleased to set aside the interlocutory judgment entered on 14th March 2014 together with all the consequential orders.**
3. **THAT the 3rd Defendant be and is hereby granted leave to file and serve his statement of**

defence and the annexed defence be deemed as properly filed and served.

4. **THAT the costs of this application be provided for.**

[8] The application was premised upon the grounds that the 3rd Defendant 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. The application was further supported by the affidavit sworn on 27th October 2014. In reiterating that he was neither served with summons nor pleading, the deponent averred that the affidavits of service sworn on 20th February 2014 and 21st April 2014 were falsehoods and the said deponent did established that they had indeed served the 3rd Defendant with the summonses and pleadings. In the Supplementary affidavit sworn on 16th January 2015, the deponent deposed to the same facts already averred in the supporting affidavit sworn on 27th October 2014, except he averred that the Plaintiff was attempting to subvert the processes of the Court by alleging service of summons.

[9] The 3rd Defendant filed submissions dated 29th January 2015, and cited the decision by the Court of Appeal i.e. ***CIVIL APPEAL NO 2 OF 1974 PATEL vs. E A CARGO HANDLING SERVICES LTD; (1974) EA. 75***which set out the requirements for setting aside an interlocutory ex-parte judgment. The 3rd Defendant submitted that the Court has wide and unfettered discretion in setting aside such judgment once it has been shown that the defence raises triable issues.

[10] The application was opposed by the Plaintiff who filed a Replying Affidavit sworn on 20th November 2014. It was contended that that the 3rd Defendant was duly served with summons and pleadings as evidenced in the affidavit of service sworn on 20th February 2014. 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 3rd Defendant had attended the hearing of Criminal Case No 680 of 2013. The Plaintiff further averred that the application is bad in law and an abuse of the process of the Court, and that the 3rd Defendant had come with unclean hands as he had lied that he was never served with the summons and pleadings. He does not, therefore, deserve the exercise of this Court's discretion.

[11] In his submissions dated 23rd February 2015, it was argued that the 3rd Defendant, as well as the 1st and 2nd Defendant, 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. By his submissions, it was contended that it would be deemed that the Defendants, including the 3rd Defendant having refused to accept service, could not aver that they were not properly served. Further, it was submitted that the Defence filed by the 3rdDefendant in countermanding the Plaintiff's claim was predicated upon the Plaint that he had claimed had not been served upon him. It was further submitted that the Defence as filed did not raise any triable issues, and that the Court discretion should not therefore be exercised in favour of the 3rd Defendant. 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. They relied on the case of ***ECOBANK KENYA LTD vs. A & A CEREALS (2013) eKLR***.according to the Plaintiff, allowing the application would occasion irreparable loss and prejudice to the Plaintiff who in any case obtained a regular judgment.

DETERMINATION

[12] Having perpended the application, the affidavits thereto and the arguments by the parties, I see only two inextricable issues for determination. The issues are;

(1) Whether summons together with the plaint were served on the 3rd Defendant; and

(2) Whether the Defence raises triable issue as to warrant an order allowing the 3rd Defendant to defend the suit unconditionally.

I note that the Defendants were 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. Therefore, what can the court make of the averments in the affidavits of service sworn on 20th February 2014 and 21st April 2014, that the deponent visited the 3rd Defendant's residence and upon not finding anyone, left the summons and pleadings at the door? Also what do the submission and averments of the Plaintiff that the 3rd Defendant's statement of Defence is predicated upon the same Amended Plaint that he contends was not served portend?

[13] The process server, one 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. It is contended that the mentioned advocate did not represent the 3rd Defendant and so service was not done on his appointed advocate. In his further affidavit dated 30th January 2015, the process server deposed that there had been an inadvertent error as to the determination of the legal representation of the 3rdDefendant, but nonetheless, the 3rd Defendant had still personally refused to accept service.

[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 identifiedthe 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. However, even 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.

Any triable issue

[16] If I find that there is a single triable issue raised in the defence, I will not hesitate to allow the Defendant to defend the suit. See Court's unfettered discretion under Order 10 Rule 11 of the Civil Procedure Rules to set aside such judgment should it find good reason to do so. The test of triable issue is what I call the Sheridan J test and was adopted in the case of ***PATEL vs. E A CARGO HANDLING SERVICES LTD***(supra), as follows;

> **"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 usually 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, 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 should go to trial for adjudication."

[17] This position was further reiterated in ***KIMANI V MCCONNEL [1966] EA. 547***and***MBOGO V SHAH (1968) EA. 93*** in which it had been held that a regular judgment may not be set aside unless it was shown that there was a defence on record that raised triable issues.

[18] I have perused the draft Statement of Defence annexed to the application by the 3rd Defendant. Therein the 3rd Defendant contended that he was neither in charge of nor involved in the installation or maintenance of the software and payments systems installed by the Plaintiff in the running of the supermarket. And therefore, the allegations by the Plaintiff in that behalf are not attributable to the 3rd Defendant. It was also further averred that the only loss that may have been attributable to the 3rd Defendant was the loss of Kshs 300,000/- and not the over Kshs 104, 000,000/- claimed by the Plaintiff. This is bona fide triable issue which merits trial. I am 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 will have 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. There will be no benefit to the law in dismissing the 3rd Defendant's application which I am convinced is meritorious. I think also that the setting aside of the judgment will serve useful purpose as the case will be determined on merit rather than on the basis of interlocutory judgment obtained ex parte. And costs will be adequate recompense to the Plaintiff. See ***EVANS vs. BARTLAM[1937] AC 437; [1937] 2 All ER 647)***.Being guided by Article 159(2) of the Constitution, section1A, 1B and 3A of the Civil Procedure Act, and Order 10 Rule 11 of the Civil Procedure Rules, I hereby set aside the interlocutory judgment entered into herein against the 3rd Defendant with all consequential orders. He will, however, pay costs to the Plaintiff. The 3rd Defendant will file and serve its defence within 7 days of today. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of June 2015.

F. GIKONYO

JUDGE