



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 493 OF 2013

PETER NGANGA MUIRURI ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

BARCLAYS BANK LIMITED ::::::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

1. The **Notice of Motion** application before the court is by the Defendant who seeks to set aside the *ex-parte* default judgement entered herein on 7th January 2015, the subsequent proceedings and the final judgment entered on herein on 20th March 2015 and that all consequential orders thereof be set aside and/or vacated and the Defendant be allowed to defend the suit on merit. .
2. The application is premised on the grounds set out therein and is supported by affidavit of **Albert Anjichi** sworn on **24th March 2015**.
3. The brief history of the application is that an *ex-parte* judgement was entered against the Defendant on 7th January 2015 and the matter thereafter proceeded to *ex-parte* formal proof and judgement was entered against the Defendant on 20th March 2015 in the absence of the Defendant. The Defendant now seeks to set aside those *ex-parte* proceedings including the judgment of 20th Mach 2015.
4. The application is opposed on behalf of the Plaintiff vide a replying affidavit of Michael Kamau Njonjo dated 21st April 2015. The deponent states that he is a process server and depones to the affidavit to refute claims of want of service of summons which are alleged to have led to the said *ex-parte* proceedings herein.
5. The court directed counsel to file written submission to the application. However, while Mr. Nthinga for the Applicant filed submission on 7th May 2015, the Mr. Wamalwa for the Respondent did not file any submissions.
6. Form the word go this court notes that the replying affidavit by the said process server Michael Kamau Njonjo only addresses issues of alleged service and does not in any manner substantively respond to the application. Coupled with the fact that the Respondent has not file submissions, it is clear that material facts and legal issues relating to the application have not been challenged. The supporting affidavit of Albert Anjichi raises serious legal and factual issues of service of summons and issues of law which required a similar match by the Respondent. The Applicant's allegation also touch on abuse of the process of the court by the Plaintiff, and the court being misled by the Plaintiff purporting to have carried out the lawful processes. It would have been necessary to hear Mr. Wamalwa respond to those issues either through his clients' (the Plaintiff's) affidavit or his own (Wamalwa's) submissions. The replying affidavit of the process service, in my view is not an adequate response to the application. In his submission Mr. Nthinga has raised weighty issues of law and facts, and has with authorities urged the court to set aside the *ex-parte* proceedings. Mr. Nthinga cited Article 50 (1) of the Constitution which guarantees every person

the right to a fair hearing. He also cited the case of **Shah – Vs Mbogo & Another [1967] EA 116** where the court in exercise of its discretion can allow this kind of application in the fairness of justice. Even if I were in doubt of the Applicant's application merits, the case law cited by Mr. Nthiga have satisfied me that the application should be allowed. On 22nd April 2015, the court in the presence of Mr. Wamalwa, directed the parties to file written submissions and the matter was to be mentioned on 26th May 2015 to confirm the filing of the same. On 26th May 2015, Mr. Wamalwa did not attend the mention, and had not filed his submissions. He provided no explanation for non-compliance. By the time of delivering this Ruling on 31st July 2015, Mr. Wamalwa still had not found it fit to file his submission to this application.

7. I am satisfied that the Notice of Motion application before the court is merited, and has not been challenged or substantively challenged, and I allow it as prayed with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF JULY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Odongo holding brief for Wamalwa for the Plaintiff

Mr. Nthiga for the Defendant

Teresia – Court Clerk