



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 375 OF 2010

TELKOM KENYA LIMITED.....PLAINTIFF

VERSUS

EM COMMUNICATION LIMITED T/A POPOTE WIRELESS.....DEFENDANT

RULING

INTRODUCTION

1. The Application before the Court is the Defendant's Notice of Motion dated **18th February 2013** and filed on **19th February 2013**. It is expressed to be brought under the provisions of **Sections 1A, 1B, 1C and 3A** of the **Civil Procedure Act** as well as **Order 10 Rule 11** and **Order 51 Rules 1-3** of the **Civil Procedure Rules**. The Application sought for the following orders;-
 1. *That this Honourable Court be pleased to set aside the judgment entered herein for the Plaintiff on 20th July, 2010 and the decree issued on 13th October, 2010.*
 2. *That this Honourable Court be pleased to stay further proceedings pursuant to the said judgment.*
 3. *THAT the costs of this application be provided for.*

THE DEFENDANT'S CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit sworn on 19th February 2013 by ISAAC WANJOHI, a Director of the Defendant Company.
3. The Defendant's case is that no summons were ever served to its director, Engineer Isaac Wanjohi, as alleged by Vihaki Armstone in his affidavit of service sworn on 6th July 2010. It contended that the said Vihaki Armstone swore a false affidavit. The Director, Eng. Wanjohi averred that he had never met the said Vihaki Armstone.
4. In the circumstances, it is the Defendant's position that this is a suitable case for the Judgment and decree to be set aside and further proceedings be stayed.

THE PLAINTIFF'S CASE

5. In opposition to the application, the Plaintiff filed a Replying affidavit sworn by its Legal Officer, LAWRENCE KARANJA on 29th May 2013.

6. The deponent averred that summons to enter appearance had been served upon the Defendant on 21st June 2010 through its Director Engineer Isaac Wanjohi at his office, Wanjohi Consulting Engineers Ltd, Ndemi road, off Ngong Road. The Defendant failed to enter appearance or file a Defence and consequently judgment in default of defence was entered against it on 20th July 2010. He further averred that the Defendant was aware of the Judgment entered against it as the same was reported in the Daily Nation on Tuesday the 7th of September 2010.
7. It was the deponent's assertion that the Plaintiff's advocates filed an application dated 16th November 2012 for leave to examine the directors of the Defendant after the investigators it hired were unable to trace any assets of the Defendant for purposes of attachment. A copy of the said application was served upon the Defendant through its director, Eng. Isaac Wanjohi on 15th January 2013. Thereafter, the Defendant filed a Notice of appointment of Advocates dated 24th January 2013.
8. It is the Plaintiff's case that the Defendant only showed desire to prosecute the matter when it learnt that the Plaintiff had sought to have its directors held personally liable for the satisfaction of the decree. It is further its case that the Defendant had not been candid with the truth regarding service of summons and therefore it is not deserving of the discretion of the Court. The Plaintiff maintained that the judgment against the Defendant was regular as proper service of summons was effected on the Defendant's principal officer.
9. The Plaintiff also contended that the Defendant had no Defence to the present suit and none had been exhibited. It therefore urged the Court not to set aside the default judgment in vain. It added that the Defendant was truly indebted to the Plaintiff and that the Court ought to allow it to proceed with recovery. In the event that the Defendant's application was to be allowed, the Plaintiff's position was that the Defendant was required to deposit the entire decretal sum in Court as a condition for defending the suit.
10. In view of the foregoing, the Plaintiff therefore urged the Court to dismiss the application with costs.
11. The Defendant filed its written submissions on 2nd April 2015 while the Plaintiff did the same on 10th April 2015

ANALYSIS

12. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions by Counsel. Having done so, I take the following view of the matter.
13. On 25th March 2015, the process server, one Vihaki Armstone was cross examined on his affidavit of service sworn on 6th July 2010, in which he had averred that he served the Defendant with copies of the pleadings in this matter. He explained the process of serving a limited liability company. This included identifying the offices of the company and the person authorised to accept service. It was his testimony that Mr. Wanjohi accepted service by retaining a copy of the summons to enter appearance and Plaintiff. However, he had refused to acknowledge receipt on the original summons.
14. Mr. Armstone testified that he had not known Mr. Wanjohi previously and that on the day of service it was the receptionist who ushered him into Mr. Wanjohi's office. He denied the allegations by Engineer Wanjohi that they had never met.
15. On re-examination, Mr. Armstone testified that he went to Mr. Wanjohi's office along Ndemi road, off Ngong road to effect the service of summons. He further testified that he introduced himself to Mr. Wanjohi who confirmed that he was indeed the said person.
16. In its submissions, the Defendant discredited the process server's competence in effecting proper service. It was their contention that in his affidavit of service, the process server did not explain how he allegedly came to know the office of Engineer Wanjohi. This position is not correct. It is clear from the process server's affidavit of service that he was informed by the Plaintiff's Advocate of the physical address of Engineer Wanjohi, located along Ndemi road, off Ngong road in Nairobi. It was also the Defendant's contention that the manner in which the process server effected service was improper as he never saw the need to get somebody to assist him to identify the directors of the Defendant. To this end, the process server had averred in his affidavit of

service that the lady he found at the reception of the Engineer's office and who had declined to disclose her name ushered him into the Engineer's office.

17. The Defendant referred the Court to the case of **Stephen Muturi vs Unibase Petroleum Limited [2008] eKLR**, where Justice Lesit while referring to the cases of **Patel Vs E.A Cargo Handling Services Limited [1974] E.A** and **Rapando Vs Ouma & 6 Others [2004] KLR 115** held as follows:-

“A person serving the process must state in a return service the time when the service was effected on the person served; the manner in which the summons were served; the name of the person who identified the person served to him and how he came to know the identifying person; the place where the service was effected and finally whether the person served was required to acknowledge service by signing and whether he complied.”

18. It was the Defendant's submission that the process server's affidavit of service did not meet that criteria. It however appears to this Court that the process server largely met the conditions as stated in the above case. He indicated the date and time of service which was on 21st June 2010 at about 2.30 pm. He also stated how he came to know the place where he effected service and he demonstrated the manner in which service was effected.
19. The evidence given by Mr. Armstone during cross examination was consistent with the account given in his affidavit of service sworn on 6th July 2010 and filed on 12th July 2010. His testimony was systematic and this Court had no reason to doubt the same. The Defendant did not dispute that Engineer Wanjohi was one of its Directors. It was also not in dispute that the said Engineer's office was at Ngong road. In fact, as is submitted by the Plaintiff, the application dated 16th November 2012 which prompted the Defendant to file the current application, was served upon Engineer Wanjohi at the same office on Ngong road. The process server was directed to the said offices by the Plaintiff's Advocates. On arrival to the said offices, the secretary who declined to disclose her name directed him to the said Mr. Wanjohi. In view of the foregoing, this Court's finding is that there is credible evidence that the Defendant was served through its Director Engineer Wanjohi.
20. Further, this court is not in a position to determine the strength of the Defendant's defence since no draft was attached to the application. The court is therefore not in a position to exercise its discretion and set aside the Judgement, since such discretion must be based on an arguable defence with triable issues. Moreover, in the present application the Defendant did not even seek for leave to defend the suit. It only sought for the Judgment herein to be set aside and for stay of proceedings pursuant to the said Judgment. This raises doubt as to whether the Defendant has a defence to the Plaintiff's case or if it is keen on defending the suit.
21. In the case of **Shah v Mbogo [1967] EA 116**, the Court of Appeal held that:-

“... I agree that where it is a regular judgment as in this case here the court will not usually set aside judgment unless it is satisfied that there is a defence on the merit.”

Similarly the said Court of appeal in the case of **Civil Case No 3399 of 1992 Fredrick Chege Kamenwa vs Aron K. Kandie** held that:-

“...notwithstanding the regularity of an ex-parte judgment, a court may set aside the same if he has reasonable defence on the merits.”

22. It is plain that the Defendant has not demonstrated any defence on merits against the suit. In the circumstances, the Defendant has not established a case to invoke the Court's discretion in its favour.

DISPOSITION

23. In view of the foregoing, the upshot of this court's ruling is that the Defendant's Notice of Motion dated **18th February 2013** and filed on **19th February 2013** was not merited and the same is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF JULY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Weru holding brief for Munyu for the Applicant

Mr. Ndungu holding brief for Dr. Kuria for the Respondent

Teresia – Court Clerk