REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 320 OF 2013

BENSON W.K. MUIGAI……..……...1ST PLAINTIFF

PAULINE WANJIRU MUIGAI……..…...……..2ND PLAINTIFF

MACVAST EXECUTIVE RESTAURANT (K) LTD….…….3RD PLAINTIFF

EVERLYN WANJIRU WAMBUI……..…….4TH PLAINTIFF

CHRISTOPHER PHYS HOWARTH…….....5TH PLAINTIFF

Versus

PHILOMENA NDANGA KARANJA…….DEFENDANT

RULING

Setting aside ex parte judgment

[1] The Applicant filed the application dated 23.12.2013 seeking for; 1) stay of further execution of the decree of the court; 2) an order to declare the attachment by Siuma Auctioneers illegal, null and void; 3) an temporary injunction to restrain the auctioneer from advertising for sale the attached goods; 4) a mandatory injunction for the said auctioneers to return the attached goods; 5) an order setting aside the e parte judgment herein unconditionally; 6) leave to the defendant to file her defence; and 7) an order for costs.

SUBMISSIONS BY THE DEFENDANT

[2] The defendant/applicant made submissions on her application dated 23/12/13. She totally denied that she was ever served with Summons to Enter Appearance, Notice of entry of the Judgment or even the Proclamation Notice. She was categorical that in view of the fact that; 1) the claim herein was already under intense contestation by her; 2) was subject of a police inquiry; and 3) it involved a colossal amount of money, there is no way she would have ignored refused to Enter Appearance and defend the suit. She even insisted that the process server be cross-examined. That was done.

[3] According to her, she has never had any financial dealings with the Plaintiff for which a suit would be filed against her by the plaintiff. She annexed to her affidavit a letter which she previously wrote to the police C.I.D Department denying any claims by the Plaintiff as well as lamenting harassment and intimidation by the plaintiff. She claims to have a plausible defence to the Plaintiff's claim that ought to

be canvassed in a full trial. The plaintiff's claim is one that does not lend itself to an entry of a final judgment in default of appearance. It ought to have gone for a formal proof. Most of the documents by the plaintiff cannot be a basis for a final judgment in default of appearance. There are so many questionable items such as bank overdrafts, auctioneers, shylocks etc. whose genesis and basis has more questions than answers. Further, she claimed, the 1st Plaintiff did not have any legal mandate to lend such an amount of money as he had no banking facilities. Another misnomer; there was no basis of joinder of the other parties as plaintiffs on the alleged cash agreement which was allegedly purely between the 1st plaintiff and the defendant.

[4] She was of the view that there is no proper service or any service of summons to enter appearance to the suit, and so the resulting judgment is an irregular one which the court must set it aside *ex debito Justitiae*. Even if the judgment is a regular one, the court still has unfettered discretion to set aside such judgment and all consequential orders upon such terms as are just to the parties. She cited the cases of **JESEE KIMANI –VS- MC CONNEE (1966), EA547 AT PAGE 555, JOHN SAKAJA-VS-CALEB KOSITANY, HCC NO. 592 OF 1998 (2008) EKRL** and **SEBEI DISTRICT ADMINISTRATION –VS- GASYALI (1968) EA 30.**

SUBMISSIONS BY THE PLAINTIFFS

[5] The Respondent argued that; 1) the Applicant was served with summons to enter appearance and the Notice of Entry of Judgment as per the affidavits of service on record; 2) there were financial transaction between the plaintiff's and the defendants as evidenced by the various annexures; and 3) the defendant has always asked for time to repay the sums she owes to the plaintiffs. She, therefore, does not have any defence to the claim. The court should consider the applicants' conduct, prior and post the judgment. She is simply engaged in further delay of the case. She has sought time to record a settlement and the application was adjourned to the 17th January, 2014. Again on the 17th January, 2014 the defendant sought more time to enable her get money from another transaction and make repayment proposals, a request the plaintiffs refused hence the order about the hearing of the application. She has deposed in her affidavit that she knows the 1st Plaintiff and his co-plaintiffs and that she owes them money. The Minutes of a meeting held on the 23rd April, 2013 show that the defendant had admitted owing the plaintiffs Kshs. 17,680,000/-. The meeting was held at the offices of Karangi coftea Ltd and was attended by various persons- none was a police officer. Police officers do not attend private meetings and take part in deliberations. The allegations in the defendant's advocate letter marked PNK2 and dated the 8th May, 2013is short of the truth and is clearly meant to discredit the commitment the defendant gave on the 23rd April, 2013 as per the said Minutes in order to escape from paying the said sum due to the plaintiffs.

[6] The 1st plaintiff has denied ever using the police to pursue his and the other plaintiffs claim against the defendant. The defendant's allegation about the police and the advocate's letter to the police is clearly an afterthought, just as this application is an afterthought.

[7] According to the plaintiff, the defendant's claim at paragraph 9 of the supporting affidavit that:-

"… I have never had any financial contract or any dealings with the plaintiff that would inform their claim for the amount stated in the suit"

Is; a contradiction of her claim, as stated in her advocate's letter to the C.I.D., that she had an agreement with the 1st plaintiff in which the 1st plaintiff would trace her late husband's unknown assets at a commission. If that agreement existed, it is a financial contract. Hence her averment amounts to perjury. Secondly, even if one were to disregard the Minutes of 23rd April, 2013 annexed to the plaintiff's documents, there are glaringly documents bearing the defendant's signatures, name and even photographs that add up to the amount claimed and give to the plaintiffs locus standi to institute to institute these proceedings. These documents are:-

(a) The "Cash Agreement" signed between the 1st plaintiff and 2nd plaintiff on one part and defendant on the other dated 23.8.2011 admitting Kshs. 12,900,462/- attached to the replying affidavit and marked "BWK1."

The defendant has said nothing about these documents.

(b) A banker's cheque dated 3rd December, 2010 for Kshs. 600,000/- received by the defendant.

(c) Undated cheques for Kshs. 6,000,000/- issued by the defendant in favour of the 2nd plaintiff, signed twice by the defendant.

(d) An undated cheque for Kshs. 6,000,000/- issued by the defendant in favour of the 2nd plaintiff. The defendant signed it twice.

(e) An undated cheque in the sum of Kshs. 6,500,000/- issued by the defendant in favour of the 1st plaintiff and signed twice by the defendant.

(f) A cheque dated 23/8/2011, issued by the defendant, signed twice in the sum of Kshs. 500,000/- in favour of the 3rd plaintiff. The cheque was presented for payment but dishonoured as shown by a note overleaf.

(g) An agreement of sale dated 3rd December, 2010 between the 4th and 5th defendants for the sum of Kshs. 3,300,000/-.

Clearly, the defendant's assertion that she didn't have any financial contract with the plaintiffs is false.

[8] The plaintiffs restated the law on setting aside a default judgment is settled. Most importantly; there must be a defence that raises triable issues. A defence is so important that even if service of summons to enter appearance is proper, a court can set aside ex-parte judgment if there is a defence on merit. They cited **TREE SHADE MOTORS LTD. VS. D.T. DOBIE AND COMPANY LTD. AND ANOTHER: CIVIL APPEAL NUMBER 38 OF 1998.** The defendant concedes that she knows the 1st defendant and that there was some assignment of a financial nature she had given him. The document produced by the plaintiffs however; show that the financial transaction was more than tracing unknown assets. There are documents the defendant signed, cheques she issued, some which were dishonoured, and a land transaction. The fact that the defendant was given an opportunity to swear a further affidavit, which she didn't shows clearly that she has nothing to say about the documents the plaintiffs have shown the court to prove their case. She has no defence at all. As pleaded in the plaint the 1st, 2nd, 4th and 5th plaintiffs are close family members, parents and their children, and friends of the defendant whom she used to get the various sums from as explained. As there is no defence, the defendant's application should, on that score alone, fail.

[9] The other condition is that the court has discretion to set aside an ex-parte judgment but this must be exercised judicially. The court has to look at the circumstances prior and after the judgment. They urge the court to look at when the cause of action arose in this case, as early as four years ago as the documents so, the defendant's issuance of cheques some of which were dishonoured – which is a criminal offence in itself – the defendant's delaying tactics even after making the application to set aside the judgment by claiming that she wanted to settle. The court's discretion while exercised to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error, is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See **STALLION INSURANCE COMPANY LTD. VS ROSEMARY OLAO CIVIL APPEAL NO. 85 OF 1998** (Digest on Civil Case Procedure page 711)

[10] The affidavits on record are elaborately detailed as to the place; time and circumstances the pleadings herein were served. The defendant has not denied the narrative given as to how she was served. She has simply stated that any signature on the said affidavit is not hers. Of course there is no

signature on the summons as she did not sign. The defendant is quite casual about her denial about the service. It is clear she was served with the said documents. The submission that the case should have gone for formal proof flies in the face of Order 10 rule 2 and 4 (1) of the Civil Procedure Rules which provides for entry of judgment for liquidated claims. They submitted that the defendant's application is not well-founded, has not merit and the same should be dismissed with costs.

COURT'S RENDITION

[11] For good order, I propose to deal with the prayers on setting aside of the ex parte judgment herein and leave to defend the suit, first. I do not want to re-invent the wheel. Doubtless, the court has a wide and unfettered discretion to set aside an ex parte judgment even where the judgment was obtained regularly, except the variation or setting aside of the judgment should be based on the defendant showing; 1) her defence has merit; 2) the plaintiff will suffer no prejudice by the setting aside; and 3) the delay for not entering appearance has been explained. There is no dearth of judicial decisions on this subject. They are legion. The rationale for the above approach by the courts is crystalized in the word of **APOLLO, JA**, in **SEBEI DISTRICT ADMINISTRATION –VS- GASYALI (1968) EA 30,** that:-

"I think a distinguished equitable judge has said: blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equitable approach to this matter is that unless there is fraud or intention to over-react, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline"

[12] I should also add that the need to determine the rights of the parties in the suit through a consideration of the merits is the cornerstone of the exercise of the discretion to set aside ex parte judgment. That, then gives the aspect of whether the applicant has a defence with merits which deserves a hearing, a central fibre in an application for setting aside ex parte judgment. And hence, the practice that the party applying should demonstrate- preferably by annexing a draft defence to the application- that he has a defence worthy of consideration on merit, makes sense; i.e. it raises triable issues.

[13] The legal dimensions have been cast. Let me now look at the circumstances of the case herein. On 13.2.14, the Process Server **Mr Peter Onjerio Nyamosi** was cross-examined by counsel for the applicant. The court also sought some clarification on the service of summons herein on the defendant. It became clear that on 27.7.2013, he served the defendant at her work place at a hotel known as Ndanga Hotel in Ruiru Town. He was ferried and accompanied by 1st Plaintiff to the defendant's place. The 1st plaintiff identified and introduced the process server to the defendant whom he knew. Notably, the process server even described how he travelled to Ruiru in the 1st plaintiff's vehicle. On service he made a return of service by filing an affidavit of service dated 20.8.2013. On 6.9.2013 he was given notice of entry of judgment dated 6.9.2013 and proceeded to Ruiru, Ndanga Hotel and served the defendant with the same after he had introduced himself to her. Again, he made a return of service by filing an affidavit of service sworn on 10.9.2013. In both occasions, the defendant declined to sign the summons and notice of entry of judgment. But, relevant copies of the summons, plaint and notice were left with the defendant on service as require by law.

[14] I find service was properly done. Going forward; does the defendant have a defence with merits? I think not. Other than stating that; 1) the plaintiff is trying to extort money from her; 2) she denied the claim before the CID and still does now; 3) the plaintiffs' claim is incapable of judgment without formal proof; and 4) there are questions to be asked on the plaintiffs' documents; there is absolutely nothing tangible which is being offered by way of defence. The plaintiffs produced documents which the defendant does not really controvert. The plaintiffs' case has been anchored on evidence and it is indefensible for the defendant to state that the plaintiffs' case is baseless. Those words that the defendant has used such as ''baseless'', ''shylocks'', ''questionable items'', ''plausible defence'' and others, are very powerful in appearance but feeble in substance. I see an attempt by the defendant to try and inflate trivial and subordinate issues in the hope that they will pass for triable issues. For instance, the statement that the plaintiffs' claim does not lend itself to entry of final judgment without formal proof is untenable,

for the claim herein is of a liquidated sum and is amenable to final judgment in default of appearance or defence under the Civil Procedure Rules especially Order 10. Further, the fact that the defendant issued bad cheques is not conduct that is attractive to equity. Equally, it is not untrue that she made certain representations to acknowledging the debt herein and she has not specifically controverted them. These things roll back the magnanimous hands of equity with which the court grants favour on the defendant. Once that happens, the applicant does not excite the discretionary remedy on her side. Even when I consider the other condition of prejudice, the scale tilts against the defendant because, if I were to set aside the judgment herein, I will be allowing the defendant to set up a defence which is not merited against the plaintiffs' claims, and that will be an outright prejudice to the plaintiffs. See the case of **KINYANJUI AND ANOTHER –VS- THANDE AND ANOTHER (1995 -98 2 E.A 159;** where the Court of Appeal, although in an application to strike out the defence stated that "…….**defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."**

[15] The argument of wrongful attachment is also not supported and is dismissed. Accordingly, the entire application dated 23.12.2013 is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Nairobi this 20th day of March, 2014

F. GIKONYO

JUDGE