



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 514 OF 2006

KENSINGTON INTERNATIONAL LIMITED PLAINTIFF

VERSUS

COLLIN STEPHEN FORD1ST DEFENDANT

ANNE MARIE FORD2ND DEFENDANT

GILLIAN FORD3RD DEFENDANT

JONATHAN NGALA OSIAKO4TH DEFENDANT

R U L I N G

1. What is for consideration by this Court is the Chamber Summons filed by the first Defendant/Applicant dated 10th May 2012 but not filed herein until 17th October 2012. The same is brought under the provisions of **Order 10 rules 10 and 11** and **Order 45 rule 1 (1) (b)** of the *Civil Procedure Rules* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application seeks that the ex parte judgement entered herein on 14th September 2007 be set aside and the Orders issued by this Court on 21st September 2007 be reviewed and set aside and that the Defendants be granted unconditional leave to defend the suit. Supplementary prayers sought that the Defendants be allowed to file Appearance and Defence out of time and that there be a stay of execution of the Judgement and Decree herein pending the hearing and determination of the Application on the one hand and the entire suit on the other.
2. The first Defendant's said Application was predicated upon the following grounds:

“(a) That exparte judgment was entered herein on 14th September 2007.

(b) That there was no plaint, notice nor summons served to enter appearance in this suit to the Defendants.

(c) That the copy of the said judgment was attached to letter dated 17th April, 2012 addressed by the firm of NAIKUNI, NGAAH & MIENCHA & COMPANY ADVOCATES to the Deputy Registrar of High Court of Kenya and a copy of the

firm of A.I. HAYANGA & ASSOCIATES in regard to ongoing Mombasa High Court CIVIL CASE NO. 306 OF 2001.

(d) That prior to that the said exparte judgment had not been served to the Defendants nor his Advocates.

(e) That on perusal of the court file it is clear that the matter proceeded exparte and judgment was unprocedurally issued against the defendants.

(f) That the said judgment should be set aside.

(g) That if orders sought are not granted the Defendants shall suffer great loss and damages.

(h) That it is for the interest of justice and fairness to allow this application”.

3. The first Defendant’s Chamber Summons was supported by the Affidavit sworn by **Andrew Isaac Hayanga** on 10th May 2012, the deponent being the advocate on record for the first, second and third Defendants. He identified that the issue in this case was that the first, second and third Defendant of the directors of a company with the same name as the Plaintiff herein. They had properly instituted a suit, being **HCCC No. 306 of 2001** (Mombasa), in the correct name of their company Kensington International Ltd in 2001 to claim for motor vehicles belonging to the company wrongly impounded by the Kenya Revenue Authority. The latter was willing to return the said vehicles when, according to Mr. Hayanga, certain imposters registered a second company bearing the same name in order to hijack the case as against the Kenya Revenue Authority in Court. The issue before the Mombasa Court was whether the imposters in the case were the correct owners of the company. Mr. Hayanga discovered the existence of this suit for Court only when he was served with a copy of a letter addressed to the Deputy Registrar of the Nairobi Court by the advocates on record for the Plaintiff dated 17th April 2012. That letter had contained copies of the Decree and Judgement herein which the deponent annexed to his Supporting Affidavit. Mr. Hayanga went on to say that he had forwarded the copies of those documents to the first, second and third Defendants who came back to him to say that they didn’t know about the existence of this case, there were never served with summons to enter appearance or any process at all regarding the same. It is to be noted that the first, second and third Defendant resides in London, England and only come to Kenya occasionally.
4. As regards the two companies having the same name, Mr. Hayanga noted that the first, second and third Defendants were the directors of the first company to be incorporated in time registered on 11th September 1999 under registration number C 84444. The second company bearing the same name was incorporated on 19th December 2000 under registration number C 92271. Mr. Hayanga stated that he knew that the incorporation of the second company with the same name as the Plaintiff herein was a mistake either caused by the negligence of the Registrar of Companies or as a result of collusion as between the people who formed the company and officials of the Registrar. He noted that at the time that this case had been filed in this Court, the Assistant Registrar of Companies had already written to the directors of the Plaintiff company herein calling upon them to change the name of the company within 15 days from the date of the letter being 15th May 2003. The deponent annexed a copy of that letter to the Affidavit in support of the Application and marked as “AIH 7”. Mr. Hayanga noted that the issue of the registration of the two companies had already been canvassed as before the High Court, Mombasa (Sergon J.).
5. Despite a change of advocates, the Plaintiff company herein took a long time to respond to the first, second and third Defendants’ said Application. However, the Court file went missing for a considerable period of time and it was reconstructed piecemeal on the application of the first, second and third Defendants. During of the process of the reconstruction, this Court thought it prudent to request the former advocate for the Plaintiff Company, Mr. Stephen K. Bundotich to swear an affidavit with regard to what he knew concerning the Plaintiff’s advocate/client file as well as the proceedings in this case. Mr. Bundotich swore an Affidavit in that regard dated 19th June 2013. He recalled that he had been instructed by Mr. Simon Mauncho an advocate practising

in Mombasa, to file suit in the Court here on behalf of his client Kensington International Ltd. As a result, Mr. Bundotich's firm filed this suit. He stated that the Defendants were served but did not enter appearance. He recalled that the Plaintiff's claim was that the Defendants had registered another company bearing a name similar to that of the Plaintiff and were using the same to take over proceedings in a case in Mombasa being the **HCCC No. 306 of 2002**. The deponent recalled that Judgement was delivered in favour of the Plaintiff and that his firm had extracted the Decree and forwarded copies of both to Mr. Mauncho as well as to the directors of the Plaintiff Company. Then in 2008, Mr. Bundotich received a call from a Mr. S. Wangila, one of the Plaintiff Company's directors, who informed him that the advocate/client file was required for the case in Mombasa. The deponent had no objection to releasing the file to Mr. Wangila.

6. Rather out of the blue, the said Mr. Stephen Wangila swore a Replying Affidavit on 26th July 2013. He referred to the contents of the Affidavit sworn by Mr. Bundotich. He maintained that he had received from Mr. Bundotich's firm a copy of the Judgement and Decree in this suit. However, he detailed that Mr. Bundotich had not handed over the pleadings or the physical client/advocate file as regards this case. The Court was singularly unimpressed with the contents of the Replying Affidavit as it left it wondering as to whether the Plaintiff had any intention of pursuing the prosecution of this suit.
7. This Court heard submissions as regards the Chamber Summons dated 10th May 2012 on 11th December 2013. Miss Lutta for the Applicant submitted that the Application was not opposed bearing in mind that the Replying Affidavit sworn by Mr. Stephen Wangila as aforesaid solely referred to matters in response to the said Affidavit sworn by Mr. Bundotich on 19th June 2013. These proceedings had been before Court through a number of advocates on behalf of the Plaintiff and all of them denied knowing anything about the case. Counsel referred to the said Affidavits of Mr. Bundotich and Mr. Wangila detailing that no objection was raised therein to have the *ex-parte* Judgement set aside. Unfortunately as regards its prayer to file Appearance and Defence out of time, the Defendants had a predicament in that there was no primary document to refer to being the Plaint. As the Court file had been lost, the Plaint appeared nowhere in the reconstructed file and the Plaintiff through the said deponents as above, could not lay their hands on copies of the pleadings. The Defendants requested of this Court to order that the Plaintiff be availed to them within a period of time and if not so availed, for the suit to be dismissed. Further, there was no evidence before this Court as to how the Plaint had been served bearing in mind that the Defendants were outside the jurisdiction of this Court. As a result, the Court was asked to find that there had been no proper service under the provisions of **Order 5 rule 3** of the *Civil Procedure Rules*. Counsel went on to refer to the Judgement that had been attached as an annexure to the Supporting Affidavit to the Application before Court which contained no mention of how service was effected upon the Defendants in London, England. Counsel maintained that the Court had a wide discretion to set aside judgement that the Applicants must show that they had a *prima facie* case. Further, the Defendants believed that there had been no proper service upon them and the onus of proving so was on the party effecting such service.
8. Miss Atuma appearing for the Plaintiff noted that the file had been reconstructed and that her client had filed a Replying Affidavit to the Application. However, counsel did not have a copy thereof. The Defendants had implied that they were not served with the original process as regards of this suit. However, if that was so, counsel maintained that there was no way that the Judgement had been entered without the Court satisfying itself that proper service had been effected. In her view, the Defendants had not satisfied the requirements of Order 45 rule 1 as to any new evidence that could not have been availed before Court at the time that the Court made its orders on 21st September 2008. Further, there was no evidence of any error on the face of the record. The Plaintiff asked the Court to ignore the prayer of the Defendants as to a stay of execution as they had not put up any security as required by the Rules. There was no requirement for the Notice of Judgement to be served upon the Defendants. Counsel noted that the Judgement had been annexed to the Application for Judicial Review being HC. Misc Appl. No. 32 of 2012. It was the Plaintiff's submission that the Defendants' Application before Court should be dismissed. Judgement had been obtained in September 2007 but the Application to set aside came five years later. If the Application was allowed this would cause prejudice to the Plaintiff and prevent it from enjoying the fruits of its judgement. As regards the matter of the Judicial Review referred to above, counsel for the Plaintiff noted that the Registrar General had failed to supply the requisite documents

required by the Court and, as a result, the review had been unable to proceed. The Plaintiff requested that this Court should direct that those proceedings before the High Court in Mombasa should come for hearing. As regards the availability of the pleadings in this case, the Defendants had not attached any draft Defence to this Application before Court.

9. In a brief response, Miss Lutta emphasised that the Defendants could not put in a draft Defence as they did not have a copy of the Plaintiff as they had never been served. Counsel noted that the Replying Affidavit put in by the said Stephen Wangila could and possibly should have had annexed thereto a copy of the Affidavit of Service of the Court process upon the Defendants. Counsel maintained that looking at the Judgement which was attached to the Supporting Affidavit to the Application before Court, there was no evidence or reference to service.
10. I have perused at length the Judgement dated 14th September 2007 of my learned brother **Waweru J.** a clear copy of which is attached to the Replying Affidavit to the Judicial Review Application – HC. Misc Civil Appl No. 32 of 2012. Contrary to what learned counsel for the Defendants has submitted to this Court, the learned Judge noted on page 4 of his Judgement the following:

“The 2nd and 3rd Defendants were never served with summons to enter appearance and copy of the plaint. The suit against them was subsequently withdrawn by notice dated 5th October 2006.

The 1st and 4th Defendants were duly served. They neither entered appearance nor filed a defence.”

It is apparent to this Court that the learned Judge did take cognizance of the fact that service had been effected at least upon the 1st and 4th Defendants. As a result, this Court finds that the Judgement was properly entered as against the 1st and 4th Defendants when one takes into account that there is no other evidence before this Court in view of the Court file being lost. The reconstructed file contains no documentation as regards the pleadings in this suit. However, there is little or no doubt that the Plaintiff has concealed material from this Court relevant to the Application before it. Mr. Bundotich, as an advocate and as an officer of this Court is charged with the responsibility of upholding its dignity. I have no doubt as to the authenticity of his Affidavit sworn on 19th June 2013, more particularly his testimony that he handed over his complete file to Mr. Wangila. Regretfully, I do not accept the testimony of Mr. Wangila contained in his Replying Affidavit sworn on 26th July 2013 that Mr. Bundotich only handed him a file containing the Judgement and Decree obtained in this suit. In my opinion, Mr. Wangila clearly had something to hide as demonstrated by his reluctance to provide the documentation necessary to reconstruct the Court file.

11. Under **Rule 1 of Order 45**, it is provided that;

“(1) Any person considering himself aggrieved—

- a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. **by a decree or order from which no appeal is hereby allowed,**

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
(Emphasis mine).

12. It is therefore imperative, that for the Court to consider an application for review, the aforementioned provisions under Rule 1 have to be satisfied. To my mind, the Defendants have

put as much material in evidence before this Court as they could as regards their Application for review. Obviously, the Defendants were hampered by the Court file going missing and the reconstructed file not containing sufficient detail in order for a comprehensive affidavit to be filed in support of that their Application. However, the file as regards the Judicial Review matter before the High Court in Mombasa, such being filed on 19th October 2012 does contain evidential material which I consider necessary with regard to the Defendant's Application before this Court. For example, annexed to the Replying Affidavit of the said Stephen Wangila sworn on 8th April 2013 as Exhibit "SWW 3" is firstly a copy of the Certificate of Incorporation of Kensington International Ltd registered under No.C. 92271 of the 19th December 2000. The next document is a copy of a Certificate of Incorporation of Kensington International Ltd registered under No. C. 84444 dated 11th February 1999. Further, I would refer to paragraph 16 of the said Stephen Wangila's Supporting Affidavit to the second Plaintiff's Notice of Motion dated 25th July 2012 filed in HCCC No. 306 of 2001 (Mombasa) being part of Exhibit "SWW 2" to the aforementioned Replying Affidavit of 8th April 2013. Mr. Wangila notes that the Assistant Registrar of Company gave testimony before the court in Mombasa that both companies did exist and that Kensington International Ltd registered under No.C. 84444 was incorporated before the second Kensington International Ltd. Bearing in mind the dates of the said Affidavits sworn by Stephen Wangila as above, such matters could not have been before **Waweru J.** when he delivered his said Judgement on 14th September 2007.

13. In my view there has been shown before this Court new and important matters of evidence which would justify a review of **Waweru J's** said Judgement. Counsel for the Plaintiff has suggested in her submissions before Court that all such matters should come for hearing in the Judicial Review Application being Misc. Appl. No. 32 of 2012 (Mombasa). I tend to agree. However in view of what I have detailed above I would now make the following Orders:

- a. The Judgement of **Waweru J.** delivered on 14th September 2007 is hereby set aside. The first and fourth Defendants will be allowed to file their Appearances and Defences out of time once the Plaintiff herein has re-served the Plaint dated 13th September 2006 and the documents ancillary thereto upon them. Leave to serve such process under the provisions of Order 5 rule 21 Civil Procedure Rules, 2010 is hereby granted to the Plaintiff.
- b. This suit will be consolidated together with the Judicial Review case being HC Misc. Appl. No. 32 of 2012 (Mombasa) and heard together in Mombasa.
- c. The Deputy Registrar/Executive Officer of this Court will ensure that this file be transferred to the District Registry, Mombasa alongside the two Mombasa files being HCCC No. 306 of 2001 as well as the aforementioned HC. Misc. Appl. No.32 of 2012.
- d. Costs of the Application before this Court will be in the cause.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE