



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 122 OF 2013

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KALKA FLOWERS LIMITED.....1ST DEFENDANT

PATRICIA SRITHAR.....2ND DEFENDANT

ARUMUGAMPILLAR SIRTHAR.....3RD DEFENDANT

R U L I N G

1. Before the Court are two applications as follows:-
 - i. *The Notice of Motion dated 31st October 2013 and amended on 8th November 2013. The Motion is filed under sections 1A, 3 & 3A of the Civil Procedure Act and under Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules.*
 - ii. *The Notice of Motion dated 2nd December 2013 and the Notice of Preliminary Objection dated 3rd December both seeking to strike out the Replying affidavit of Alex Ngatia Thangei. The said Motion is taken out under Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 3 and 3A of the Civil Procedure Act.*
2. The first application is supported by the affidavits of the third defendant sworn on **31st October 2013** and **8th November 2013** respectively. The third defendant depones that the defendants were never served with summons to enter appearance as required by law and consequently the *ex parte* judgment should be set aside and the defendants given leave to defend the suit.
3. He further depones that the second defendant was never served with summons and that she did not at any time give any one authority to accept service on her behalf. It is the defendants' case that they have a good defence and therefore they pray for an opportunity to present the defence in Court.
4. The said application is opposed vide the Replying affidavit of **Alex Ngatia Thangei** sworn on **19th November 2013** and filed in Court on even date. Together with the Affidavit is a bundle of documents marked as annexure **ANT 1** running for, pages 1 to 16.
5. The deponent describes himself as an Advocate of the High Court of Kenya having personal conduct of the matter on behalf of the Plaintiff. On the issue of service of summons, the deponent states that he instructed Mr. Martin Mbutu Mutua, a licensed process server to serve summons to

- enter appearance upon the three defendants. On 17th April 2013 he received an affidavit of service from Mr. Mbutu confirming that he had effected service upon the three defendants.
6. The deponent further states that he received a letter from the 1st defendant and signed by the 2nd and 3rd defendants on **18th April 2013** confirming receipt of the Plaintiff. The deponent also avers that in the said letter the defendants admitted the full debt and tendered payment proposals.
 7. The deponent avers that after the defendants had failed to enter appearance within the time allowed, he applied and obtained a default Judgment on 30th April 2013. Thereafter a decree was issued on **10th May 2013**. In view of the foregoing, it is the deponent's position that proper service was effected upon the defendants and that the *ex parte* Judgment was regular. The deponent further avers that the execution process was regularly and lawfully done

2ND APPLICATION

8. The second application being the Notice of Motion dated **2nd December 2013** seeks the following main prayers:-
 1. *That the Honourable Court do strike out the contents of paragraph 5 (c) & (d) of the Replying affidavit of Alex Ngatia Thangei allegedly sworn on 19th November 2012.*
 2. *That the Honourable Court be pleased to expunge from the Court record, the document/letter dated 18th April 2013 annexed and referred to in paragraph 5 (c) and (d) of the Replying affidavit of Alex Ngatia Thangei.*
 3. *That the Honourable Court do strike out the entire affidavit of Alex Ngatia Thangei allegedly sworn on 19th November 2012.*
9. The application is based on the grounds stated on the face thereof and is supported by the affidavit of ARUMUGAMPILLAR SIRTHAR, described as a director of the 1st defendant, sworn on **2nd December 2013** on behalf of the defendants.
10. It is the Deponent's averment that on or about the month of April 2013, the Plaintiff, through the Chief branch manager fraudulently coerced and intimidated him to write a letter addressed to its advocates detailing a proposal for payment and in which the said branch manager insisted that he indicates that the Defendants had received the Plaintiff. He further avers that the said manager promised him in exchange of the contents thereof that the defendants would receive concessions on the loan facilities.
11. It is therefore the Defendants' case that paragraph 5 (c) & (d) of the Replying affidavit of Alex Thangei is prejudicial and oppressive to them. The Defendants' position is that the said paragraphs should be struck out and/or expunged from the Court record.
12. The Plaintiff filed Grounds of Opposition dated **22nd January 2014** in opposition to the Defendants' application. It is the Plaintiff's contention that the application is actuated by malice and only intended to delay the expeditious determination of the main injunction application while the defendants continue to enjoy interim orders. It is the Plaintiff's position that the matters deponed to by the advocate are within his knowledge as the advocate having the personal conduct of the matter and he is in the circumstances the most credible person to depone to them.
13. The Defendant has also filed a Notice of Preliminary Objection dated **3rd December 2013** on grounds that the Replying affidavit dated **19th November 2012** sworn by **Alex Ngatia Thangie** on behalf of the Respondent offends the provisions of the **Advocates (Practice) Rules, Rule 9** as well as the provisions of **sections 5 and 11** of the **Oaths and Statutory Declarations Act**. It was further the defendants' contention that the said affidavit offended the provisions of **Order 19 of the Civil Procedure Rules 2010**.
14. I have considered the applications, the affidavits on record as well as the submissions by Counsel. Having done so, I take the following view of the matter.

ANALYSIS

11. With regard to the first application, the main issue for determination is whether the *ex parte* Judgment herein should be set aside. The principles of setting aside *ex parte* Judgment are well settled. The Court has discretion to set aside *ex parte* Judgment. That discretion is provided for under **Order 10 Rule 11** of the **Civil Procedure Rules 2010**. It provides as follows-

“Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree of order upon such terms as are just.”

12. The Court's discretion under that Rule has been considered in several court's decision among them **PATEL -VS- E.A. CARGO HANDLING SERVICES [1974]EA 75-**

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. 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.”

15. It is the defendants’ case that they were not properly served with summons and that they have a good defence.

16. I have noted that the defendants unequivocally admitted the debt owed to the bank in their letter dated **18th April 2013** as addressed to the firm of Waruhiu K’owade & Ng’ang’a. I further note that the defendants have admitted the debt on various occasions. This raises doubt as to whether the Defendants have a good defence with triable issues.

17. The above notwithstanding, to determine whether the *ex parte* Judgment herein should be set aside, the main issue for determination is whether the defendants were properly served with summons to enter appearance. The position in law is that where there is no proper service, the resulting default judgment is irregular and must be set aside *ex debito justitiae*, that is, as a matter of right, on application by the Respondent. See **Remco Limited Vs Mistry Jadra Parbat & Co. & 2 Others Milimani HCCC No. 171 of 2001**.

18. I have perused the affidavit of service dated **23rd April 2012** as sworn by Martin M. Mutua. It is evident that the year 2012 as indicated was an error as the events recounted therein relate to the year 2013. In his affidavit, the process server is categorical that on **15th April 2013** he served copies of the Plaintiff together with summons to enter appearance upon one Mr. Gichia, who introduced himself as the manager of the **1st Defendant Company**. However, it is the **1st Defendant’s** case that there is no employee in their offices by the name Mr. Gichia. None of the parties called upon the process server for cross-examination. Therefore, I will decide the matter on a balance of convenience.

19. With regard to service of summons on a corporation **Order 5 Rule 3(a)** of the Civil Procedure Rules provides that the summons may be served on the secretary, director or other principal officer of the corporation.

20. In the affidavit sworn by the process server, there is no evidence that he made attempts to find the secretary or director(s) of the **1st Defendant Company**. Therefore, there was no attempt to effect service upon the director or secretary of the Company.

21. With regard to the **2nd and 3rd Defendants** who have been sued as guarantors, service of summons should have been effected upon them personally. There is no evidence that the same was done. In conclusion, the Defendants were not properly served with summons to enter appearance.

22. It was also submitted for the Defendants that, in applying for Judgment on **30th April 2013**, the Plaintiff’s Advocate circumvented the Course of Justice. According to Counsel, this was done some 12 days after the Defendants received the Plaintiff. Therefore, the prescribed time for entering appearance had not lapsed. Assuming that proper service was effected upon the Defendants, I have noted that the application for default Judgment was made after 10 working days from the purported date of service of summons. The Defendants were required to enter appearance within

fifteen (15) days from the date of service. It is therefore evident that the application for default Judgment was premature.

23. In view of the above, it is plain that the default judgment herein is irregular and should be set aside *ex debito justitiae*. I hereby set aside the *ex parte* Judgment. The Defendants are granted 14 days within which to file and serve their Defence. Each party will bear their own costs of the application.

THE SECOND APPLICATION

24. I will address the second application dated **2nd December 2013** and the Preliminary Objection simultaneously as they both seek to strike out the Replying affidavit of **Alex Ngatia Thangei**.

25. It is submitted for the Plaintiff that the said affidavit is incurably defective as it is alleged to have been sworn on 19th November 2012. I think it is rather obvious that the same was an error. The events deponed to by the Advocate occurred in 2013 and therefore it is impossible that the affidavit was sworn in the year 2012. The said error is on the form of the affidavit and does not affect the substance. **Order 19 rule 7** of the Civil Procedure Rules provides that:-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

26. It is also submitted that the said affidavit and matters deponed therein are oppressive and prejudicial to the defendants. This is based on paragraphs 5 (c) and (d) of the Replying affidavit. According to the 3rd Defendant, the Plaintiff, through the Chief branch manager fraudulently coerced and intimidated him to write the letter dated 18th April 2013. It is further submitted that the advocate has sworn an affidavit on behalf of the Plaintiff on contentious matters. According to the Plaintiff it is a contentious issue as to who actually authorised the letter dated 18th April 2013 and how it came to the possession of the said advocate.

27. **Order 19 rule 3** of the **Civil Procedure Rules** provides for matters to which affidavits shall be confined. The said rule states as follows:-

“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

28. In the above matter, it is clear that it is not in dispute that the letter dated **18th April 2013** is actually in existence. The Defendants’ contention is that they were coerced to write the said letter by the Plaintiff. In my view, the Plaintiff’s Advocate has got nothing to do with the said allegations of coercion. In particular, paragraphs 5 (c) and (d) have got nothing to do with the circumstances under which the letter dated 18th April 2013 was written. The Advocate simply deponed to the fact that he received the said letter which is addressed to the firm in which he is a partner. He further deponed that on **9th May 2013** he received a letter from the Plaintiff Bank confirming receipt of the 1st Defendant’s letter dated **18th April 2013**. These are facts and the same are not disputed.

29. In that case the Advocate deponed to matters that were within his knowledge. I do not see how the said paragraphs are contentious or oppressive to the Defendants.

30. In addition, in the Notice of Preliminary Objection dated **3rd December 2013**, it was the Defendants’ case that the replying affidavit offends the provisions of the **Advocates (Practice) Rules, Rule 9**. The said provision states as follows:-

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he

will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

31. In view, of the above rule, the Defendants have not in any way shown that the Advocate will be required as a witness to give evidence in this matter.
32. In the foregoing circumstances, I find no reason to strike out the contents of paragraph 5 (c) and (d) of the replying affidavit sworn by Alex Thangei. Consequently, there is no basis for striking out the said affidavit.
33. In summary I make the following orders in relation to the said two applications:-
- a. ***The first application being the Notice of Motion dated 31st October 2013 and amended on 8th November 2013 is hereby allowed. The ex-parte judgement therein is hereby set aside, and the Defendant granted 14 days within which to file and serve their Defences. Parties shall bear their own costs of this application.***
 - b. ***The Notice of Motion dated 2nd December 2013 and the Notice of Preliminary Objection dated 3rd December 2013 both filed on 3rd December 2013 are hereby dismissed. The Defendants shall bear the costs of the application.***

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Keitany holding brief for Thangei for Plaintiff

Ochola for Defendants

Jason – Court Clerk