



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 764 OF 2010

EQUITORIAL COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

MITTS ELECTRICAL SERVICES LTD. 1ST DEFENDANT

PRIYA GANDHI 2ND DEFENDANT

SATYA GANDHI 3RD DEFENDANT

RULING

1. For the determination of the Court is the application by the Defendants dated 16th January, 2014. The application is brought pursuant to the provisions of **Order 11 Rule 11** and **Order 22 Rule 22** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act*. The applicant seeks the following prayers *inter alia*;

“1. THAT this application be certified as urgent and heard *ex parte* in the first instance and service of the same be dispensed with;

2. THAT there be a stay of execution of the *ex parte* judgment given on 5th August, 2013 against the Defendants until the *interparties* hearing of this application or further orders by the Court;

3. THAT the *ex parte* judgment given on 5th August, 2013 against the Defendants herein together with all consequential orders be set be set aside;

4. THAT leave be granted for the Defendants to file their defence;

5. THAT any other relief or orders the Court deems fit be granted;

6. THAT the costs of this application be provided for”.

2. The application is predicated upon the grounds that the Respondent filed a falsified affidavit of service

before an application for request for judgment in default of appearance. It is further contended that the affidavit of service purporting service of the notice of entry of judgment is also false as the Applicant never carried on business at the address alluded to in the said affidavit.

3. The application is further supported by the affidavit of the 3rd Applicant, Satya Gandhi, sworn on 16th January, 2014. The deponent contends that on 13th January, 2014 she received at her office a representative of Jocet Auctioneers who informed her of the purpose of his visit and notification of the suit. It is averred that the Applicant was unaware of the suit and the *ex-parte* judgment entered on 5th August, 2013. Further, the deponent maintained that the affidavits sworn by **Simon Mbinda** and **Boniface Kyalo** on 19th September, 2012 and 25th September, 2013 respectively are false in that no proper service was effected on the Applicants. They contend that the draft Defence raises triable issues and they should thus be given an opportunity to Defend themselves over the allegations propounded by the Respondents.

4. In opposing the application, the Respondents filed the Affidavit of **Joseph Louis Onguto** sworn on 4th February, 2014. It was contended therein that the suit was commenced on 12th November, 2010 and Summons to enter appearance issued on 2nd May, 2012. Instructions were issued on 25th October, 2012 to have the same served upon the last known address of the Applicants but to no avail. It was averred that on 20th September, 2012, the Respondents filed an application for substituted service, culminating with the service notice appearing on 17th June, 2013 in the Standard Newspaper and subsequent request for judgment on 1st August, 2013. On 5th August 2013, judgment was entered against the Applicant for Kshs. 6,216,308.75 together with costs and interest. It is further contended that the draft statement of Defence is untenable in both law and fact, and that the said judgment as entered was regular, with due process having been duly followed and complied with.

5. **Order 5 Rule 1** of the *Civil Procedure Rules* provides for the service of summons to enter appearance by the Defendant. The Respondents produced before the Court two summonses issued by the Court; one dated 12th November, 2010 and the other on 2nd May, 2012. Both these summonses were not responded to. On 12th October, 2012, the Respondents made an application for substituted service after a return of non-service by one **Simon Mbinda** was filed on 19th September, 2012. It was alleged that the process server had been unsuccessful in serving the summons and Plaintiff. It is stated therein inter alia:

“3. THAT I have carried out investigations within the city of Nairobi covering City Hall, Kenya Power and the Companies Registry to establish the whereabouts of the 1st, 2nd and 3rd Defendants physical address for service to no avail”.

6. Having effected service by substituted service as allowed by Mutava, J on 17th June, 2013, the Respondents proceeded to file an application for request for judgment on 31st July, 2013. Judgment against the Applicant for Kshs. 6,126,308.75 was entered on 5th August, 2013, with the Decree being issued on 17th November, 2013. Notice of Execution was issued and proceeded to be served on the Applicant as alluded to in the affidavit of one **Boniface Kyalo** sworn on 25th October, 2013. The Respondents appointed **Messrs. Jocet Auctioneers** to proceed with the execution of the Decree and warrants against the Applicants, who then claimed that it was the first time that they had heard of the suit against them as well as the *ex parte* judgment dated 5th August, 2013. They appointed the firm of **Messrs. Owago & Associates Advocates** on 16th January, 2014 to represent them in this matter.

7. The Court's power in setting aside *ex parte* judgments is vested under **Section 3A** of the *Civil Procedure Act*. In exercise of its inherent and discretionary jurisdiction, the Court, in compliance with **Order 10 Rule 11** of the *Civil Procedure Act*, stands guided to exercise this discretion, subject to the dictates of justice and in upholding the fundamental rights of defence of a litigant. The Court will, however, not exercise its power whimsically and come to the aid of an indolent litigant, merely on the aspersion that an apparent error or mistake was manifest on its part. Further, in the exercise of its discretion, the Court has to be satisfied that there is a good Defence and just cause as to the delay in

entering appearance and filing Defence. This was as reiterated by Emukule, J (as he then was) in **H.C.C.C No. 426 of 2003 Joyce Wanjeri Gachiri v Dorita L. Macaharia** in adopting the decision in **Patel v E.A Cargo Handling Services [1974] E.A 75**. In the case of **Kimani v McConnell [1966] E.A 547** Harris, J (as he then was) reiterated as follows as regards *ex parte* judgments:

“I agree that where it is a regular judgment, the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J put it, a “triable issue” that is an issue which raised a prima facie defence and which should go to trial for adjudication.”

8. As reiterated in **Mbogo v Shah (1968) E.A 93**, the Court will only exercise its discretion to avert an injustice, and rectify any inadvertent mistake or error of the litigant, in order to achieve the overriding objective of the Court being the expeditious, fair and equitable determination of matters as enunciated under **Sections 1A and 1B** of the *Civil Procedure Act*. Newbold, J (as he then was) in **Mbogo v Shah** (supra) reiterated thus:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error; but not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

9. Service was deemed to have been effected by the Respondents in the substituted mode of service on 17th June, 2013. The Applicants could have moved then to Court and proceed with entering appearance and filing their defence, notwithstanding that service of summonses and notice of execution had unsuccessfully been effected personally upon them. They only came to Court on 16th January, 2014 after warrants for execution had been issued and served upon them. Where the conundrum is here is how did the process server Boniface Kyalo know the address of the 1st Defendant on Dar-es-Salaam Road, Industrial Area Nairobi so as to serve the Notice to execute on 23rd October 2013? Where had Mr. Kyalo got this knowledge from whereas Mr. Simon Mbinda who filed the Affidavit of Non-Service dated 19th September 2012 was unable to locate the 1st Defendant’s registered office or business premises? In my view, this Court’s Order dated 12th October 2012 for substituted service by way of newspaper advertisement was obtained on false premises.

10. In such circumstances, I fall back on the Ruling of Haris J. in the case of **Kimani vs. McConnell** (supra) viz:

“I agree that where it is a regular judgement, the Court will not usually set aside the judgement unless it is satisfied that there is a Defence on its merits”.

The Judgment herein was obtained after the Plaintiff had complied with this Court’s said Order for substituted service and in my view, was properly obtained, as a result. I have carefully examined the Defendants’ Draft Defence dated 16th January 2014 which seems to have been filed herein (without leave) on even date. In my view, the said draft Defence contains mere denials as regards the averments in the Plaintiff with the possible exception of paragraph 10 thereof relating to the plea in bar of res judicata. The Defendants have referred to proceedings in that connection before Court being **HCCC No. 395 of 2004** and have attached copies of the documentation as regards that suit including the Plaintiff dated 15th July 2004 and a Ruling delivered by Khaminwa J. on 27th October 2009 in which the Lady Judge dismissed the Plaintiff’s Application for summary Judgement dated 6th October 2005. I have examined the documentation and although the Plaintiff herein is the successor of the Southern Credit Banking Corporation Ltd., the defendants in that suit are not the same as herein. In my view, the two suits are based on different parties and upon a different set of facts and documentation.

11. As a result, I do not consider that the Defendant’s draft Defence will succeed as regards its res judicata plea and I do not find that there are any triable issues raised therein worthy of the name.

Accordingly, I find the Defendants' Application dated 16th January 2014 unmeritorious and dismiss the same with costs to the Plaintiff.

DATED and delivered at Nairobi this 18th day of June, 2014.

J. B. HAVELOCK

JUDGE