IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 23 OF 2013

GREEN GAS COMPANY LIMITED..1ST PLAINTIFF/RESPONDENT

AHMED SHEIKH ADAN ……. 2ND PLAINTIFF/RESPONDENT

VERSUS

FEISAL MAHSEN SAGGAF .....1ST DEFENDANT/APPLICANT

KHALID MAHSEN SAGGAF.....2ND DEFENDANT/APPLICANT

QUALITY GAS LIMITED……...3RD DEFENDANT/APPLICANT

MAHSON INVESTMENTS CO. LTD….4TH DEFENDANT/APPLICANT

R U L I N G

1. The applicants herein filed a **Notice of Motion** dated **24th February 2014** pursuant to the provisions of **Order 10 Rule 11** and **Order 51 Rule 1** of the Civil Procedure Rules; Section **1A, 1B (1)(a), 3A** and **95** of the Civil Procedure Act seeking orders that:

i. The application be certified as urgent.
ii. Proceedings and execution thereof be stayed pending hearing and determination of this application.
iii. Judgment entered on the 18th October 2013 be set aside.
iv. Leave be granted for the memorandum of appearance and draft defence annexed to the application to be deemed as duly filed.
v. Other orders that the court may deem fit to grant.

2. In support of the application are grounds that: Notice of the suit filed against the applicant by way of plaint dated the 24th May 2013 has just been brought for their attention as summons were never served; the applicants have a meritorious defence (which raises triable issues) and should not be condemned unheard given that they were not aware of the case and that it is in the interest of justice that they be allowed to file a defence out of time.
3. Further, in support of the application is an affidavit deponed by **Feisal Mahsen,** the 1st applicant, who avers that upon filing of the suit by the respondents they were never served with summons as alleged by **Julius Kilonzo,** the process server. The 1st applicant has never had residence in the Hughes building as claimed in the affidavit of service. His offices are situated in Mirage Plaza on

Mombasa Road. He was in Mombasa at the time of the alleged service. He learnt of the suit from a third party when the respondents filed a request of judgment. The respondents will not be prejudiced if orders sought are granted.

4. In response thereto the respondents filed a preliminary objection and a replying affidavit. In the preliminary objection they objected on the grounds that: the application is fatally, incurably defective, bad in law, lacks merit and an abuse of the process of court; the applicants are not properly on record having not complied with the mandatory provisions of the Civil Procedure Rules which calls for striking out/dismissal of the application dated the 24th February 2014; the applicants were duly served with summons by **Harrison Kiarie** advocate and **Julius Kilonzo,** a process server. A court order dated 24th May 2013 which prevented them from interfering with the property known as **LR 20616** which they have complied with was duly served. The applicants were given a period of **two (2) months** prior to the request of judgment.
5. The default judgment was entered on the **23rd September 2013.** The applicants appointed Sheikh & Company advocates who filed a notice of appointment on the 11th October 2013. They filed an application dated 10th October 2013 where they sought leave to file a defence after acknowledging service stating that they delayed to enter appearance. They have since ignored that application which is still pending in court.
6. Further, it is deposed that the 1st and 2nd respondents are foreigners and have now closed their offices. They owe huge debts to several marketers. The present firm of advocates has not sought leave to come on record in place of Sheikh and Company Advocates. This application is similar to the application dated 10th October 2013, hence an abuse of the court process. **Wasonga Kimakia & Company** unprocedurally reviewed the orders dated 25th February 2014 exparte without giving notice to the respondents as required by the law. The **two (2)** applications should be struck out as incompetent. They also took time after being served with the proclamation yet there was time to ventilate the matter before the proclamation took effect. The draft defence is a sham as it does not answer to the claims of forgery, misrepresentation of company records and diversion of the business to the 4th applicant.
7. When the application came up for interparte hearing, **Mr. Wasonga** notified the court that he had agreed with **Mr. Ochieng** for the respondents to drop the issue of representation, whether or not they were on record irregularly. They agreed to abandon the issue.
8. However, it is important to note that the agreement was between the **two (2)** advocates who do not come from the firm of **Sheikh & Company Advocates** who were duly instructed and filed their **notice of appointment** on the **10th October 2013.** They filed a **Notice of Motion** dated **11th October 2013** seeking leave of the court to file a statement of defence and counter claim out of time. They came to court under Certificate of Urgency and interim orders were granted by the court on the same date. The decree in the matter was issued while the firm of **Sheikh and Company Advocates** were on record, on the **18th October 2013.**
9. To date, the firm of Sheikh and Company Advocates are on record having not ceased to appear for the applicants. It is therefore the duty of the court to interrogate the status of the firm of **Wasonga Kimakia and Associates.**
10. **Order 9 rule (5),(6)** of the Civil Procedure Rules state:

> **"(5) A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.**
>
> **(6) The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)".**

11. The notice filed in court by **Wasonaga Kimakia** was not served upon the firm of **Sheikh and Company Advocates**. Therefore they still remain the advocates on record.
12. Secondly, at the point of filing the application a decree had been drawn while Sheikh and Company Advocates were the advocates on record.

Order 9 rule 9 of the Civil Procedure Rules provide that:

> **"when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-."**

This being the case, change of representation from **Sheikh and Company Advocates** to **Wasonga Kimakia** and Associates should have been by an order of the court. No such leave was sought.

13. In the case of **John Langat versus Kipkemoi Terer and 2 others (2013) eKLR** which is persuasive where a consent between advocates was filed; **Muchelule J**. stated thus:

> **"There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates**
>
> **"without an order of the court"**
>
> **No such order was sought or obtained. It follows and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka and Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."**

14. Similarly in the case of **Isaac Kaesa Mwangangi and Another versus Jacob Kipchumba and Another (2014) eKLR Kasango J.** elaborated on the mischief the drafts of the Civil Procedure Rules aimed at curbing, she rightly stated that:

> **"I am of the view that the mischief that was being addressed by Order 9 rule 9 was two-folds. Firstly it was to notify the advocate who is on record that another advocate was taking over the conduct of the case. The purpose of that in view is to inform the previous advocate to whom the clients file should be forwarded and it was also to enable the previous advocate to have addressed his or her legal fees earned to that date…"**

In view of the foregoing it is apparent that the application is irregularly on record which makes it incompetent.

15. It is however my considered view that I should address the merit and demerit of the application.
16. The issue would be whether the exparte judgment entered should be set aside?
17. The principles of setting aside an exparte judgment are well settled. This was stated in the case of **Shah versus Mbogo (1967) E.A. 116** where the court laid the following criteria:

> **"The court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice".**

18. In regard to service upon the defendants, affidavits of service have been sworn by **Harrison Kiarie Advocate** and **Julius Kilonzi,** a process server. The defendant was served personally and

in his capacity as the director of 3rd and 4th defendants. Service upon a company is usually made upon the secretary, director or its principle officer. Service in the instant case upon the 3rd and 4th defendants, corporations, was upon one of its directors. Service upon the 2nd defendant was effected upon the 1st defendant, who acted as his agent having been authorized verbally on phone within the hearing of the process server.

19. Although it is denied that they were served, the affidavits of service deponed are detailed. Many attempts were made prior to service being effected. The person who identified him is pointed out.

20. According to **Order 5 rule 15(2)** of the **Civil Procedure Rules:** Any person who knowingly makes a false affidavit of service is liable to prosecution since it is an offence. If indeed the applicants believed the two (2) deponents had lied, nothing would have been easier than causing them to be subjected to cross-examination in order to establish the fact that they had made false assertions. This being the case I find that service in the circumstances was proper.
21. It has been deponed by the 1st applicant that they became aware of the suit on the **16th August 2013**. No action was taken then. However prior to that date, it is not denied that they refrained from interfering with the suit premises in compliance of the court order. As at August 2013 no judgment in default of entry of appearance had been made. The interlocutory judgment was entered two (2) months later.
22. In **October, the 11th 2013** they filed an application they later abandoned. They waited until execution was issued and that is when they returned to court, having filed another application irregularly. The applicants are far from being honest.
23. When judgment was entered, a notice was given. That fact is not denied. No action was taken. They disregarded the notice until further action was taken. They have demonstrated by conduct their intention to obstruct justice. Had the application been properly on record, being foreigners who take things for granted, it would have behoved this court to impose conditions to an order granting them an opportunity of being heard.
24. It is alleged that they have a defence with triable issues. I have perused the draft defence and counterclaim. A notice of withdrawal of other prayers in the plaint was given leaving the liquidated claim perse that was supported by annextures. The same is hence a mere denial.
25. From the foregoing it is apparent that the application is incompetent. Consequently, it is dismissed with costs to the respondents.
26. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **31st** day of **JULY, 2014.**

L.N. MUTENDE

JUDGE