REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 361 OF 2009

AFRICAN BANKING CORPORATION LIMITED ……..…... PLAINTIFF

Versus

GENERATION FARMERS & CO. LTD.....1ST DEFENDANT

FRANCIS MURAYA WACHIRA.....2ND DEFENDANT

JOYCE WAMBUI MURAYA…….. 3RD DEFENDANT

RULING

Setting aside ex parte judgment

[1] The Defendant has applied for two significant orders that; 1) execution of the Decree issued on 7th October, 2011 and the notice to show cause arising therefrom be stayed; and 2) the interlocutory judgment entered into on 7th October, 2011 be set aside. The Defendant's strongest grounds are; First, they were never served with the Plaint and summons to enter appearance as is required under Order 5 Civil Procedure Rule and secondly, they have a good defence to the Plaintiff's claim as is evident in the Defendants draft statement of defence marked "FMM3". The Defendant states at paragraph 3 of the Supporting Affidavit:-

> ***"THAT, I wish to state that we have never been served with the Plaint and summons to enter appearance at all and the plaintiff is put to strict proof how we were served."***

[2] The Defendants stated that the Plaintiff has avoided answering the query on service. Instead, the Plaintiff in paragraph 3 of their replying affidavit has just mentioned in passing that the Defendants were served with the plaint and summons without stating when, how or by whom; the purported service was done. According to the Defeendants, these are the strict requirements of any service of summons under Order 5 of the Civil Procedure Rules. And the fact that M/s Mutitu, Thiongo & Co Advocates had filed a memorandum of appearance on behalf of the Defendants does not in any way remove the necessity of proving proper service was done on the Defendants. Indeed the affidavit of service annexed and marked "SL" is not dated and deposed only as to how Notice to Show cause was served on 11th May, 2014 but does not state how service of summons and plaint was done upon the Defendants.

[3] The Defendant has also insisted that they never instructed the firm of Mutitu, Thiongo & Co. Advocates and that explains why the firm did not go further to file a defence in this matter. Had the Defendants been properly served, they would have appointed counsel of choice who would have ensured

due diligence was done in filing the defence. Be that as it may, the Defendants in their draft defence marked "FMW3" have raised serious triable issues to which the Plaintiff has not responded in the replying affidavit. Worth of note is that the replying affidavit is sworn by one STEVE LUSENO who is an Advocate practicing in the firm of Majanja Luseno & Co. Advocates who are on record on behalf of the Plaintiff. The said Advocate did not reply to the application perhaps because all issues raised in the draft defence are not within his information or cannot be addressed substantively by the said Advocate.

[4] The Applicant identifies some of the issues in the draft defence to be:

i. Paragraph 6 – the Plaintiff's claim of Kshs. 4,800,772 is inflated as the defendants have paid a sum of Kshs. 1,933,984 which has not been denied by the plaintiff or even accounted for.
ii. Paragraph 5 – the Defendants' problems began when the financed prime mover registration NO. KAW 523K and Trailer Registration No. 2C 5187 were attached and sold by the Plaintiff as per paragraph 11 of the plaint. The Plaintiff has never accounted for the whereabouts of the prime mover and trailer. The plaintiff has never accounted for the amount that was realized from the sale of the prime mover and Trailer and whether or not the proceeds of sale were deducted from the loan account
iii. Paragraph 7 – the agreed interest rate was at 9% flat rate and therefore, interest rate of 11% per annum from January, 2009 has no basis. The Plaintiff has not bothered to annex any loan agreement to that extent.
iv. Par 8 – the Plaintiff has put a deaf ear to the fact that the Defendants were victims of the Post-election political chaos that rocked Kenya and Rift Valley in particular in December/January, 2008. Before that they were regularly paying the loan instalment of Kshs. 160,867 monthly as demonstrated in annexure "FMW2" which again is not disputed or denied.
v. Paragraph 10 – the Defendants denied owing the plaintiff a sum of Kshs. 4,800,772 and called for strict proof of the amount.

[5] The Defendants stated that these are triable issues and relied on the case of **PATEL v E.A CARGO HANDLING SERVICES LTD (1974) EA 75** that a defence with merit does not mean a defence that must succeed, it means a triable issue- an issue which raises Prima facie defence and which should go for trial for adjudication. The fact that it is not in dispute that the Plaintiff had advanced money to the defendants and that the defendants were paying monthly instalments of Kshs. 180,000 to the plaintiff does not mean that they now lose or waive their fundamental right to a fair hearing on merits. Nobody should be condemned without being accorded a fair hearing. The plaintiff has admitted the defendants paid the sum of Kshs. 180,000 the hearing of the Notice to show cause. What needs to be established is actual outstanding loan balance after deducting the defendants payment of Kshs. 1,933,984, the proceeds of sale for the prime Mover and Trailer and also the payment of Shs.180,000-all these sums have been admitted. The Defendants have proved that they are being oppressed and forced to pay disputed amounts without being accorded a chance to be heard. The application dated 23rd May, 2014 should be allowed as prayed. The Defendants cited the following authorities:-

1. HCCC No. 618 of 2012 (NBI) Ajit Singh Vs J.F Mccloy
2. HCCC No. 266 of 1999 (MSA) Interglobe Services ltd Vs Hama Ware Housing Ltd
3. HCCC No.223 of 2002 (NBI) Kabiro Ndaiga & Co. Vs Agency Ltd
4. HCCC No. 591 of 2012 (NBI) Yamko Yadpaz Industries Ltd Vs Kalka Flowers Ltd
5. HCC No. 114 of 2006 (ELD) Lochab Brothers Ltd Vs Lilian Munabi Nganga & others

The Plaintiff defended its judgment

[6] The Plaintiff (hereafter the Respondent) stated that it is entitle to the judgment entered herein in their favour and made the following submissions is support of their avowed position. The Respondent re-stated that, in exercising jurisdiction in this matter, the court has to consider whether or not the Deputy Registrar in entering the judgment acted lawfully so as to render the ex parte judgment regular. To them, they stated that it is not disputed that after being served with the Summons to enter appearance in this matter, the defendants retained a firm of Advocates who entered appearance on 2nd July, 2009. The Defendants thereafter failed to file a Defence within the time limited by the rules. It is in default of

Defence that a Request for Judgment was made and acted upon by the Deputy registrar. It is incumbent upon the Defendants to give a plausible reason why they did not file a Defence, and the reasonableness of the explanation is what would inform the exercise of the court's discretion in their favour. But in the absence of an explanation, the court has not basis to grant the motion. The Applicants, having been represented by counsel, cannot now allege that they were not served with Summons to enter Appearance. According to the Respondent, no inquiry as to service would lie when there has been an appearance on behalf of a party. See **SHAH v MBOGO (1967) EA 116** on exercise of discretion; not to be exercised in favour of a party who is aimed at delaying the process of the court. This application is tinctured with inordinate delay having been filed more than 930 DAYS after the judgment was entered into. It was in fact made on the eve of the hearing of a Notice to Show Cause and again, 90 DAYS after the delivery of the Ruling dismissing an earlier application. There has been no attempt to explain the delay. In the **Shah Vs Mbogo** Harris J had this to say at page 123:-

> **"I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In my opinion, applying those principles to the facts before me and taking everything into account, the society has not made out a sufficient case on the merits to justify the setting aside of the perfectly regular order of July 8, 1966 and accordingly the motion must be refused."**

[7] The Respondent quipped: What would be the justice in setting aside a judgment already partially performed? The Defendants have partly paid the decretal sum. A sum of Kshs. 180,000 was paid on the hearing of the Notice to Show cause. This is set out in the Affidavit of Steve Luseno. On that basis, the Defendants are estopped from re-opening the issues sought to be litigated again. The Respondent acted upon those representations by the Applicants and suspended the execution process as the Applicants sought to raise further sum. The filing of this application for new orders is going behind that state of affairs and is an abuse of the process of the court. See what David Foskett, Q.C of Gray's Inn states at page 77 of his book ***In the Law and Practice of Compromise***;

> **"An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of new action."**

The Respondent posits that this principle applies whether or not litigation is commenced on a dispute and, also, whether or not the compromise has been embodied in an order or judgment of the court. It is founded on two aspects of public policy: One, the need for there to be an end to disputation and the other, the desirability of parties to be held to their bargains. Judgment debtors have a duty to the court to settle judgments. They cannot abuse the process of the same court as they seek to avoid this liability and/or obligation. For the foregoing reasons, the Respondent prays that the Notice of Motion dated 23rd May, 2014 be dismissed with Costs.

COURT'S RENDITION

[8] I must admit, and the Parties appreciate this, that this application presents a difficult scenario. First, there is a loudly touted claim by the Applicants that they were never served with summons to enter appearance and therefore, the ex parte judgment obtained is without legal backing. The claim is a serious one and if proved, encapsulates a violation of the right to fair trial enshrined in Article 25, 47 and 50 of the Constitution. Two more claims by the Applicants are worth noting; that the agreed interest rate was a flat one at 9% without any enhancement; and the proceeds of the prime mover which was attached and sold by the Respondents has not been accounted for. The Applicant insisted that the entire balance claimed is, then, put in doubt and should be re-worked after deducting the proceeds of the prime mover and the other Kshs. 180,000 paid on the day of the hearing of the Notice to Show Cause herein. On the

other hand, the Respondent claims that the ex parte judgment was entered into in default of defence after the Applicant had entered appearance through the firm of Mutitu, Thiong'o & CO Advocates. The issue of non-service of summons cannot, therefore, arise. The Applicant responded to that postulation and stated that entry of appearance does not remove the necessity to serve summons as a requirement of fair trial. Again, the Respondent argued that the payment by the Applicants of some Kshs. 180,000 was in partial satisfaction of the decree. And on that basis, the Respondent quipped and threw a spanner into the works: What would be the justice in setting aside a judgment already partially performed? In these circumstances lies the difficulty I have alluded to. But a Court of law often draws on its experience and the legal tools, to wit, the Constitution and the law, which increases its range and power of resolving such difficulties, and by considering the entire circumstances of the case it serves justice to all parties. See the principles of justice in Article 159 of the Constitution.

[9] Order 5 of the Civil Procedure Rules is the supreme code that governs service of court processes in all civil proceedings under the Civil Procedure Act. Here we are concerned with service of summons and plaint. Order 5 of the Civil Procedure Rules is not a code of technicalities; rather, it is the enabler of fair trial, because, service of summons and plaint brings to the attention of the Defendant the kind of case he is faced with and for which he should defend: which is a step or procedure which cannot be supplanted merely because the Defendant had some knowledge or was aware of the existence of the case. It is not impossible that a party learning of proceedings against him may rush to put in an appearance or instruct counsel or even attend Court. An appearance was filed by MUTITO, THIONG'O & CO ADVOCATES. But such filing of appearance alone, unless it is in reply to the summons and plaint served in accordance with Order 5 of the Civil Procedure Rules, does not remove the necessity, and is not proof of service of summons. That is why Rule 15 of Order 5 of the Civil Procedure Rules requires that:

> **15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.**
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> **(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.**

[10] Return of summons served in all cases together with evidence of service is mandatory and should be seen a tool of accountability of court processes. Except, there is a disturbing practice that has gained root in litigation in defiance of rule 15: no return of summons is made. It is only when occasion such as the one in this case arises, that parties start to appreciate the importance of rule 15 of Order 5 of the Civil Procedure Rules. I insist due deference should been shown to accountability procedures especially on service of court process because it is an important facet of fair trial and source of protection to a party who claims was not served with court process. These things I have said become important when looked at in the context of this case, and the requirement that every summons shall be accompanied by a copy of the plaint. See rule 1(3) of Order 5 of the Civil Procedure Rules. The latter statement throws me back to the necessity of a return of service within the broader sphere of fair trial. The Respondent did not file a return or affidavit of service to show summons and plaint was served in accordance with the law. The basis of default judgment is that a party failed to file appearance or defence within the prescribed period after summons and a copy of the plaint was served. And in the absence of an affidavit of service, the foundation of default judgment either for failure to file appearance or defence is scorched. Towards that end, and I will state it again, entry of appearance, does not remove the necessity of and is not proof of service of summons. I have perused the file, and found no affidavit of service of summons and plaint as required in law. Nothing shows service of summons was done and I have no choice than to agree with the Applicant that summons was not served.

[11] Before I make any penultimate order after the foregoing finding, there are other aspects of this case

which are peculiar and are important in moulding appropriate relief herein. These matters are; 1) the inordinate delay on the part of the Applicant to come to court; 2) the partial satisfaction of the decree; 3) accounts of the proceeds of the attachment and sale of the prime mover herein; 4) the interest rate; and 5) the actual outstanding balance. It is on the basis of all these issues that I will exercise my discretion and make a decision that avoids injustice or unnecessary hardships to the parties. See **SHAH v MBOGO.** The Applicant is not averse to a re-working of the actual outstanding loan balance after all the deductions are made and appropriate interest rate is applied. Setting aside the ex parte judgment without giving that opportunity for an amicable settlement a chance will not serve the kind of justice the case deserves. And it is not the wish of this Court to crush the desire expressed by both parties to see this matter brought to closure in the best way possible. As a court of law, I should move steadily as opposed to acting in haste in removing the offending matter out of the way. If I act with haste, I will deny the Applicant a quick settlement of accounts and administer a sudden shock to the Respondent. The Applicant has requested for re-working of the actual outstanding loan balance; I hereby direct that parties should hold a settlement conference within 30 days and file a settlement brief of the outstanding balance taking into account the proceeds of the prime mover, the agreed interest rate and the Kshs. 180,000 paid on the hearing of the Notice to Show Cause. Meanwhile, I will stay any further execution so that parties will deal at arm's length. Depending on the outcome of the settlement brief, I will issue my final orders in this matter. It is profitable for parties to realize that; *bona fides* on the part of the parties in the way they approach the matters in question is of paramount importance. It is so ordered. In view of the orders of the Court, this case shall be mentioned on a date which is convenient to the parties and the Court.

Dated, signed and delivered in open court at Nairobi this 26TH day of September, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

Ondati for Luseno for Plaintiff/Respondent

Wanjohi for defendant