



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 170 OF 2013

SUPERIOR INVESTORS (K) LTD.....PLAINTIFF

VERSUS

EVANS ABINCHA GESAKA.....DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated 24th July 2013 and filed on 25th July 2013 was brought under the provisions of Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following:-
 - a. Spent.
 - b. **THAT an order be and is hereby issued staying execution of the Decree issued by this Honourable Court on 21st June 2013 in respect of the *ex-parte* judgment of 13th June 2013.**
 - c. **THAT the *ex- parte* judgment of 13th June 2013, the Decree issued by this Honourable Court on 21st June 2013 and all other consequential Orders emanating therefore be and is hereby set aside.**
 - d. **THAT the Defendant herein be and is hereby granted unconditional leave to defend the suit.**
 - e. **THAT this Honourable Court do make any further orders and issue any other relief it may deem just to grant in the interest of justice.**
 - f. **THAT the costs of this application be provided for.**

THE DEFENDANT'S CASE

2. He swore a Supporting Affidavit and Supplementary Affidavit on 24th July 2013 and 8th August 2013 respectively. His case was that he only became aware of the existence of the suit and the *ex parte* judgment when he was served with the resultant Decree and Certificate of Costs issued on 13th July 2013. He averred that he had a good and reasonable defence against the Plaintiff's claim and that it would be fair and just for him to be given unconditional leave to defend the suit.
3. His written submissions were dated 28th August 2013 and filed on 30th August 2013.

THE PLAINTIFF'S CASE

4. In response to the Defendant's application, Michael Matimu Kinyua swore a Replying Affidavit on 1st August 2013 and Further Affidavits on 1st August 2013 and on 13th August 2013 respectively. It contended that the Defendant had been duly served with the Summons to Enter Appearance as was evidenced in the Affidavit of Service sworn on 20th May 2013 and filed on 7th June 2013. It further averred that the Defendant had failed to discharge its burden of proving that he was not served with the court process.
5. Its written submissions were dated 23rd August 2013 and filed on 26th August 2013.

LEGAL ANALYSIS

6. Order 22 Rule 22 (1) of the Civil Procedure Rules, 2010 that was relied upon by the Defendant was not relevant in the circumstances of this case as this is the same court that issued the Decree herein. The said Order provides as follows:-

“The court to which a decree has been sent for execution (emphasis court) shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time....”

7. The court will therefore not consider the same but will instead address itself to the provisions of Order 10 Rule 11 of the Civil Procedure Rules which gives it wide and unfettered discretionary powers to order a stay of execution of the decree and consequential order and the setting aside of an *ex-parte* judgment. The said Order provides that:-

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

8. The court's discretion must be exercised judiciously and be supported by the facts of the case with a view to avoiding injustice or hardship resulting from accident, inadvertence or excusable delay. It is not intended to assist a party to evade or obstruct the course of justice as could be seen in the case of **Patel vs E.A. Cargo Handling Services Limited [1974] E.A. 75** that was relied upon by the Plaintiff. The Defendant did not enclose a copy of the case of **Civ No 474 of 2002 Elite Earthmovers Limited vs Krisha Behal & Sons** which it placed reliance upon and which it said, had enunciated the aforesaid position. The court will therefore not have regard to the same.
9. Notably, the onus is on an applicant to present sufficient reasons to persuade the court to exercise its discretion in such an applicant's favour. On the other hand, a respondent has an obligation to provide water tight proof to demonstrate that summons were served upon such an applicant as was correctly submitted by the Defendant. Proof of service of Summons to Enter Appearance and the Plaintiff upon a defendant is therefore crucial for the court to satisfy itself that such a defendant had notice of court proceedings instituted against it. This is a position that was upheld in the case of **Civil Appeal No 16 of 1999 John Akasirwa v Alfred Inat Kimuso** (unreported).
10. If there is no evidence of service of summons, the court will automatically allow a defendant to defend the suit. He does not have to show that he has an arguable defence-**See (Kabutha v Mucheru [2004] eKLR)**. The position is, however, different if a court finds that a defendant has been duly served.
11. As the Defendant herein did not apply to cross-examine Eric N Mulandi, the Process Server on the contents of his Affidavit of Service that was attached to the Plaintiff's Supporting Affidavit, the court was only left with the option of weighing the affidavit evidence adduced by both the Defendant against that of the Process Server.
12. This was an issue that was considered in the case of **Amayi Okyumu Kasiaka vs Moses Okware Opari & Another [2013] eKLR** where it held that the applicant having failed to apply to cross-examine the process server therein, the court would have to scrutinise the affidavit of the said process server against the affidavit evidence of the parties therein.
13. The aforesaid Process Server averred that he met with the Defendant in his premises at The Amboseli Gardens. He said that after introducing himself to the Defendant and informing him of the purpose of his visit whereupon, he served the Defendant with the principle copies of the Plaintiff, verifying affidavit, witness statements, Plaintiff's documents and summons to enter appearance which the Defendant signed on his copy to acknowledge receipt of the same.

14. The aforesaid Process Server further explained the whereabouts of the Defendant on 14th May 2013 when he first went to serve him with the court process as he was told by “ a soldier” at the gate of Amboseli Gardens, how he commuted to the Defendant’s premises, reference of a motor vehicle registration number KAP 650C, the names of workers at the Defendant’s premises, namely Soni and Eva, the latter who directed him to the Defendant’s offices on 15th May 2013 at 3.30 pm, physical location of the Defendant’s hotel premises and the Defendant’s mobile telephone number 254718295002.
15. The Defendant did not deny knowledge of the persons or the vehicle that was mentioned in the said Affidavit of Service. He admitted that the telephone number was his and only wondered where the said Process Server obtained the same. Although the court is not an expert document examiner, it did not fail to notice the similarity of the signature appended on the Summons to Enter Appearance that was returned as proof of service and the signatures in the Defendant’s Supporting and Supplementary Affidavits. It is difficult for this court to fathom how the said Process Server would have placed a signature that was so similar to that of the Defendant without them having known each other previously.
16. Weighing the affidavit evidence of the Defendant against that of the aforesaid Process Server, the court is more inclined to believe the Process Server as the details in his Affidavit of Service were so cogent and concise and were not controverted and/or rebutted by the Defendant. The court was therefore satisfied that the Plaintiff discharged its obligations as far as service of court process upon the Defendant was concerned.
17. Accordingly, entry of interlocutory judgment herein against the Defendant was for all purposes and intent a regular judgment as the Plaintiff was well within its right to seek interlocutory judgment against the Defendant due to his failure to enter appearance and/or file his defence within the requisite period stipulated by the law.
18. However, entry of interlocutory judgment in a regular manner does not in itself negate the need for such an interlocutory judgment to be set aside if a defendant’s defence raises triable issues that ought to be considered on merit or there are sufficient reasons that would lead the court to set aside such judgment.
19. While it was held in the case of **Co-operative Bank of Kenya Limited v Said Sheikh Ahmed [2004] eKLR** that was relied upon by the Plaintiff that it was not a rule of law or procedure that a draft defence must always be attached to an application to set aside an *ex-parte* judgment, this court is of the considered view that the absence of a draft defence would make it difficult for a court to determine whether or not a defendant had a defence on merits that would persuade it to set aside an interlocutory judgment.
20. Indeed, in the case of **Shah v Mbogo [1967] EA 116**, the Court of Appeal held that:-

“... I agree that where it is a regular judgment as in this case here the court will not usually set aside judgment unless it is satisfied that there is a **defence on the merit** (emphasis court).”
21. In the absence of a draft defence filed annexed to with the application to set aside the interlocutory judgment herein, the court was not able to ascertain whether or not the Defendant had an arguable case. He thus failed to establish the principles that were enunciated in **Shah v Mbogo** (Supra). The court therefore agrees with the Plaintiff that the court would not be justified to exercise its discretion in favour of the Defendant. As was held in the case of **Rapando v Ouma & 6 Others [2004] 1 KLR 115**, a case that was relied upon by the Defendant, the main concern of the court is to do justice to parties in any matter and not tilt in favour of one party to the detriment of the other.
22. Having considered the pleadings, the affidavit evidence and written submissions in respect of the parties’ cases, the court came to the conclusion that the Defendant did not satisfy this court that he was entitled to his day in court. Due to reasons only known to him, he failed to secure himself a fair hearing when he failed to exercise due diligence in this matter. His application to set aside the *ex parte* judgment herein can only be deemed to be a ploy to evade and/or obstruct the course of justice and delay the Plaintiff from enjoying its fruits of judgment.

DISPOSITION

23. In the circumstances foregoing, the ruling of this court is that the Defendant's Notice of Motion application dated 24th July 2013 and filed on 25th July 2013 was not merited and the same is hereby dismissed with costs to the Plaintiff.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 9TH day of DECEMBER, 2014

J. KAMAU

JUDGE