



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 354 of 2012

SBC KENYA LIMITED..... PLAINTIFF

- VERSUS -

STELESAL GLOBAL LIMITED..... DEFENDANT

RULING

1. This is the defendant's Notice of Motion dated 16th October 2012. The defendant seeks to set aside the interlocutory judgment entered against it in default of appearance and defence. The motion is expressed to be brought under Order 12 rule 7 of the Civil Procedure Rules 2010.
2. The primary grounds are set out in the deposition of Gerald Ogesa, a director of the defendant, sworn on 16th October, 2012. The applicant contends that there was improper service of summons to enter appearance. The reasons are twofold: first, the director who was served was ailing and on his death bed in Mombasa; and secondly, the deponent states that on 18th July 2012, a set of the summons were left with his nephew, one George Ouma, who is not a director or officer of the company. The deponent avers that at that time, he was making funeral arrangements for his co-director who finally passed on in Mombasa. Lastly he stated that he has an arguable defence as disclosed in the annexed draft statement of defence. I have also seen a supplementary affidavit of the same deponent sworn on 25th October, 2012. The deponent has annexed a medical record showing that his brother was on his death bed at the time of the disputed service. He also contests his brother's signature on the summons. The defendant thus pleaded with the court not to remove it from the throne of justice.
3. The application is contested. There is a replying affidavit sworn by Delwin Moldenhauer on 15th November 2012. In a nutshell, the plaintiff contends that summons were properly served as required by order 5 of the Civil Procedure Rules. It was submitted that there has been undue laches and that the motion is a stratagem contrived to delay justice. Reference was made to the annexure marked 'DWM 1' to the deposition which confirms the knowledge by the defendant's director of the suit and summons as early as 24th July, 2012. The draft defence is also attacked as a mere denial raising no triable issues.
4. I have heard the rival arguments. I am of the following considered opinion. Under order 5 of the Civil Procedure Rules service on a corporation should be effected at its registered offices or on a director, secretary or other authorized officer. See *Kingsway Tyres & Automart Ltd Vs Rafiki Enterprises Limited* [1996] eKLR.
5. The court has wide and unfettered discretion to set aside an *ex parte* order. As held in *Shah vs Mbogo* [1967] E.A 116, at 123, that discretion "is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is otherwise not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of

justice". See also *Maina Vs Mugiria* [1983] KLR 79. Those are the clear parameters for the court in a matter of this nature.

6. The motion turns largely on whether there was effective service or at all. The defendant concedes it had two directors: Gerald Ogesa, the deponent of the two affidavits, and his deceased brother Leonard Murabi. The material affidavit of service sworn by Francis Kiongo Chabari, a process server, is dated 4th July 2012. In the affidavit he states that on 3rd July 2012 he served the late Leonard Ogesa Murabi. He depones as follows;

a) *At the entrance, i met one Mr. Juma who informed me that one of the defendant company's directors, Mr. Leonard Ogesa Marabi was in and he pointed him out to me.*

b) *I then started by introducing myself to him and the purposes of my visit.*

c) *Mr. Leonard Ogesa Marabi too introduced himself to me as one of the defendant company's directors and he was aware of the court matter and he could be served with the same court documents.*

d) *I then served Mr. Leonard Ogesa Marabi by tendering to him a copy of the summons to enter appearance, the plaint, the witness statement and other documents filed in court and I required his acknowledgment on the reverse side of the original copy of the same court documents.*

e) *Mr. Leonard Ogesa Marabi accepted the service of the above said court documents and acknowledged by signing, writing the time of service as 15.00 hours and the date as 03/07/2012 on the reverse side of the original copy of the summons to enter appearance.*

7. I have no cause to doubt that at the material time, the deceased was ailing and on his death bed. Doubt is removed by the medical records marked 'GSO 4' in the supplementary affidavit. But I have no evidence that he was incapacitated or incapable of understanding the summons or even accepting them. He acknowledged receipt. The deceased died several days later on 13th July 2012. Again, I have no cause to doubt that Gerald Ogesa was involved in the burial arrangements. The key thing however is that by that time service on his co-director had taken place over 10 days earlier. It is not disputed that the deceased was a director of the company. To that extent, there was full compliance with order 5 of the Civil Procedure Rules that I set out earlier. The deponent of the supplementary affidavit contests his brother's signature on the summons. To do so, he has annexed a document marked 'GSO 5' by the deceased containing a signature of the deceased. The document is a completely illegible PDF copy and I am unable to rely on it for that proposition.

8. I am also of the view that where service is contested, the aggrieved party should summon the process server for cross-examination. The defendant never issued such a notice. I find that quite telling. On the face of it then, I have formed the clear impression that the summons were properly served on a director of the company on 3rd July 2012. I am fortified there by subsequent events. There is a letter dated 24th July 2012 marked "DWM 1". It is on the defendant's note paper under the hand of Gerald Ogesa. It is addressed to the plaintiff's counsel. It is not disputed. He states as follows:

"The summons was served while I was away in Mombasa attending to family matters and in between (Friday, July 13th, 2012) I lost my only brother hence the delay in communicating with your office. I am burying my brother this Saturday, July 28th in Budalangi District-Busia County.

Sir, am aware of the issues raised in the summons and would like to seek for an audience/appointment with your office so that you can hear me out. We are ready and willing to get to an amicable conclusion to this matter so that both parties can be satisfied".

9. The defendant's other director Gerald Ogesa was thus aware that summons had been served upon the company that month. That confirms the matters averred to in the affidavit of service. To my mind then the company's claim that no service was made is a red herring: It is seeking to obstruct the course of justice.

10. The only other matter is whether the defendant has an arguable defence raising triable issues. Paragraphs 3 and 4 of the draft defence are general denials. Paragraph 6 concedes that there was a distributorship agreement. The defendant states the plaintiff breached it and “constantly frustrating the defendant’s efforts to do business in a profitable manner”. Paragraph 5 contains a claim that the defendant supplied the defendant with goods it had not ordered which the defendant returned but was nevertheless billed. That is the entire defence. The letter I quoted above seems to run counter to the defence. It is an acknowledgement of the debt and a request for “an amicable conclusion” of the matter. When I juxtapose that against the plaint and the documents filed with the plaint including the statement, agreement and invoices, I am not satisfied that the draft defence raises a triable issue on the debt. If I had found such a triable issue, my hands would be tied and I would be inclined to set aside the judgment. See *Osodo Vs Barclays Bank International Limited* [1981] KLR 30, *Momanyi Vs Hatimy* [2003] 2 E.A. 600. I have formed the clear impression that even if the matter were to proceed to trial, the defence set up would be a complete sham.

11. That to me is not a good defence that would persuade me to reinstate it to the seat of justice. In *Magunga General Stores Vs Pepco Distributors Ltd* [1987] 2 KAR 89 it was held as follows;

“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given”.

12. Lastly, there was considerable delay in bringing the present motion. From the defendant’s letter dated 24th July 2012, the defendant company was aware of that suit that month. The present motion was only filed on 17th October 2012 nearly 3 months from the date of service and at least 2 ½ months from the date of that letter. The lengthy delay is not explained. When there is unexplained and inordinate delay, it is deemed to be inexcusable. See *Allen Vs Sir Alfred Mc Alpine & Sons* [1968] 1 ALL ER 543. See in particular Salmon L.J’s decision at page 561. So much so that the delay here has militated against my exercise of discretion in favour of the applicant.

13. For all the above reasons, I find that the defendant’s notice of motion has not reached the threshold for setting aside of interlocutory judgment. In the result, I dismiss the motion with costs to the plaintiff.

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of February 2013.

**G.K. KIMONDO
JUDGE**

Ruling read in open court in the presence of

Ms Mathai for the Plaintiff.

No appearance for the Defendant.