



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 399 of 2011**

**KENNEDY NJUGUNA MWANGI :::::::::::::::::::::::::::::: PLAINTIFF/RESPONDENT**

**- VERSUS -**

**COLLINS KIPRONO BETT :::::::::::::::::::::::::::::: DEFENDANT/APPLICANT**

**RULING**

1. The application before the court is a **Notice of Motion** dated **26<sup>th</sup> June 2012**. It seeks the following orders:-
  - 1) That this application be certified as urgent and service thereof be dispensed with in the first instance.
  - 2) That the proceedings and judgement in Milimani Civil Suit No. 399 of 2011 be set aside pending the hearing and determination of this suit.
  - 3) That in the interim there be and is hereby granted a temporary stay of execution of the decree dated the **2<sup>nd</sup>** day of **April 2012** warrant of attachment of movable property dated the **23<sup>rd</sup>** day of **May 2012** in all Milimani Civil Suit No. 399 of 2011 pending *inter-parte* hearing and determination of this suit.
  - 4) That the Applicant be and is hereby granted leave and defend the suit by the Plaintiff/Respondent.
  - 5) That the costs of this application be provided for.
2. The grounds in support of the application are set out therein. The application is supported by affidavit of the Defendant **COLLINS KIPRONO BETT** dated **26<sup>th</sup> June 2012** and its annextures. The application is opposed through affidavit in reply by the Plaintiff **KENNEDY NJUGUNA MWANGI** dated **11<sup>th</sup> July 2012**.
3. Briefly the facts of the application is that the Plaintiff is in the process of executing a decree of this court dated **2<sup>nd</sup>** day of **April 2012** and has attached movable property of the Defendant on account of the decretal sum now standing at **Kshs.16,158,735/=**. The Defendant alleges that the judgement leading to the decretal sum was obtained irregularly without notice to the Defendant. The Defendant further avers that he has never been served with pleadings and for that reason he was never aware of the suit, and that he only became aware of the same when he was served with the execution process. It is for these reasons that the Defendant has filed this application seeking the prayers stated above.
4. M/s Fatuma for the Defendant/Applicant successfully sought the leave to amend **prayer 2** of the

application by deleting “*pending the hearing and determination of this suit*”. The counsel submitted that the main issue in the application is that the Defendant was not served with the summons to enter appearance and on this ground alone the judgement should be set aside.

5. The counsel further submitted that if the court finds that service was proper then the court should enquire into the nature of the proposed defence, which however, she did not attach to the application.

6. In reply Mr. Kago for the Plaintiff/Respondent in opposing the application submitted that the interlocutory judgement was entered by court after the court was satisfied with the service of the process. He pointed to the affidavits of service on court file. He referred to a Ruling of this court on **17<sup>th</sup> October 2011**, where this court, in relation to a separate application by the Plaintiff for a mareva injunction, ruled that the Plaintiff had been served. Mr. Kago submitted that the Defendant was served with the hearing of this matter through his local chief.

7. I have carefully considered the application and the submissions of the parties. The issues for me to determine, in my view, are as follows:-

i. Whether the Defendant was served with the suit papers.

ii. Whether the interlocutory judgement entered for the Plaintiff on **22<sup>nd</sup> March 2012** was regular, and if so, whether there was a need for formal proof.

8. On the issue of service, it is clear to me that the Defendant was served with the process not only relating to the suit process but also of the application dated **16<sup>th</sup> September 2011**. The Defendant appears to me not to be keen in defending this matter. I am therefore satisfied that the Plaintiff was served with the suit papers and that he deliberately refused or neglected to enter appearance and file the defence. This being so in my view, the interlocutory judgement entered for the Plaintiff on the **22<sup>nd</sup> March 2012** was regular.

9. On the second issue, it is my view that having obtained that regular judgement, the Plaintiff was by law obligated to prove the particulars of the special claim through formal proof. Mr. Kago submitted that under **Order 10 4 (1)** of the **Civil Procedure Rules**, where the claim is for a liquidated sum there is no requirement for formal proof. In my view, this submission is not correct, at least for the case at hand. The case at hand is based on an alleged Joint Venture Agreement which had several terms and clauses which created various obligations. The special damages claimed in the suit of **Kshs.15,500,000/=** does not arise out of a single transaction. It arises from various components of the said Joint Venture. The proof of these damages could only come from the Plaintiff through the process of formal proof. The Plaintiff had a very clear obligation to prove his case. In **MWAI – VS – KENYA TOURIST DEVELOPMENT CORPORATION [1983] KLR 538**, the court stated that special damages should not only be specifically pleaded, but must also be strictly proved. The Plaintiff ought to have led evidence to show how the alleged **Kshs.15,500,000/=** was arrived at.

10. In the upshot I allow the Notice of Motion dated **28<sup>th</sup> June 2012** as prayed with costs in the cause.

11. The Defendant must file its defence within **7 (seven) days** from the date hereof.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

N/A for the Plaintiff /Applicant

Ogola for the Defendant/ Respondent

Teresia – Court Clerk