



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 719 of 2009

ECOBANK KENYA LIMITED PLAINTIFF

VERSUS

A & A CEREALS LIMITED DEFENDANT

RULING

On the 9th December 2010, the Defendant herein filed a Chamber Summons under the provisions of the former *Civil Procedure Rules*, **Order XXXIX Rules 1 (a)** and **2A** as well as **Order IXA Rules 10** and **11** and **Order IXB Rule 8**. The Application was also brought under the general jurisdiction clauses of the Civil Procedure Act. Apart from seeking Orders for stay of execution, which had been dealt with by this Court, the Defendant prayed that the *ex-parte* Judgement entered herein on 5th November 2009 be set aside as well as the *ex-parte* Order made by the Deputy Registrar of this Court dated 16th September 2010 as against the directors of the Defendant Company. The Grounds upon which the Application were made as under **Order L Rule 7** were that the Summons to Enter Appearance was not served upon the Defendant and as such, Judgement was entered irregularly. Similarly, the Chamber Summons dated 18 March 2010 was not served upon the directors of the Defendant Company and consequently should be set aside *ex debito justitiae*, in that the Defendant had a viable Defence which raised triable issues.

2. The Application was supported by the Affidavit dated 9 December 2010 of **Peter Odhiambo Marega** who described himself therein as a director of the Defendant Company. The deponent commenced his Affidavit by referring to correspondence that passed between the Plaintiff's advocates and the Defendant's advocates in July 2009. He thereafter referred to the Affidavit of Service sworn by one **Ronald Mwanja** on 2 November 2009 in which the deponent thereof had detailed that he had served the Summons to Enter Appearance and the Plaintiff upon a Ms Lilian Matheka on behalf on the Defendant company on 30 September 2009. Mr. Marega declared that the Defendant had never employed anyone of that name nor was any employee of the Defendant Company authorised to accept service of Court Process. Somewhat strangely, the deponent then attached a copy of a letter of appointment for what it termed the Defendant's employee at the material time being one **Rose Wanjiku Mungora**. The deponent also swore to the fact that he had been advised by his counsel on record that the Plaintiff and/or its advocates had failed to issue a mandatory Notice of Entry of Judgement as required by law. Then at paragraph 8 of the Affidavit in support of the Application, Mr. Marega went into some detail as regards the Plaintiff's Chamber Summons dated 18 March 2010 which sought to examine the Defendant's directors and in default of attendance therefore, execution to issue against the said directors. He criticised

the second Affidavit of Service sworn by the said Ronald Mwanja dated 10 September 2010 in which the deponent had maintained that he had served Mr. Marega at Woodlands Apartments off Dennis Pritt Road, Kilimani, Nairobi on 9 September 2010. Mr. Marega detail that he had vacated those Apartments in or about May 2009 and he even went to the extent of attaching, as an exhibit to his said Affidavit, a Tenancy Agreement dated 11 May 2009 in relation to Unit E3, Garden Terraces, Kabarnet Road, Nairobi. Mr. Marega wrapped up his said Affidavit by noting that the auctioneers had arrived at his (new) residential premises on 2 December 2010 to proclaim his movable property without any notice whatsoever. He further noted that the motor vehicle registration number KAT 908U was not available at the time of the Proclamation and had been proclaimed by the auctioneers irregularly.

3. On 10 December 2010, Njagi J. made Orders staying the execution of the Defendant's and directors' property pending the hearing of this Application *inter-parties*. Thereafter on 13 January 2011, one **Iminza Kaisha** swore a Replying Affidavit in his capacity as the Head of Legal of the Plaintiff bank. The deponent related the opening of a bank account in February 2007 at the Plaintiff's Plaza 2000 Branch, Nairobi by Mr. Marega and his partner Ms. Millicent Oduor Odhiambo in the style of A & A Cereals. He noted that they were granted overdraft facilities and on 6 June 2008, the Plaintiff bank had been notified that the said business had been converted into a company. The deponent went on to say that as at 31 December 2008, the Defendant's liability with the Plaintiff bank stood at Shs. 6,015,663.01. He noted further, that on 15 January 2009, Mr. Marega and Miss Odhiambo attended at the Plaintiff bank and it was agreed that the liability would be settled by way of payment of Shs. 500,000/-per month for January through to May 2009 and thereafter the balance would be paid by the end of May 2009 as the directors were disposing of a property being L. R. No. Nairobi/Block-32/996. Mr. Kaisha observed that the defendant and its directors refused, neglected and/or failed to meet their contractual obligations necessitating the filing of proceedings by the Plaintiff Bank. He went on to state that once the Defendant realised that the Plaintiff was pursuing the debt, it started concealing its assets and investigations revealed that Mr. Marega and Miss Odhiambo had sold the aforesaid property to a Mr. Kiilu by Transfer dated 14 May 2010. The proceeds of that sale had not been utilised towards the reduction of the indebtedness of the Defendant to the Plaintiff. The deponent noted that, as a consequence of which, the Plaintiff had afforded the Defendant and its directors time to regularise the account and the liability but they neglected to do so necessitating these proceedings.

4. Over and above the Replying Affidavit, the Plaintiff/Decree Holder filed Grounds of Opposition to the Defendant's said Application which detailed such grounds as follows:

"1. The Applicant has not disclosed any ground to merit the granting of the orders sought in the application.

2. The discretion of the Court cannot be exercised in vain.

3. That there is a regular judgment herein and realization of the decretal sum is only logical.

4. That the Judgement debtor's past conduct whilst dealing with the Decree holder militates against the exercise of any discretion in its favour.

5. The Defendant having admitted being indebted to the Decree holder can and should invoke the court's discretion to suspend its contractual liability.

6. The Application is otherwise incompetent in law or otherwise.

7. Such other grounds as shall be adduced at the hearing hereof".

5. The said Mr. Marega swore a Supplementary Supporting Affidavit (with the leave of the Court) on 24 January 2011. The deponent denied that the Defendant had sought or had been granted overdraft facilities by the Plaintiff bank. He noted that although the Defendant had deposited with the Plaintiff bank the Title Deed for South Sakwa/Barkowino/3247, that piece of land had never been formally charged to the Plaintiff bank. Principally, the deponent denied any liability for the sum of Shs. 6,015,663.01 or that there

had been any agreement as to the commercial rates of interest being charged by the Plaintiff bank. He also went into some detail as regards his and his wife's dealings with the Plaintiff bank including a proposal made by its Chief Operating Officer that the aforementioned South Sakwa property be disposed of by private treaty to pay off the debt, despite there being no formal Charge over the property held by the Defendant bank. Finally, the deponent reiterated his Affidavit in support of the Application to the extent that he reiterated once more, that the Defendant had never employed a Lillian Matheka who had been served with this court's process.

6. The Defendant's written submissions were filed and dated 23 November 2012. They commenced by identifying issues as follows:

- “1. **Whether the exparte dated 5th November, 2009 should be set aside.**
2. **Whether there has been deliberate concealment of material facts by the Plaintiff.**
3. **Whether there was improper service of summon by the Plaintiff.**
4. **Whether the Defendant has a valid defence that raises triable issues.**
5. **Whether a Stay order should be granted to restrain the Plaintiff/his duly authorized employees, agents and servants.**
6. **Whether the Defendant merits the costs of this Application”.**

As regards the law, the Defendant referred the court to what it termed the *locus classicus* case of **Shah v. Mbogo & Anor. (1966) EA 116** as per the guiding principle from **Harris J.**:

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained *ex-parte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice...”

It was the Defendant's opinion that the Plaintiff herein had clearly intended to delay or to subvert the course of justice having failed to serve upon the Defendant, Summons to Enter Appearance. The Defendant also referred to the case of **Interconsult Engineers Ltd v. Gabriel Mungai and Nairobi City Council Nairobi HCCC 1109 of 2001 (unreported)** wherein **Njagi J.** had quoted from the principles stated by **Duffus P.** in **Patel v. EA Cargo Handling Services (1975) EA 75** as follows:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean a defence that must succeed; it means “a triable issue”, that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

7. The Plaintiff filed its submissions herein on 13 December 2012. With regard to service of Summons in the suit, it submitted that the Defendant was a limited liability company and process had been duly served at the Defendant's registered address by a duly authorised Court Process Server, the said Ronald Mwanja. The Defendant had not disputed that its registered address was at Jubilee Insurance House. To its way of thinking, the Plaintiff maintained that service was duly effected and duly acknowledged. As regards the law, the Plaintiff also referred the court to the **Shah v. Mbogo** authority but noted that the court's discretion to set aside a judgement was to be exercised to avoid injustice or hardship:

“but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.”

The Plaintiff went on to refer the court to a number of authorities including Haile Selassie Avenue Development Company Ltd v. Josephat Mureithi & 10 Ors HCCC No. 2012 of 2001 (unreported), John Kotingo & Anor. v. Warren Enterprises Ltd (2005) eKLR, Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v. Habib Bank Ltd (1998) 4 All ER 764 as well as Daima Bank Ltd v. Patrick M. Musimba (2006) eKLR.

8. Out of the cases cited to this Court by the Plaintiff, I received considerable guidance from that of John Kotingo (supra). In that authority, Ojwang J. (as he then was) quoted Justice Ringera in Trust Bank v. Portway Stores (1993) Ltd & 4 Ors by detailing that the learned judge had:

“clearly laid out the principles to guide this Court in considering an application such as the instant one, for setting aside judgement and creating a fresh opportunity for both parties to be heard. The pertinent principles may here be restated:

- (i) unfettered discretion – guided by the object of ensuring that justice is done;**
- (ii) why was the particular default committed?**
- (iii) how has the applicant conducted itself?**
- (iv) has the applicant a defence on the merits?**
- (v) is the applicant going to compensate the respondents for loss of their judgement advantage?**
- (vi) is it vital, in the circumstances of this case, for the opportunity be created for the applicant to be heard?”**

What is clear from the authorities and probably the most important consideration for a Court to look at when faced with determining an application to set judgement aside is whether the applicant has a defence on the merits. This principle was clearly expounded in the Interconsult Engineers case (supra) and re-emphasised in the John Kotingo case as above. Exhibit “AA 7” to the Supporting Affidavit is a draft Statement of Defence which the Defendant would propose to file should the default judgement entered herein be set aside. That draft Defence admits that the Defendant held a Current Account with the Plaintiff but denies that there was any overdraft facility or loan agreement as between the parties. Further, the Defendant denies any correspondence emanating from admitting the debt owed. Paragraph 8 of the draft Defence makes the extraordinary statement that if the Defendant had written the letters admitting the debt, it did so in order to avert diversion of Shs. 1 million from Ms. Odhiambo’s Deposit Account with the Plaintiff, as well as to avoid any adverse dealings with the Title Deed for the said South Sakwa property. I have perused the letters annexed to the Replying Affidavit at pages 1, 2, 3, 4 and 5 thereof. To my mind the last four of these letters clearly make proposals to liquidate monies owed by the Defendant to the Plaintiff even to the extent at page 2, the letter dated 15 January 2009, the Defendant detailing that it was proposing to liquidate the outstanding amount of Shs. 6,015,663.01. According to paragraph 10 of the Replying Affidavit, that figure was the amount outstanding owing to the Plaintiff bank by the Defendant as at 31 December 2008. The claim of the Plaintiff as per the Plaint dated 29 September 2009 is the Shs. 4,891,456/-which was the balance owing as at 14 August 2009, together with interest thereon at 25.75%. Obviously, between January 2009 and August 2009, the Defendant had made efforts to reduce its borrowing from the Plaintiff.

9. In its said Application, the Defendant has relied heavily on the fact that it was never served with Court process in relation to this suit. The Affidavit in support as well as the Further Supporting Affidavit emphasises that the person mentioned in the Affidavit of Service Ms Lilian Matheka was never employed by the Defendant and was not known to the deponent of the 2 affidavits. The process server details that he was informed by the Company Secretary of the Plaintiff that the Defendant’s registered office was situated on the 2nd floor of Jubilee Insurance House, Wabera Street, Nairobi. This fact has never been denied by the Defendant in the said 2 Affidavits. The old **Order V rule 2** which was applicable as regards service of court process when this suit was filed, reads as follows:

“2. Subject to any other written law, where the suit is against a corporation the summons may be served –

(a) On the secretary, director or other principal officer of the corporation; or

(b) If the process server is unable to find any of the officers of the corporation mentioned in rule 2 (a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation”.

The letters written by the Defendant to which I have referred to above, all bear the address – 2nd Floor, Jubilee Insurance House, Wabera Street, Nairobi. As a result, I am satisfied that service of Court process was achieved as far as this suit is concerned, upon the Defendant. Even if I were not so satisfied, I am of the opinion that the draft Defence to which I have referred has no merit and has not raised a triable issue worthy of the name. As a consequence, I dismiss the Defendant’s Chamber Summons dated 9 December 2010 with costs to the Plaintiff.

DATED and delivered at Nairobi this 30th day of April 2013.

**J. B. HAVELOCK
JUDGE**