



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 591 of 2012

YAMKO YADPAZ INDUSTRIES LIMITED PLAINTIFF

VERSUS

KALKA FLOWERS LIMITED DEFENDANT

RULING

1. The Defendant's Notice of Motion dated 21 December 2012 is brought under the general **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as **Order 10 Rule 11** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. The Application seeks the substantive orders that this Court do grant a stay of execution of the Judgement and Decree issued on 7 November 2012 and that the same and all consequential Orders entered against the Defendant be set aside. The Defendant also asks for leave to file its Defence within 14 days of this Ruling. The Application was based on 9 grounds as follows:

"1. Service of the Summons and Complaint was never effected upon the Defendant Company.

2. The Court file contains an affidavit of service of one Ronald Mwanja, purporting to have effected service of Summons on 17th September 2012 at 11.45 am upon a purported Director of the Defendant Company Mr. Devendra Halai but the said Devendra Halai was deceased on 28th June 2009.

3. Further, the said Mr. Halai was not even a Director or Shareholder of the Defendant, having transferred his shares in the year 2009.

4. It is thus quite clear that no Summons or other court papers have ever been served upon the Defendant.

5. It would be a miscarriage of justice for the ex-parte judgment entered in this matter to stand in the circumstances.

6. It is the best interests of justice that Judgment be set aside and the Defendant given leave to

defend the suit.

7. The setting aside of the default judgment will not prejudice the interests of the Respondent. In the circumstances it would be in the interest of justice if the application was allowed and the case be heard on merit.

8. The Defendant has a good Defence to this suit.

9. The Defendant has a constitutional right to be heard and to challenge the suit filed by the Plaintiff”.

2. The Affidavit in support of the Application was sworn by **Arumugampillai Srithar**, a director of the Defendant, on 21 December 2012. The deponent basically maintained that to the best of his knowledge, no one involved with the Defendant Company had been served with Summons to enter appearance in this suit. He denied the contents of the Affidavit of Service sworn by one **Ronald Mwanja** on 12 October 2012 in that he had served a Court process on one **Davendra Halai** (who had died on 28 June 2009). He maintained that Mr Davendra Halai was neither a director nor a shareholder of the Defendant company and attached to his said Affidavit a copy of a letter dated 19 October 2009 from the Registrar of Companies which showed that he and one **Patricia Sathar** were the sole directors of the company holding 500 shares each therein. Consequently, the deponent maintained that service of summons and court papers had not been effected upon the Defendant and prayed that the Judgement entered herein be set aside. To this end, he attached to the Affidavit in support of the Application a draft Defence for this Court’s consideration.

3. On behalf of the Plaintiff, Mr. **Mahesh Halai** swore a Replying Affidavit on 14 January 2013. The deponent declared that he was a director of **Agro Irrigation Pump Services Ltd** which company was the agent in Kenya for the Plaintiff and he attached to the said Replying Affidavit a copy of a Power of Attorney in his favour provided by the Plaintiff and dated 5 December 2011. He opened the main part of his Affidavit by stating that he had been advised that the process server who had effected service of the Court process herein informed him that the Defendant had been properly served. He denied the statement made by the deponent of the Affidavit in support of the Application that any of the officials of his company had discussed the matter with the Defendant. He maintained that the presumption that has been created is that the Defendant was indeed served and chose deliberately and consciously to disregard the Summons. He further maintained that the Plaintiff would be greatly prejudiced if the Application was allowed as the Defendant had failed to settle the sum owing to the Plaintiff, as per the Plaint, amounting to over Shs. 20 million. While noting the draft Defence, Mr. Halai observed that the Defendant had not referred in any way to a copy of its letter dated 28 July 2011 which admitted the debt that forms the basis of this suit. He also noted that the Defendant had made a down payment of Shs. 15,901,716/-in respect of the equipment supplied to it by the Plaintiff. Mr. Halai also attached to his said Affidavit a copy of the contract as between the Defendant and the Plaintiff as to the supply of the equipment.

4. With the consent of the court granted on 17 January 2013, the Defendant through the said **Arumugampillai Srithar** filed a Further Affidavit sworn on 24 January 2013. Straightaway, the Defendant reiterated that the court process with regard to this suit had not been served upon it. The deponent maintained that the Replying Affidavit only confirmed the Defendant’s averments that service of summons had been made upon a dead man, Davendra Halai, who was not even a director of the Defendant Company. He maintained that the entire process of service had been fraudulent in order to obtain a default judgement against the Defendant. The deponent noted that prior to filing the Application before Court, the Defendant had filed, on 21 December 2012, an Authority to file Suit and to swear the Affidavit in support but it had inadvertently not been served upon the Plaintiff’s advocates at the time of service of the present Application. Thereafter, Mr. Srithar commented upon advice received as to the Power of Attorney exhibited to the Replying Affidavit. He had been informed by the Defendant’s advocates on record that the same was fatally defective as it had not been signed by 2 directors of the Plaintiff company nor was it under Seal. Further, the Power of Attorney did not give authority to the said Mr. Mahesh Halai to swear to any Affidavits with regard to the matter before court. Further, the Court’s approval as to the authorisation had not been obtained contrary to the provisions of **Order 9 rule 2 (a)** of

the *Civil Procedure Rules*. As a consequence, the deponent maintained that the Respondent (?) had no capacity to hold the Power of Attorney allegedly issued by the Plaintiff. The deponent further contested the documents marked as exhibit “C” and “D” to the Replying Affidavit especially as regards the copy of the cheque marked as No. 7 and the invoice marked as No. 8.

5. The Defendant’s submissions with regard to its Application dated 21 December 2012 were filed on 6 February 2013. The large part of the Defendant’s submissions dwelt upon the facts as put before court by the Affidavit in support of the Application as well as Mr. Srithar’s Further Affidavit. The one comment made by the Defendant of concern to this Court was that it was most suspicious that the Replying Affidavit had been sworn by Mr. Mahesh Halai who bore the same name as the deceased Davendra Halai upon whom service of summons had been made, according to the said Affidavit of Service. Thereafter, the Defendant referred the Court to the case of **Kamau Mwangi versus Wambui Kariuki (2012)eKLR** where **Mwili J** (as she then was) had quoted from the celebrated case of **Abraham Kiptanui versus Delphis Bank Ltd & Anor. HCCC No. 1864 of 1991 (unreported)** as follows:

“Once it is established that a judgement on record is irregular it must be set aside as of right. There are no two ways about it. The same is not susceptible to any variation. Its only fate is vacation from the record. Such a judgement is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself...”

The Defendant asked this Court to adopt the finding as above. The Defendant then commented upon the irregularity of the Power of Attorney issued by the Plaintiff company and set out in full the provisions of **Order 9 Rule 2 A** of the *Civil Procedure Rules* as well as quoting from the judgement of **Mwongo J** in the case of **Khanjira & Anor. Versus Safaricom Ltd (2012)eKLR** in which the learned Judge had found that for orderly representation in court, every appearance, act or application by a recognised agent should be subjected to the prior approval of the Court. The Defendant commented that no such approval had been obtained by the Plaintiff in this case. The Defendant also maintained that the attempt by the Plaintiff to discredit the two affidavits sworn by Mr. Srithar as being defective for failing to comply with the provisions of **Order 9 Rule 2 (c)** was avoidable. To this end, the Court was referred to *Article 159 (2) (d)* of the *Constitution* as well as **Order 19 Rule 7** as regards Affidavits being accepted by Court notwithstanding any irregularities. Further, quoting from the case of **Equity Bank Ltd versus Kathreen W. Wamiti & 2 Ors. (2012)**, the Defendant maintained that, in the interests of justice, it should be recorded an opportunity to be heard. It further maintained that the draft Defence exhibited to the Affidavit in support of the Application clearly presented triable issues and that the Replying Affidavit of the Plaintiff was without merit, defective and should be struck out. The Court was urged to allow the Application and to set aside the default Judgement herein.

6. The main theme of the Plaintiff’s submissions filed herein on 12 February 2013 was that the Summons herein was properly and duly served. The Plaintiff suggested that it could not be a coincidence that the process server, upon attending at the Defendant’s premises, found a person who identified himself as Davendra Halai. The Defendant had quickly obtained proof of the death of the said Davendra Halai, the possibility of which was queried by the Plaintiff. It maintained that the presumption that must be created was that the person being served misled the process server and gave a false name upon being served with the Summons herein. Further, the Plaintiff maintained that the Defendant did not have a good defence to its claim as per paragraphs 14, 15 and 16 of the Replying Affidavit. In response to the allegation made by the Defendant that the Plaintiff was defective as the deponent of the Affidavits in this matter one Mahesh Halai did not have the authority from the Plaintiff company to depone to the same, the Plaintiff responded as follows:

“i) The suit has been filed by the proper aggrieved party Yamko Yadpaz Industries Ltd. NOT Mr. Mahesh Halai.

ii) The said deponent of the various affidavits is a Director of Agro Irrigation and Pumps Services who by a Power of Attorney No. PA/57811/1 are authorized generally to act for the Plaintiff (see paragraph 4 Replying Affidavit).

iii) The said Director has locus to file and swear affidavits by such power and furthermore the said authority is obtained under Order 9 rule 2 (b).

iv) Under Order 9 rule 2 (b) no leave is required to appear or act subject to demonstration that the said party falls within the parameters set out in the said rule.

v) In any event the Applicant cannot blow hot and cold at the said time.

The said applicant in paragraph 4(a) of its further affidavit filed on 24th January 2013 relied on the protection conferred by Article 159(2)(d) of the Constitution in trying to defend itself against technical objections raised by the plaintiff yet seeks to raise its own.

The respondent therefore avers that Article 159(2)(d) would apply in this instant as well and urges the court to consider the objection in respect of the validity of the affidavits to be a technical one in respect of which the Respondent is entitled to protection”.

7. To supplement its submissions, the Plaintiff relied upon the authorities of Maina versus Mugiria (1983) KLR 78, Kimani versus McConnel (1966) EA 547 as well as Patel versus E. A. Cargo Handling Services (1974) EA 75. All these authorities emphasise the discretion of the court to set aside but that such discretion was intended so to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error. The Plaintiff concluded its submissions by stating that, in its opinion, the Defendant’s said Application dated 21 December 2012 was not merited and should be dismissed. It urged the court to find that the Defendant had not sufficiently demonstrated that it was deserving of discretionary Orders. However, should this court see fit to set-aside the *ex-parte* judgement herein, the Plaintiff urged that such should be secured by an Order for throw away costs which it put at Shs.100,000/, together with an appropriate undertaking.

8. I have perused the Affidavit of Service sworn by **Ronald Mwanja** dated 12 October 2012. I note that attached thereto was a sketch map detailing the whereabouts of the Defendant’s flower farm at Isinya, Kajiado District. There was nothing to note that the person who received court process on behalf of the Defendant disclosed his name to the process server as Mr. Davendra Halai, the same surname as the Managing Director of the Plaintiff, Mr. Mahesh Halai. What has not been explained in any of the affidavits submitted as regards the Application is the connection between the deceased Mr. Davendra Halai and Mr. Mahesh Halai. The whole transaction covering the service of court process is unclear to me but it seems that the Plaintiff’s submission is correct in that the person receiving the court process on behalf of the Defendant was trying to evade such service by giving the name of the deceased.

9. Consequently, whether proper service of court process was effected or otherwise, I do not consider of particular importance. In my opinion, the draft Defence at pages 6 - 8 of the Exhibit to the Supporting Affidavit dated 21 December 2012 is what the court should be looking at in determining the Application before it. At paragraph 2, the Defendant raises a preliminary objection to the whole suit in querying the validity of the Power of Attorney held by the Plaintiff’s agents in Kenya – Agro Irrigation and Pump Services Ltd. It points out that the said Power of Attorney should have been given in the name of the deponent to the Supporting Affidavit as well as the Affidavit verifying the Plaint – Mr. Mahesh Halai. That seems to me an initial point in issue as between the parties. However, the rest of the draft Defence contains mere denials of the allegations made in the Plaint as against the Defendant in relation to whether a contract existed between the parties or otherwise. There is no explanation whatsoever in the draft Defence as to the payment by the Defendant to the Plaintiff of Shs. 15,901,017/60 by cheque dated 27 June 2007. The Plaintiff details that this was a down-payment of 30% of the contract price of US dollars 800,051.20. All the Defendant has done in the draft Defence is denied that there was a contract at all, with no mention of the figures put forward by the Plaintiff.

10. To my mind, in determining this matter I needed to be guided by the principles governing the exercise of judicial discretion as to the setting aside of an *ex parte* judgement obtained in default which were clearly set out in the judgement of the Court of Appeal in the Maina v Mugiria case as follows:

“2. The principles governing the exercise of judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

a) Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93.

d) The court has no discretion where it appears there has been no proper service (*Kanji Naran v Velji Ramji* (1954) 21 EACA 20).

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton* [1972] SC 30)”.

I also accept the holding in the **Kimani v McConnel** case referred to in the **Maina v Mugiria** case as follows:

“4. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (*Jesse Kimani v McConnel* [1966] EA 547, 555F)”.

11. The upshot of the above is that I consider that on the part of the Defendant there was deliberate evasion in accepting the service of court process in this matter. Whoever the person was at the Defendant’s said flower farm who pretended to be a director of the Defendant who had been deceased for 4 years, fully and purposely intended to evade the service of court process. However, I consider that the point raised in the draft Defence as to the validity or otherwise of the Power of Attorney in favour of the Plaintiff’s agent company in Kenya to be sufficiently material so as to disallow the Plaintiff the fruits of its default judgement entered herein. I note that the Power of Attorney dated 5 December 2011 has been granted to the said company Agro Irrigation & Pump Services Ltd not to the said Mahesh Halai. As a consequence, I find that Mr. Halai was not properly authorized by the Plaintiff Company to depone to either the Verifying Affidavit dated 2nd March 2012 in support of the Plaint or the Replying Affidavit dated 14 January 2013. The said company Agro Irrigation & Pump Services Ltd is a legal entity in its own right just as Mr. Halai is. In my opinion, the Power of Attorney has been granted to the wrong legal entity as regards this suit. Accordingly, I allow the Defendant’s Notice of Motion dated 21 of December 2012 but with no order as to costs. Further, I direct that the Verifying Affidavit to the Plaint, be struck out and that the Plaintiff do file a fresh Verifying Affidavit to be sworn by a properly authorized (by the Plaintiff) deponent within 60 days of the date hereof.

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

J. B. HAVELOCK

JUDGE