



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 320 OF 2010

FINA BANK LIMITED.....PLAINTIFF

VERSUS

JOHN MURIITHI KABERENGE

T/A JONGI INVETMENTS.....DEFENDANT

RULING

1. I have before me a Motion on Notice dated 5th April 2013 by the Defendant for the setting aside of a Judgment entered against him on 24th June, 2011. The same was entered at the request of the Plaintiff on the basis that the Defendant had failed to enter appearance and/ or file a defence within the legally permissible timeframe. The Application was made under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and under Order 10 Rule 10 and 11, Order 51 Rule 1 and Order 22 Rule 22 of the Civil Procedure Rules 2010. The Defendant relied on the grounds on the body of the Motion and on his Affidavits sworn on 8th April 2013 and 24th May 2013 respectively.
2. In the Affidavits, it was contended that the Defendant was not served with summons to enter appearance as required by law and that the Defendant has a defence which raises triable issues. On service, the Defendant deponed that he used to collect his mail through Post Office Box Number 237 Kutus, but owing to the nature of his business and his constant travel, it proved difficult to receive his mail through the said Post Office number. He further contended that he got to know of the suit upon making inquiries at the Post office at Kerogoya Kutus where he was informed by an unnamed employee of the aforesaid Post office that a letter had indeed been posted to him on 19th April, 2011 by the Firm of M/s Macharia –Mwangi & Njeru Advocates but the same had been returned to the sender as it was unclaimed. He attached an envelope through which the said letter had been posted initialed “RTS” to buttress his assertions. He also claimed that he never received a Notice of Entry of Judgment vide Registered mail, and it was only after he carried out sufficient queries at the Post Office in Kerugoya Kutus that he was informed that a letter sent to him on 16th September 2011 by the aforesaid firm was also returned to them unclaimed.
3. With regard to the defence on merit, the Defendant annexed to his application a proposed defence in which he denies being indebted to the Plaintiff as alleged. He contended that the amounts claimed by the Plaintiff were excessive and exaggerated owing to the punitive and unconscionable interest rates levied on the principle amount advanced to him. He further contended that the Plaintiff lacked sufficient particulars of the alleged sum. He also contended that the Court needed to

- determine whether there was repossession of Motor vehicle registration Number KBC 604V and Trailer registration Number ZC 9134 and if that was so, whether such repossession disabled him from fulfilling his obligations under the asset finance facility. The defendant therefore contended that if the default judgment herein was not set aside, he would be greatly prejudiced.
4. The Plaintiff on its part opposed the Application by filing a Replying Affidavit of Zachary Muturi Muchai sworn on 22nd April, 2013. The Plaintiff maintained that the Defendant was duly served with the summons to enter appearance and that the Defence advanced by the Defendant had no merit. The Plaintiff contended that the Defendant was served with the summons to enter appearance through registered post to his last known address being P.O. Box 237 Kutus as was ordered by the Court on 1st April, 2011. The same were forwarded by the Plaintiff's advocate vide a letter 18th April, 2011 as deponed in the affidavit of service sworn by Mutua Molo of 31st May, 2011. From the said affidavit, the letter was posted on 19th April, 2011 as was evidenced by the certificate of posting through registered mail. The Plaintiff therefore maintained that it had served the summons as was ordered by the Court and that the Defendant had not disputed that Post Office Box Number 237 KUTUS was his postal address.
 5. The Plaintiff also submitted that it was the onus of the Defendant to rebut the presumption raised in the affidavit of service that service of summons upon him was effected, of which he had not done. On the allegation of the return of the letters unclaimed, the Plaintiff was of the opinion that the Defendant cannot blame the Plaintiff for his omission of not collecting his mails. The Plaintiff thus contended that it fully discharged its obligation once it forwarded the summons to the Defendant's last postal address as was ordered by the Court on 1st April, 2011. The Plaintiff raised issue with the copy of the envelope annexed to the Defendant's application marked "JMK 2 and JMK 3" stating that the Defendant had placed no material on record to explain why the unidentified post office clerk would be in possession of a copy of an envelope addressed to the Defendant and which ought to have been returned unclaimed as alleged. The Plaintiff also contended that the Plaintiff in any case knew of the existence of the present proceedings and it was only when execution of the decree was underway, did he move to court. The Plaintiff credits this information from a private investigator by the name Edward N. Marondo who had been commissioned by the Plaintiff to investigate the whereabouts and economic means of the Defendant. The investigator claimed to have met the Defendant who had promised to approach the Plaintiff with the intention of settling the instant suit.
 6. On the merit of the proposed Defence, the Plaintiff asserted that there was any triable issue raised given that the Defendant had admitted to the existence of the Hire Purchase Agreement dated 29th July, 2008 and a letter of offer dated 9th July, 2008, whose terms and conditions he had duly accepted. The Plaintiff also claimed that the Defendant had acknowledged being indebted to the Plaintiff, having utilized the facility granted to him and fallen behind in his repayments. It therefore urged the Court to dismiss the Application.
 7. I have considered the Affidavits on record and the written submissions by Counsel. I have also considered the various authorities relied upon by counsel. There are two issues that must be determined in this application. The same are first, if the Court is persuaded that the Defendant was not served properly or at all, the resultant *ex parte* Judgment will be set aside as a matter of course. There will therefore be no need for the exercise of judicial discretion. On the other hand, if the Court is satisfied that the Defendant was served, it may consider exercising its discretion on the usual principles.
 8. It is not in dispute that the Plaintiff was granted leave to serve the summons to enter appearance on the Defendant through Registered post to his last known address on 1st April, 2011. According to the Affidavit of service sworn on 31st May, 2011 by Mutua Molo, a letter dated 18th April, 2011 enclosing the original Plaint dated 14th May, 2010, summons to enter appearance dated 20th May, 2010 and the Court Order dated 1st May, 2011, were sent to the Defendant on 19th April 2011. A certificate of posting bearing the same date was also attached. The point of departure, however was that the Defendant alleged that he did not receive the said letter and the enclosures therein. He contended that the same were returned to sender, as they were uncollected for a period of time owing to the nature of his business and constant travel. The Defendant further submitted that he was able to determine the foregoing fact from the information he received from a Post Office Clerk at Kutus Kerogoya Post Office. As such, he argued that service of the summons to enter

appearance was not properly effected. He also raised the same arguments with regard to the Notice of Entry of Judgment.

9. In my view, it is clear that the summons and Plaintiff were sent to the Defendant's last known address of Post Office Box 237 Kutus on 19th April 2011. The averments in the Affidavit of Service by 31st May, 2011 are uncontroverted. All that the Defendant asserts is that he did not receive the summons. He attached a copy of envelopes bearing the initials "RTS" marked as "JMK 2 and JMK 3". The initials could be read to mean, "Return to Sender". He further claimed that he sourced the said envelopes that had the letters that enclosed the summons to enter appearance and the Notice of entry of Judgment from an unnamed clerk that worked with the Post Office at Kutus.
10. I think in the circumstances, the case of **Kyangavo-vs-Kenya Commercial Bank Limited (2004) KLR** proves instructive where **Kasango J** held that:-

"The Plaintiff bore the burden to prove to this court that a letter sent by registered post to his post office box was not received by him. Such confirmation can be made by the postmaster of the particular post office where the Plaintiff receives his mails."

That statement commends itself to this court. It is clear that the Defendant did not obtain proof that he did not receive the letter dated 18th April, 2010 that contained the court process. Further, the Defendant did not disclose the name of the alleged clerk who had allegedly informed him that the aforesaid letters were returned to the sender. It is also doubtful how a clerk at the post office at Kutus will have copies of the envelope with the remarks "RTS". In the circumstances, I think that nothing would have been easier than for the Defendant to procure a letter from the Post Master General to confirm his assertions that he did not receive the letter with the summons enclosed or that the letter was returned unclaimed. This was not done and the Defendant's claim of none service of the summons to my mind have no basis. The Plaintiff did discharge its responsibility by posting the summons as ordered by the Court, it was for normal cause of business to collect his letters from his post office box. The Plaintiff is not to blame for the Defendants oversight or alleged difficulties. To my mind therefore, I find that the defendant was served with summons to enter appearance via substituted service of registered mail via his last known address.

11. The question that arises then is, should the Court in the circumstances of this court exercise its discretion in favour of the Defendant? It is trite law that the Court has no limits or restrictions in exercising its discretion to set aside an ex parte Judgment, so long as justice is done to both parties. Such discretion should also not be exercised to assist the person who has deliberately sought to obstruct or delay the Course of Justice. See the cases of **SHAH -vs- MBOGO (1967) EA 116 at 123B** and **MAINA -v- MUGIRIA (1983) KLR 78**.
12. In this case, the Defendant did submit that he has a defence which raises triable issues. The Plaintiff on the other hand claimed that the same is a sham and should not be entertained. I have seen the proposed Defence attached to the Defendant's Application. Has the Defendant raised triable issues? In the case of **PATEL -V- EA CARGO HANDLING SERVICES (1974) EA 75** **Duffus P** made the following remarks;

"Defence on merit does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication." (emphasis mine)

Under paragraph 6 of the Defence, the existence of the Agreement imposing the various formalities affecting the relationship between the Plaintiff and the Defendant has been raised. The Defendant also submitted that the Plaintiff did not provide sufficient particulars as to how an initial facility of Kshs. 3, 349,000/= as at 31st July, 2008 graduated to a sum of Kshs. 7, 530, 519.41 as at 31st May, 2010 a period of less than two (2) years. I have also seen paragraph 9 of the proposed Defence wherein the Defendant alleges that on 15th January, 2009 or thereabouts, the Plaintiff repossessed Motor vehicle

Registration No. KBC 640V and Trailer Registration No. 9134 in breach of the letter of offer dated 9th July 2008 and this in turn frustrated the Defendant from fulfilling his obligations under the facility. As such, the Defendant submitted that the said asset finance facility had been discharged and the Plaintiff had no right to demand the sums of money from the Defendant. In the Replying Affidavit, the Plaintiff is quiet about these issues. If there was repossession, what happened to the subject motor vehicles? Were they sold? If so, where were the funds applied?

13. Considering the foregoing, I find that the said Defence cannot be said to be a sham. It raises triable issues that need to be further interrogated, ventilated and determined on merit. In my view, justice requires that the substance of disputes be investigated and decided on merit and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. I also find that should the Court fail to set aside the ex parte Judgment, the Plaintiff shall be greatly prejudiced given the decretal amount of Kshs.6,774,296/58 plus interest claimed out of the initial sum advanced. Further, I find that the inconveniences that will be caused to the Plaintiff by the Defendant can be adequately compensated by an award of costs.

14. For all of the foregoing, I will allow the Defendant's application in terms of Prayer Number 3 and 4 of the Motion dated 5th April, 2013 on the following conditions;

- i. ***The Judgment entered on 24th June, 2011 is hereby set aside.***
- ii. ***The Defendant is hereby granted leave to file a defence within fourteen (14) days of today's date.***
- iii. ***The Defendant shall pay to the Plaintiff, the sum of Kshs. 30,000/= as thrown away costs of the suit. The same shall be payable within 30 days or in default, the setting aside Order issued by this Court shall automatically be vacated.***

DATED and DELIVERED at Nairobi this 26th day of July, 2013

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A. MABEYA

JUDGE